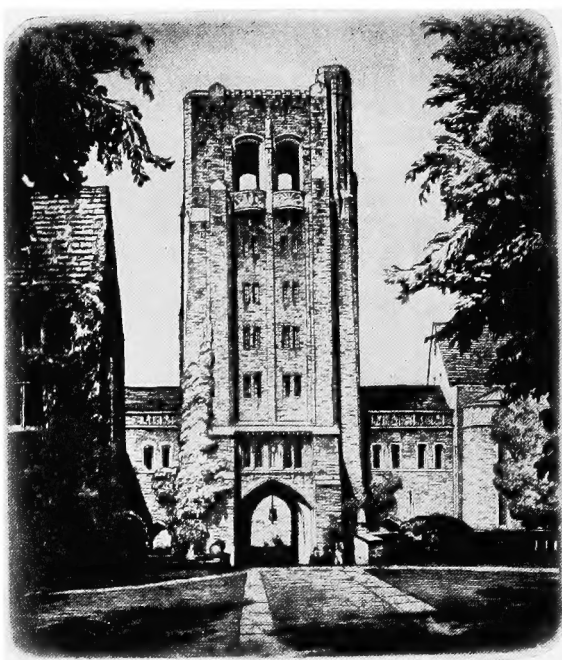




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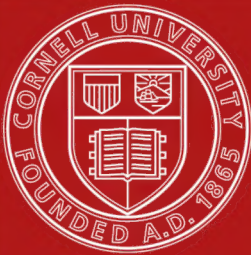
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*DICTIONARY*  
OF  
ENGLISH LAW.







# A DICTIONARY

OF

**E**nglish **L**aw

CONTAINING

*DEFINITIONS OF THE TECHNICAL TERMS IN  
MODERN USE*

And a Concise Statement of the Rules of Law  
affecting the Principal Subjects

*WITH HISTORICAL AND ETYMOLOGICAL NOTES.*

BY

CHARLES SWEET, LL.B.

*OF LINCOLN'S INN.*

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## PREFACE.



THE object of this Work is sufficiently indicated by its title. The Author believes it will be found that in many cases a Dictionary, from the nature of its arrangement and scope, affords an opportunity of giving a *résumé* of a subject with a completeness which would not be possible in an ordinary text-book, while it also gives details which would be out of place in an institutional work, such as that of Blackstone. It is therefore hoped that this Dictionary may be found useful by the practitioner as well as the student.

In compiling the Work the Author has relied almost wholly on his own researches. In order to collect the necessary materials, it was necessary to peruse the principal text-books on the various branches of the law, and also the contemporary reports for the last ten years, the period over which the process of collecting materials has (with some unavoidable interruptions) extended. A more difficult task was that of selecting, from the abundant store thus obtained, the matter appropriate to the scheme of the Work. It would have been easier to have made the book nearly twice its present size.

In order to include in the Dictionary as much useful matter as possible without unduly increasing its bulk, all obsolete matter has been omitted, except where it appeared useful to explain the existing law, or to enable the student

to understand expressions used in the earlier reports and text-books which are still referred to at the present day. An endeavour has been made, by the use of different types, marginal notes, numbered paragraphs, and other typographical devices, to assist the reader in finding his way through the book.

The Addenda contain the principal alterations in the law which have been made during the progress of the Work through the press, including the more important provisions of the new Conveyancing Act. The reader is requested to note up these alterations in their appropriate places in the body of the Dictionary.

The Author's thanks are due to the Bar Association of New York for their courtesy in allowing him the use of their excellent library during a stay of some months in that city; and to his former tutor, Mr. DAVID LYELL, LL.D., of the Inner Temple, for advice and assistance during the earlier stages of the Work.

NEW YORK,

*Christmas, 1881.*

# TABLE OF ABBREVIATIONS.

A. & E. ....	Adolphus and Ellis's Reports, K. B.
Amb. ....	Ambler's Reports, Chancery.
Anst. ....	Anstruther's Reports, Exch.
App. Ca. ....	Law Reports, Appeal Cases.
Archbold Crim. Pl. ....	Archbold's Pleading and Evidence in Criminal Cases. 18th edit. by William Bruce. 1875.
Archbold's Pr. ....	Archbold's Practice of the Queen's Bench, Common Pleas and Exchequer Divisions of the High Court of Justice. 13th edit. by Samuel Prentice. 1879.
Atk. ....	Atkyns' Reports, Chancery.
B. & Ad. ....	Barnewall and Adolphus's Reports, K. B.
B. & B. ....	Broderip and Bingham's Reports, C. P.
B. & C. ....	Barnewall and Cresswell's Reports, K. B.
B. & S. ....	Best and Smith's Reports, Q. B.
B. C. C. ....	Bail Court Cases, Lowndes and Maxwell.
B. C. R. ....	Bail Court Reports, Saunders and Cole.
B. & L. ....	Browning and Lushington's Admiralty Reports.
B. N. C. ....	Brook's New Cases, K. B.
B. N. P. ....	Buller's Nisi Prius.
B. & P. ....	Bosanquet and Puller's Reports, C. P.
Bainbridge on Mines ....	A Treatise on the Law of Mines and Minerals. By William Bainbridge. 4th edit. by A. Brown. 1878.
Ball & B. ....	Ball and Beatty's Reports, Chancery, Ireland.
Barn. & Ald. ....	Barnewall and Alderson's Reports, K. B.
Barn. & Cress. ....	Barnewall and Cresswell's Reports, K. B.
Barn. K. B. ....	Barnardiston's Reports, K. B.
Barn. C. ....	Barnardiston's Reports, Chancery.
Beat. ....	Beatty's Chancery Reports, Ireland.
Beav. ....	Beavan's Reports, Rolls Court.
Bel. ....	Bellew's Reports, K. B.
Benjamin on Sales ....	A Treatise on the Law of Sale of Personal Property. By J. P. Benjamin, Q.C. 2nd edit. 1873.
Bing. ....	Bingham's Reports, C. P.
Bing. N. C. ....	Bingham's New Cases, C. P.
Bl. ....	Blount.
Bl. Comm. ....	Commentaries on the Laws of England. By Sir William Blackstone. 21st edit. by Chitty, Hargrave, Sweet, Couch, and Welsby. 1844.
Black. W. ....	Sir Wm. Blackstone's Reports, K. B.
Black. H. ....	Henry Blackstone's Reports, C. P.
Bli. ....	Bligh's Reports, House of Lords.
Bli. N. S. ....	Bligh's Reports, New Series.
Block Dict. ....	Dictionnaire Général de la Politique, par M. Maurice Block. Nouv. édit. 2 vols. 1873-4.
Blount's Tenures ....	Fragmenta Antiquitatis, or Antient Tenures of Land and Jocular Customs of Manors. By Thomas Blount. New edit. by Josiah Beckwith. 1784.

- Bos. & Pul. .... Bosanquet and Puller's Reports, C. P.  
Bos. & P. N. R. .... Bosanquet and Puller's New Reports, C. P.  
Braithwaite's Pr. .... The Record and Writ Practice of the Court of Chancery.  
By Thomas W. Braithwaite. 1858.  
Brice on Ultra Vires..... A Treatise on the Doctrine of Ultra Vires. By Seward  
Brice. 2nd edit. 1877.  
Bridg. O. .... Orlando Bridgman's Reports, C. P.  
Bro. Ab. .... Brooke's Abridgment.  
Bro. C. C. .... Brown's Chancery Reports (Eden or Belt).  
Bro. P. C. .... Brown's Parliament Cases.  
Brod. & B. .... Broderip and Bingham's Reports, C. P.  
Broom's C. L. .... Commentaries on the Common Law. By Herbert Broom.  
4th edit. 1869.  
Brownne on Divorce ..... A Treatise on the Principles and Practice of the Court for  
Divorce and Matrimonial Causes. By George Brownne.  
3rd edit. 1876.  
Brownne's Probate Practice.. A Treatise on the Principles and Practice of the Court of  
Probate in Contentious and non-Contentious Business.  
By George Brownne. 1873.  
Brownl. .... Brownlow and Goldborough's Reports, C. P.  
Bull. N. P. .... Buller's Nisi Prius.  
Bulst. .... Bulstrode's Reports, K. B.  
Bunb. .... Bunbury's Reports, Ex.  
Burr. .... Burrow's Reports, K. B.  
Burr. S. C. .... Burrow's Settlement Cases.  
Burton's Comp. .... An Elementary Compendium of the Law of Real Property.  
By Walter Henry Burton. 7th edit. by Edward Priestly  
Cooper. 1850.  
Byles on Bills ..... A Treatise on the Law of Bills of Exchange, Promissory  
Notes, Bank Notes, and Cheques. By Sir John B. Byles.  
10th edit. by M. B. Byles. 1870.  
C. B. .... Common Bench Reports, or Manning, Granger and Scott's  
Reports.  
C. B., N. S. .... Common Bench Reports, New Series.  
C. & M. .... Crompton and Meeson's Reports, Ex.  
C. M. & R. .... Crompton, Meeson and Roscoe's Reports, Ex.  
C. & P. .... Carrington and Payne's Reports, N. P.  
C. P. D. .... Law Reports, Common Pleas Division.  
Ca. temp. F. .... Cases in the time of Finch.  
Ca. temp. Holt ..... Cases in the time of Holt, C. J. K. B.  
Ca. temp. H. .... Cases time Hardwicke, K. B.  
Ca. t. K. .... Cases time King, Chancery.  
Ca. t. Talb. .... Cases time Talbot, Chancery.  
Camp. N. P. .... Campbell's Reports, Nisi Prius.  
Car. & P. .... Carrington and Payne's Reports, N. P.  
Cary. .... Cary's Reports, Chancery.  
Carth. .... Carthew's Reports, K. B.  
Ch. D. .... Law Reports, Chancery Division.  
Charley's Real P. Acts .. The Real Property Acts, 1874, 1875 and 1876. By William  
Thomas Charley. 3rd edit. 1876.  
Chitty on Contracts ..... A Treatise on the Law of Contracts. By Joseph Chitty, jun.  
10th edit. by John A. Russell. 1876.  
Chitty Pr. .... Chitty's Queen's Bench Practice. 12th edit. 1866.  
Cl. & Fin. .... Clark and Finnely Reports, House of Lords.  
Co. .... Coke's Reports.  
Co. Litt. .... The First Part of the Institutes of the Laws of England, or a  
Commentary upon Littleton. By Sir Edward Coke. With  
the Notes of Francis Hargrave and Charles Butler. 17th  
edit. by Charles Butler. 1817.

- Col. C. C. .... Collyer's Chancery Cases.
- Comp. Clerk ..... The Compleat Clerk, containing the best Forms of all sorts of Presidents for Conveyancing and Assurances, &c. 5th edit. 1683.
- Comyns' Dig. .... A Digest of the Laws of England. By Sir John Comyns. 4th edit. by Samuel Rose. 6 vols. 1800.
- Cooke on Inclosure ..... The Acts for Facilitating the Inclosure of Commons. By George Wingrove Cooke. 4th edit. 1864.
- Coop. .... Cooper (G.), Chancery.
- Coote's Prob. Pr. .... The Common Form Practice of the High Court of Justice in granting Probates and Administrations. By Henry Charles Coote. 8th edit. 1878.
- Cowp. .... Cowper's Reports, K. B.
- Cox. .... Cox's Reports, Chancery.
- Cox C. C. .... Cox's Criminal Cases.
- Cox Inst. .... The Institutions of the English Government. By Homersham Cox. 1863.
- Cox M. C. .... Cox's Magistrates Cases.
- Cr. & Ph. .... Craig and Phillips, Chancery.
- Cro. Car. .... Croke's Reports, Charles I.
- Cro. Eliz. .... Croke's Reports, Elizabeth.
- Cro. Jac. .... Croke's Reports, James I.
- Crompt. & J. .... Crompton and Jarvis's Reports, Ex.
- Crompt. & M. .... Crompton and Meeson's Reports, Ex.
- Crompt. M. & R. .... Crompton, Meeson and Roscoe's Reports, Ex.
- Cunn. .... Cunningham's Reports, K. B.
- Curt. .... Curteis's Ecclesiastical Reports.
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- D. or Dig. .... Justiniani Digesta, sive Pandectæ.
- D. & L. .... Dowling and Lowndes's Bail Court Reports.
- D. & M. .... Davison and Merivale's Q. B. Reports.
- Dal. .... Dalison's Reports, C. P.
- Daniell Ch. Pr. .... The Practice of the High Court of Chancery. By the late Edmund Robert Daniell. 5th edit. by Leonard Field and Edward Clennell Dunn. 1871.
- Dart's V. & P. .... A Treatise on the Law and Practice relating to Vendors and Purchasers of Real Estate. 5th edit. By J. Henry Dart and William Barber. 1876.
- Davidson's Conv. .... Davidson's Precedents and Forms in Conveyancing, Vol. I. 4th edit. 1874. Vol. II. part 1, 4th edit. 1877; part 2, 3rd edit. 1869. Vol. III. 3rd edit. 1873. Vol. IV. 2nd edit. 1864. Vol. V. part 1, 3rd edit. 1876; part 2, 3rd edit. 1878.
- Davis on Building Societies. The Law and Practice of Building and Freehold Land Societies. By Henry F. A. Davis. 2nd edit. 1874.
- Day's C. L. P. Acts ..... The Common Law Procedure Acts and other Statutes relating to the Practice of the Superior Courts of Common Law. By John C. Day. 4th edit. 1872.
- Dea. & Sw. .... Deane and Swabey's Reports, Probate and Divorce.
- Deac. & Ch. .... Deacon and Chitty, Bankruptcy Reports.
- Dears. C. C. .... Dearsley's Crown Cases.
- Dears. & B. C. C. .... Dearsley and Bell's Crown Cases.
- De G. .... De Gex's Bankruptcy Reports.
- De G., F. & J. .... De Gex, Fisher and Jones's Reports, Chancery.
- De G. & J. .... De Gex and Jones's Reports, Chancery.
- De G., J. & S. .... De Gex, Jones and Smith's Reports, Chancery.
- De G., M. & G. .... De Gex, Macnaghten and Gordon's Reports, Chancery.
- De G. & Sm. .... De Gex and Smale's Reports, Chancery.

- Denison & Scott's Pr. .... The Practice and Procedure of the House of Lords in English, Scotch and Irish Appeal Cases. By Charles Marsh Denison and Charles Henderson Scott. 1876.
- Dyer ..... Dyer's Reports, K. B.
- Dick. .... Dicken's Reports, Chancery.
- Dig. .... Justiniani Digesta [The Digest or Pandects of the Emperor Justinian], recognovit Theodorus Mommsen. Berlin, 1872.
- Dirksen Man. Lat. .... Manuale Latinitatis Fontium Juris Civilis Romanorum, auctore Henrico Edwardo Dirksen. Berolini, 1837.
- Doug. .... Douglas's Reports, K. B.
- Dow & C. .... Dow and Clark, House of Lords Cases.
- Dow. & L. .... Dowling and Lowndes, Bail Court Reports.
- Dow. & Ry. .... Dowling and Ryland's K. B. Reports.
- Dow. & R. M. C. .... Dowling and Ryland's Magistrates' Cases.
- Dow. & Ry. N. P. .... Dowling and Ryland's Nisi Prius.
- Dr. & Wal. .... Drury and Walsh, Chancery Reports, Ireland.
- Dr. & War. .... Drury and Warren, Chancery Reports, Ireland.
- Drew. .... Drewry's Reports, Chancery.
- Drew. & Sm. .... Drewry and Smale's Reports, Chancery.
- Drury ..... Drury's Reports, Chancery, Ireland.
- Durnf. & E. .... Durnford and East, or Term Reports, K. B.
- E. & A. .... Eccles. and Admiralty Reports.
- E. of Cov. .... Earl of Coventry's Case.
- East ..... East's Reports, K. B.
- El. B. & E. .... Ellis, Blackburn and Ellis's Reports, Q. B.
- El. B. & S. .... Ellis, Best and Smith's Reports, Q. B.
- El. & Bl. .... Ellis and Blackburn's Reports, Q. B.
- El. & El. .... Ellis and Ellis's Reports, Q. B.
- Elphinstone's Conv. .... A Practical Introduction to Conveyancing. By Howard Warburton Elphinstone. 1871.
- Eq. Ca. Abr. .... Equity Cases Abridged.
- Eq. Rep. .... Equity Reports.
- Esp. .... Espinasse's Rep. or Digest N. P.
- Ex. D. .... Law Reports, Exchequer Division.
- Exch. Rep. .... Welsby, Hurlstone and Gordon's Reports.
- Fearne's Cont. Rem. .... An Essay on the Learning of Contingent Remainders and Executory Devises. By Charles Fearne. 10th edit. (with the notes, &c. of Charles Butler), by Josiah W. Smith. 1844. [Cited by the paging of the 9th edit.]
- Fisher on Mortgage .... The Law of Mortgage and other Securities upon Property. By William Richard Fisher. 3rd edit. 1876.
- Fitz. N. B. .... The Natura Brevium of the most reverend Judge, Mr. Anthony Fitzherbert. 9th edit. 1794.
- Fin. .... Finch's Reports, Chancery.
- Free. Chy. .... Freeman's Chancery Reports.
- Freem. K. B. .... Freeman's Reports, K. B.
- Gaius ..... Gaii Institutionum Commentarii IV.
- Gale on Easements .... A Treatise on the Law of Easements. By Charles James Gale. 5th edit. by David Gibbons. 1876.
- Gibson's Codex ..... Codex Juris Ecclesiastici Anglicani. By Edmund Gibson. 2nd edit. 1761.
- Giff. .... Giffard's Reports, Chancery.
- Godb. .... Godbolt's Reports, K. B.
- Godol. .... Godolphin.

- Golds. .... Goldsborough's Reports, K. B.
- Gow's N. P. C. .... Gow's Nisi Prius Cases.
- Greaves' Crim. Acts ..... The Criminal Law Consolidation and Amendment Acts of the 24 & 25 Vict. By Charles Sprengal Greaves. 2nd edit. 1862.
- Grimm D. R. A. .... Deutsche Rechtsalterthümer von Jacob Grimm. 2nd edit. 1854.
- H. & C. .... Hurlstone and Coltman's Reports, Ex.
- H. & N. .... Hurlstone and Norman's Reports, Ex.
- H. Cox Inst. .... The Institutions of the English Government. By Homersham Cox. 1863.
- H. L. Rep. Cas. .... Clark and Finnelly's House of Lords' Reports, New Series.
- H. & R. .... Harrison and Rutherford's Reports, C. P.
- Haddan's Adm. Jurisd. .. Outlines of the Administrative Jurisdiction of the Court of Chancery. By Thomas Henry Haddan. 1862.
- Hag. Adm. .... Haggard's Admiralty Reports.
- Hag. Con. .... Haggard's Consistory Reports.
- Hag. Ec. .... Haggard's Ecclesiastical Reports.
- Hare ..... Hare's Reports, Chancery.
- Hawkus P. C. .... A Treatise of the Pleas of the Crown. By William Hawkins. 2nd edit. 1724.
- Hayes Conv. .... An Introduction to Conveyancing. By William Hayes. 5th edit. 2 vols. 1840.
- Haynes's Equity ..... Outlines of Equity. By Freeman Oliver Haynes. 2nd edit. 1865.
- Hem. & M. .... Hemming and Miller, Chancery.
- Hob. .... Hobart's Reports, K. B.
- Hodges on Railways..... A Treatise on the Law of Railways. By Sir W. Hodges. 6th edit. by J. M. Lely. 1876.
- Holt ..... Holt's Reports, K. B.
- Holt N. P. .... Holt's Nisi Prius Reports.
- Holtz. Encyc. .... Encyclopädie der Rechtswissenschaft, herausgegeben unter Mitwirkung vieler namhafter Rechtsgelehrter von Dr. Franz von Holtzendorff. Leipzig, 1870.
- Hov. Suppl. .... Hovenden's Supplement to Vesey, jun.
- Hunter's Suit..... An Elementary View of the Proceedings in a Suit in Equity. By Sylvester Joseph Hunter. 5th edit. by George Woodford Lawrence. 1871.
- Hut. .... Hutton's Reports, C. P.
- Inst. .... Lord Coke's Institutes of the Laws of England. In four parts. The First Institute is commonly cited as Coke upon Littleton.
- J. & W. .... Jacob and Walker's Reports, Chancery.
- Jac. or Jacob ..... Jacob's Reports, Chancery.
- Jac. & W. .... Jacob and Walker's Reports, Chancery.
- Jarman & Bythewood's  
Conv. .... { A Selection of Precedents forming a System of Conveyancing, with Dissertations and Practical Notes. By the late H. M. Bythewood and Thomas Jarman. (First 7 volumes are the 3rd edition by George Sweet, 1841-2; the 8th is the second edition; the 11th vol. by George Sweet and Andrew Bisset. 1849.)
- Jenk. .... Jenkins's Reports, Ex.
- John. .... Johnson's Reports, Chancery.
- John. & H. .... Johnson and Hemming's Reports, Chancery.
- Johnson on Patents ..... The Patentee's Manual. By James Johnson and J. Henry Johnson. 3rd edit. 1866.
- Jones T. .... Jones's Reports, K. B.
- Jones W. .... Jones's Reports, K. B.





- M. & S. .... Maule and Selwyn's Reports, K. B.  
M. & W. .... Meeson and Welsby's Reports, Ex.  
Mac. & G. .... Macnaghten and Gordon's Reports, Chancery.  
Macpherson's Privy C. Pr. The Practice of the Judicial Committee of her Majesty's most Honourable Privy Council. By William Macpherson. 2nd edit. 1873.  
Macq. H. L. Cas. .... Macqueen's Scotch Appeal Cases.  
Macqueen's Husband and Wife ..... { The Rights and Liabilities of Husband and Wife. By John Fraser Macqueen. 2nd edit. by Sidney Hastings and John Davies Davenport. 1872.  
Madd. .... Maddock's Reports, Chancery.  
Madox Bar. Ang. .... Baronia Anglica. An History of Land-Honors and Baronies and of Tenure in Capite. By Thomas Madox. 1741.  
Madox Exch. .... The History and Antiquities of the Exchequer of the Kings of England. By Thomas Madox. 2nd edit. [quarto]. 1769.  
Madox Form. Ang. .... Formulæ Anglicanum, or a Collection of Ancient Charters and Instruments. By Thomas Madox. 1702.  
Man. & G. .... Manning and Granger's Reports, C. P.  
Man. & R. .... Manning and Ryland's Reports, K. B.  
Manning's Exchequer .... The Practice of the Court of Exchequer. Revenue Branch. By James Manning. 2nd edit. 1827.  
Manning's Law of Nations. Commentaries on the Law of Nations. By William Oke Manning. New edit. by Sheldon Amos. 1875.  
Manwood, Forest .... A Treatise and Discourse of the Lawes of the Forrest. By John Manwood. 1598.  
Mar. .... March's Reports, K. B.  
Marsh. .... Marshall's Reports, C. P.  
Maude and Pollock's Merch. Shipping .... { A Compendium of the Law of Merchant Shipping. By Frederick Philip Maude and Charles Edward Pollock. 3rd edit. 1864.  
Mau. & Sel. .... Maule and Selwyn's Reports, K. B.  
May's Parl. Pr. .... { A Treatise on the Law, Privileges, Proceedings and Usage of Parliament. By Sir John Erskine May. 8th edit. 1879.  
McCle. .... McClelland's Reports, Ex.  
McCle. & Yo. .... McClelland's and Young's Reports, Ex.  
Mee. & W. .... Meeson and Welsby's Reports, Ex.  
Mer. or Meriv. .... Merivale's Reports, Chancery.  
Mitford on Pleadings .... A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill. By John Mitford [Lord Redesdale]. 4th edit. by George Jeremy. 1827.  
Mo. .... Moore's Reports, K. B.  
Mod. Ca. .... Modern Cases.  
Mod. Rep. .... Modern Reports, K. B.  
Mont. B. C. .... Montagu's Reports, Bankruptcy.  
Mont. & B. .... Montagu and Bligh's Reports, Bankruptcy.  
Mont. & Chit. .... Montagu and Chitty's Reports, Bankruptcy.  
Moo. C. C. .... Moody's Crown Cases.  
Moo. & M. .... Moody and Malkin's Reports, N. P.  
Moo. P. C. C. .... Moore's Privy Council Cases.  
Moo. P. C. C., N. S. .... Moore's Privy Council Cases, New Series.  
Moo. Ind. Ap. .... Moore's India Appeals.  
Moo. & R. .... Moody and Robinson's Reports, N. P.  
Moo. J. B. .... J. B. Moore's Reports, C. P.  
Moo. & P. .... Moore and Payne's Reports, C. P.  
Moo. & S. .... Moore and Scott's Reports, C. P.  
Moore (C. P.) .... Moore's Common Pleas Reports.  
Mos. .... Moseley's Reports, Chancery.  
Myl. & Cr. .... Mylne and Craig's Reports, Chancery.  
Myl. & K. .... Mylne and Keen's Reports.

N. Benl. ....	New Benloe, K. B. Reports.
Nev. & M. ....	Neville and Manning's Reports, K. B.
New Rep. ....	New Reports in all the Courts.
Noy ....	Noy's Reports, K. B.
N. R. ....	New Reports, by Bosanquet and Puller, C. P.
O. Benl. ....	Old Benloe, C. P.
Orl. Bridgman ....	Orlando Bridgman's Reports, C. P.
Ortolan Inst. ....	Explication Historique des Institutes de l'Empereur Justinien. Par M. Ortolan. 8me édit. 1870.
Ow. ....	Owen's Reports, K. B.
P. D. ....	Law Reports, Probate Division.
Pal. ....	Palmer's Reports, K. B.
Paley Summ. Conv. ....	Paley's Law and Practice of Summary Convictions by Justices of the Peace. 5th edit. by H. T. J. Macnamara. 1866.
Par. ....	Parker's Reports, Ex.
Pea. ....	Peake's Reports, N. P.
Peak. Ad. Cas. ....	Peake's Additional Cases.
Peak. N. P. C. ....	Peake's Nisi Prius Cases.
Per. & Dav. ....	Perry and Davison's Reports, K. B.
Perkins's Prof. Book ....	A Profitable Book treating of the Laws of England, principally as they relate to Conveyancing. By John Perkins [originally published in French in 1532]. 15th edit. by R. J. Greening [cited by the sections].
Ph. ....	Phillips's Reports, Chancery.
Phillimore's Eccl. Law ....	The Ecclesiastical Law of the Church of England. By Sir Robert Phillimore. 2 vols. 1873.
Plow. Com. ....	Plowden's Commentaries or Reports, K. B.
Pol. ....	Pollexfen's Reports, K. B.
Pollock on Contract ....	Principles of Contract at Law and in Equity. By Frederick Pollock. 1876.
Pollock's County Court Practice ....	Pollock's Practice of the County Courts. The 8th edit. by Henry Nicol and Arthur Wilson. 1876.
Poph. ....	Popham's Reports, K. B.
Pr. or Price ....	Price's Reports, Exchequer.
P. W. ....	Peere Williams's Reports, Chancery.
Preston's Conv. ....	A Treatise on Conveyancing. By Richard Preston. 3rd edit. 3 vols. 1821.
Pritchard Q. S. ....	The Jurisdiction, Practice and Procedure of the Quarter Sessions. By Thomas Sirrell Pritchard. 1875.
Q. B. ....	Adolphus and Ellis, Queen's Bench Reports, New Series.
Q. B. D. ....	Law Reports, Queen's Bench Division.
Ray. T. ....	Sir Thomas Raymond's Reports, K. B.
Raym. ....	Raymond.
Reg. Gen. ....	Regulæ Generales [General Rules of Practice under various Acts of Parliament applying to the Common Law Courts]: distinguished by the Term and Year in which they were made; e.g., Reg. Gen. M. T. 1869 = Regulæ Generales of Michaelmas Term, 1869.
Rep. ....	Coke's Reports.
Rep. Comm. on Fees ....	Report of Treasury Committee on the various Fees payable on Appointments or for other Services. 14 August, 1867.
Rep. Legal Dep. Comm. ....	First and Second Reports of the Commissioners appointed to inquire into the Administrative Departments of the Courts of Justice. 1874.
Robson's Bankruptcy ....	A Treatise on the Law of Bankruptcy. By George Young Robson. 2nd edit. 1872.

- Rogers' Eccl. Law ..... A Practical Arrangement of Ecclesiastical Law. By Francis Newman Rogers. 2nd edit. 1849.
- Rose ..... Rose's Reports, Bankruptcy.
- Rules of Court ..... Rules of Court contained in the 1st Schedule to the Judicature Act, 1875, as amended by Rules made subsequently at various Dates.
- Russ. .... Russell's Reports, Chancery.
- Russ. & M. .... Russell and Mylne's Reports, Chancery.
- Russ. & R. .... Russell and Ryan's Crown Cases.
- Russell on Crimes ..... A Treatise on Crimes and Misdemeanors. By Sir W. O. Russell. 5th edit. by Samuel Prentice. 3 vols. 1877.
- Russell's Merc. Agency .. A Treatise on Mercantile Agency. By John A. Russell. 2nd edit. 1873.
- Ry. & M. .... Ryan and Moody, N. P. Reports.
- Saint Bonnet Dict. .... Nouveau Dictionnaire de Droit Français, par M. Saint Bonnet. 2ème tirage. 1872.
- Salk. .... Salkeld's Reports, K. B.
- Saund. .... Saunders's Reports, K. B.
- Savigny vom Beruf ..... Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft: von F. C. von Savigny. 3 edit. 1840.
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# LAW DICTIONARY.

## A.

**A. and B. LISTS.** See *Contributory*.

**AB INITIO**—from the beginning. See *Relation*.

**ABANDONMENT.**—§ 1. In the law of marine insurance, where the subject-matter of an insurance is constructively lost to the assured, he cannot call upon the underwriter to settle with him for a total loss without abandoning—that is, relinquishing to the underwriter whatever may be saved,—because the property still exists in specie, and there is a prospect, however remote, of its arriving at its destination. As to what is a constructive total loss, see *Loss*, § 3. Abandonment is effected by giving express and unconditional notice to the underwriter within a reasonable time after the assured has received intelligence of the loss,<sup>1</sup> and its effect is to transfer the whole property and interest in the thing insured to the underwriter.<sup>2</sup> (See *Dereliction* ; *Non-user*.)

§ 2. The Board of Trade have power to authorize the abandonment of the whole or part of a railway, so as to release the company from all liability to make or work it. The holders of three-fifths of the shares must consent, and provision is made for the compensation of persons damaged.<sup>3</sup>

§ 3. In criminal law, the offence of abandoning or exposing children under the age of two years is punishable by penal servitude for five years.<sup>4</sup>

**ABATEMENT.**—I. § 1. To abate a nuisance is to remove it: thus, if a house or wall is erected by my neighbour so near to mine that it stops my ancient lights, I may enter his land and pull it down; or, if an obstruction is unlawfully placed in a highway, I may cut it down or remove it. Abatement is a remedy by act of the party (see *Remedy*); it must be effected peaceably, and (in the case of a private nuisance) without doing more damage than is necessary.<sup>5</sup>

II. § 2. In the law of real property, where a person dies seised of land, and a stranger who has no right makes entry and gets possession

<sup>1</sup> Smith's Merc. Law, 382 *et seq.*; Maude & Pollock, Merch. Shipp. 413 *et seq.*

<sup>2</sup> Maude & Pollock, 416.

<sup>3</sup> Hodges on Railways, 433; Abandon-

S.

ment of Railways Acts, 1850, 1867, 1869.

<sup>4</sup> Stat. 24 & 25 Vict. c. 100, s. 27; 27 & 28 Vict. c. 47.

<sup>5</sup> Steph. Comm. iii. 244.

of the freehold before the heir or devisee enters, this is called an abatement, and the stranger is an abator.<sup>1</sup> The person entitled has, of course, a right of action to recover the land. (See *Disseisin* ; *Deforcement*.)

Of legacies,  
&c.

III. § 3. In the administration of a testator's estate, abatement is where the amount payable to a legatee or appointee has to be reduced because there is not enough to pay all the legatees or appointees of the same class in full, or because the claimant is not entitled to participate in a certain part of the estate. Thus, where the estate of a testator, after payment of his debts and specific legacies, is insufficient to pay all the general legacies, they must abate or be reduced in proportion to their respective amounts.<sup>2</sup> § 4. So, if a testator, whose estate consists both of pure and impure personalty, gives a legacy to a charity without directing it to be paid out of his pure personalty, the legacy must abate in the proportion which the impure personalty bears to the whole residuary personal estate—(thus, whole estate, 1,500*l.* : pure personalty, 1,000*l.* :: amount of legacy, 300*l.* : amount payable to charity, 200*l.*); because the charity cannot participate in the impure personalty, owing to the provisions of the Charitable Uses Act, commonly called the Mortmain Act<sup>3</sup> (see those titles).

Charitable  
legacy.

Of action.

IV. § 5. In procedure, abatement is where an action is put an end to and destroyed by the death of one of the parties, or some other event which makes it impossible to continue the action. Thus, an action for assault abates on the death of either plaintiff or defendant, because the right of action, or liability (as the case may be), does not survive to his representatives (see *Actio Personalis moritur cum Personâ*). Formerly almost every change of interest pendente lite caused an abatement, which could be cured in cases where the right of action or liability survived, by Revivor, Scire facias, or Suggestion (*q. v.*); but this is no longer the case.<sup>4</sup>

V. As to pleas in abatement, see *Plea*, §§ 2, 5.

ETYMOLOGY.]—Norman-French: *abatement* from *abatre*, to throw down, destroy.<sup>5</sup> In treating of abatement in the second sense (*supra*, § 2), Britton sometimes spells the word *enbatre*, *embatement*,<sup>6</sup> which makes it possible that it was a different word from abatement in the other meanings, and signified intrusion rather than destruction of the estate.

**ABDICATION** is where a sovereign gives up his throne or government, either (a) so that the abdication operates in favour of his successor, or (b) so that the throne is vacant, and a successor has to be appointed. A constructive abdication of the latter kind took place on the Revolution of 1688.<sup>7</sup> (See *Resignation* ; *Constructive*.)

Civil.

**ABDUCTION**.—§ 1. In private or civil law, abduction is the act of taking away a man's wife by violence or persuasion. For this injury

<sup>1</sup> Co. Litt. 277 a.

<sup>2</sup> Williams on Executors, 1260, 1271 ; Watson's Comp. Eq. 834, 1244.

<sup>3</sup> Watson, 54.

<sup>4</sup> Rules of Court, 1. ; *Eldridge v. Burgess*, 7 Ch. D. 411 ; Steph. Comm. iii. 591 ;

Smith's Action (11th ed.), 194.

<sup>5</sup> Britton, 122 b, 155 ; Co. Litt. 134 b, 277 a.

<sup>6</sup> Britton, 161 *et seq.*

<sup>7</sup> Bl. Comm. i. 211 ; iv. 78.

an action lies, formerly known as an action of trespass *de uxore raptâ et abductâ*.<sup>1</sup>

§ 2. In criminal law, abduction is the act of taking away or detaining Criminal.  
a woman, either against her own will, or (in the case of a woman under the age of twenty-one) against the will of her parents or any other person having the lawful charge of her. The abduction of an unmarried girl under the age of sixteen is a misdemeanor punishable with two years' imprisonment and hard labour; the abduction of any woman by force, with intent to marry or carnally know her, is a felony punishable with fourteen years' penal servitude, as is also the abduction against her own will (or, in the case of a woman under twenty-one, against the will of her parents or guardians) of a woman possessed of property, from motives of lucre, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person.<sup>2</sup>

§ 3. The abduction of a married woman is punishable with two years' Of married woman.  
imprisonment and fine.<sup>3</sup>

§ 4. The abduction of a voter to prevent him from voting at an election Of voter.  
is a variety of the offence of undue influence<sup>4</sup> (*q. v.*).

**ABET—ABETTOR.**—To abet is to incite a person to commit a crime; an abettor is a person who, being present or in the neighbourhood, incites another to commit a crime, and thus becomes a principal in the second degree.<sup>5</sup> (See *Principal*.)

ETYMOLOGY.]—Old French: *à* and *beter*, to bait or excite an animal.<sup>6</sup>

**ABEYANCE.**—§ 1. A hereditament or other right is said to be in abeyance when it exists only in contemplation of law, because there is no person *in esse* in whom it is vested, although the law considers it as always potentially existing.<sup>7</sup>

§ 2. Thus the fee-simple in the glebe of a church is in perpetual Of glebe.  
abeyance, for it is not in the patron, nor the ordinary, nor the parson. Again, when the parson of a church dies, the freehold of the glebe is in no one during the time that the parsonage is void, and is therefore said to be in abeyance until another is made parson.<sup>8</sup>

§ 3. A dignity is said to be in abeyance when there is for a time no Of dignity.  
person entitled to it. Thus, where an earl dies, leaving only daughters, the dignity is in abeyance until the king confers it upon one of them.<sup>9</sup>

ETYMOLOGY.]—Norman-French: *abeiance*, *abaience*, from *baer*, *bayer*, to gape, to expect.<sup>10</sup>

<sup>1</sup> Steph. Comm. iii. 437.

<sup>2</sup> Stat. 24 & 25 Vict. c. 100, ss. 53 *et seq.*; Russell on Crimes, i. 883; Stephen's Crim. Dig. 177.

<sup>3</sup> Stat. 3 Edw. I, c. 13; Steph. Comm. iii. 437.

<sup>4</sup> Stat. 17 & 18 Vict. c. 102.

<sup>5</sup> Bl. Comm. iv. 34.

<sup>6</sup> Skeat, Etym. Dict. s. v.

<sup>7</sup> Litt. §§ 645—647; Bl. Comm. ii. 107; Steph. Comm. i. 236; Fearn, Cont. Rem. 353 *et seq.*

<sup>8</sup> Litt. § 647. As to abeyance of an estate tail, see §§ 649 *et seq.*

<sup>9</sup> Co. Litt. 165 a; Bl. ii. 216.

<sup>10</sup> Co. Litt. 342 b; Loysel, Gloss. s. v.; Diez, i. 44.

Oath.

**ABJURATION.**—§ 1. To abjure is to renounce on oath. To abjure the realm was to take a perpetual oath of banishment; abjuration was “a deportation for ever into a forreine land,” and was a civil death,<sup>1</sup> until it was abolished by stat. 21 Jac. 1, c. 28.<sup>2</sup> § 2. The oath of abjuration, by which members of parliament and public officials were required to abjure or renounce the Pretender, was abolished by stat. 21 & 22 Vict. c. 48, and 29 & 30 Vict. c. 19.<sup>3</sup> (See *Oath*; *Relegation*; *Death*.)

**ABORTION.** See *Miscarriage*.

**ABRIDGMENTS** are digests of the law, arranged alphabetically. The oldest are those of Fitzherbert, Brooke and Rolle, the more modern those of Viner, Comyns and Bacon.<sup>4</sup> The term “digest” has now supplanted that of “abridgment.”

**ABROGATE** is to annul or repeal an order or rule issued by a subordinate legislative authority; e.g. a rule of practice issued by the judges of a Court.

**ABSCOND.**—§ 1. To abscond is to leave one's ordinary residence or country to avoid legal proceedings.<sup>5</sup>

§ 2. The Absconding Debtors Act, 1870 (33 & 34 Vict. c. 76), is intended to prevent “insolvent debtors departing for foreign countries before the necessary proceedings can be taken to make them bankrupt;” and for that purpose enables a Bankruptcy Court to issue a warrant for the arrest of the debtor before the petition for adjudication has been presented. (See *Bankruptcy*; *Debtors Act*.)

Of plaintiff.

**ABSENCE BEYOND SEAS** is absence from the United Kingdom and the adjacent islands belonging to her Majesty. It was formerly a disability in a plaintiff under the Statutes of Limitations entitling him to an extension of time after his return; but this is so no longer.<sup>6</sup>

Of defendant.

§ 2. In the case of a person against whom a claim exists in respect of a simple contract or tort being absent beyond seas at the time of the right of action accruing, the plaintiff may bring his action within the time limited for that purpose after the defendant's return.<sup>7</sup>

Of appellant.

§ 3. Absence beyond seas entitles an intending appellant to the House of Lords to an extension of the year usually allowed for appealing, but not to more than five years in the whole.<sup>8</sup> (See *Limitation*; *Disabilities*.)

**ABSOLUTE.**—A decree, order, rule, declaration, &c., is said to be absolute either (1) when it is to take effect at once (absolute in the

<sup>1</sup> Co. Litt. 133 a.

<sup>2</sup> Bl. Comm. iv. 133.

<sup>3</sup> Steph. Comm. ii. 338, 401.

<sup>4</sup> Steph. Comm. i. 51.

<sup>5</sup> *Crane v. Fullion*, 2 Ch. D. 220; *Ex parte Gutierrez*, 11 Ch. D. 298.

<sup>6</sup> Stat. 19 & 20 Vict. c. 97, s. 10; 37 &

38 Vict. c. 57, s. 4; Shelford, R. P. Statutes.

<sup>7</sup> Stat. 4 & 5 Anne, c. 3, s. 19 (commonly cited as 4 Anne, c. 16); 19 & 20 Vict. c. 97, ss. 11, 12.

<sup>8</sup> Standing Orders as to Appeals, May, 1878.

first instance); or (2) when it was originally made provisional and no one has satisfied the Court that it ought not to take effect. (See *Nisi*; *Decree*; *Foreclosure*.) As to the meaning of "absolute," when applied to an estate, to the acceptance of a bill of exchange, &c., see the various titles.

**ABSTRACT.**—§ 1. Upon a contract being entered into for the sale of Of title. property the title to which is evidenced by deeds or other conveyances, the purchaser (in the absence of a stipulation to the contrary) is entitled to receive from the vendor a document containing an epitome of the deeds, &c., with dates of events bearing on the title, *e.g.* deaths, marriages, &c., so that the whole document may show the title which the vendor is bound to give. (See *Title*.) This is called the abstract of title. Its object is to facilitate the examination of the title by the purchaser and his legal advisers,<sup>1</sup> and with this object it is arranged in a peculiar manner. The brief paper on which it is written is divided into columns or margins, and every margin is appropriated to a particular kind of clause in the deeds to be abstracted; thus the description of the deed and the names of the parties are placed in the first or outer margin: the recitals in the second margin, the testatum in the first margin, the parcels in the fourth margin, the habendum and covenants in the third margin, &c.; all verbiage is omitted, and certain clauses of frequent occurrence in identical terms ("Common Forms") are represented by abbreviations. § 2. The abstract is verified by the production of the original deeds, certified copies of the court rolls, probates of wills, statutory declarations, &c.<sup>2</sup> (See *Evidence*, § 2.)

§ 3. A document from which the abstract is made is said to be In chief. abstracted in chief, in opposition to those documents which are abstracted indirectly by being introduced in the recitals of other abstracted instruments.<sup>3</sup> Thus if an abstract is made from a conveyance from A. to B., in which is recited a conveyance from Z. to A., the conveyance from A. to B. is said to be abstracted in chief, while that from Z. to A. is not.

§ 4. An abstract is said to be "perfect" if it is as complete as the Perfect. vendor can make it at the time of delivery; sometimes a "perfect abstract" means one which shows a perfect title, that is, when it shows that the purchaser will acquire the legal and equitable estates free from incumbrances.<sup>4</sup>

§ 5. Of course where a person's title to property consists wholly of entries in registers (*e.g.* a copyright or registered land) no abstract is required. (See *Requisitions*.)

§ 6. Under the Stamp Acts, when an adjudication stamp is applied for, For adjudica- the application is generally required to be accompanied by an abstract of tion stamp. the instrument to be stamped.<sup>5</sup> This abstract is made out on a printed form furnished by the Commissioners. (See *Stamp*.)

<sup>1</sup> See Bythewood, *Conv. i.* 75; Davids. *Conv. i.* 523.

<sup>2</sup> Dart's *Vendors and Purchasers*, 310.

<sup>3</sup> Dart, 299.

<sup>4</sup> *Ibid.* 281.

<sup>5</sup> Stamp Act, 1870, s. 20; Dowell, *Stamp Acts*, 114.

**ABUT—ABUTTALS.**—Land abuts on that by which it is bounded, *e.g.* on another piece of land belonging to a different owner. In a deed the description of the boundaries of the land conveyed or leased, &c. is sometimes called the abuttals.<sup>1</sup>

ETYMOLOGY.]—French : *aboutir*, to adjoin ; *à*, “to,” and *bout*, “end.”

**ACCELERATE.**—An estate, interest or other right is said to be accelerated when it comes into possession (or is likely to come into possession) sooner than it otherwise would, by the surrender, merger or destruction of a preceding estate, interest or right. Thus if property belongs to A. for life, remainder to B. for life, remainder to C., and B. surrenders his life interest to C., C.’s estate is accelerated, because it will probably come into possession sooner than it would if B.’s life interest were in existence.

**ACCEPTANCE** in its widest sense is the act of assenting to an offer ; in other words, the expression of a unity of intention with the person making the offer.<sup>2</sup> (See *Agreement*, § 3.)

Bill of exchange.

II. § 2. In the law of bills of exchange, acceptance is where the drawee of a bill (or in certain cases some other person) writes his signature across the bill, with or without the word “accepted” or other words.<sup>3</sup> (See *Presentation*, § 1.) He thereby engages to pay the bill when due.<sup>4</sup>

Absolute.  
General.  
Qualified.  
Conditional.

§ 3. An acceptance may be either *absolute*, [*general*,] *qualified*, or *special*. An absolute acceptance is one without qualification or limitation. A qualified acceptance is either *conditional*, where the acceptor inserts in the acceptance words which make his liability to pay dependent on the happening of some event, or the like ; or *partial*, or *varying* from the tenor of the bill, as where he accepts for part of the amount of the bill, or for a different date.<sup>5</sup> § 4. A *special* acceptance is one which specifies a particular place for payment of the bill. It may either make the bill payable at a particular place (*e.g.* a banker’s) without more, in which case presentment may be made not only to the banker, but also to the acceptor (whence such an acceptance is said to be a general acceptance as against him) ; or it may make the bill payable at a particular place, and not elsewhere, in which case presentment can only be made at that place.<sup>6</sup>

Partial or varying.

Special.

For honour.

§ 5. When a bill has been dishonoured by non-acceptance or protested for better security, any person may accept it for the honour of the drawer or of any of the indorsers, and thereby engage himself to pay the bill at maturity, if it is then presented to the drawee or acceptor and dishonoured.

Supra protest.

Except where there is a “reference in case of need” (*q. v.*), it seems that a bill can only be accepted for honour after it has been protested, and hence such an acceptance is sometimes called an acceptance *supra*

<sup>1</sup> For the cases on the old rule, that in an action of trespass the abuttals should be set out, see Fisher’s Digest, *Trespass*, 13 (a).

<sup>2</sup> Pollock on Contract, 9 ; Chitty on Contracts, 11.

<sup>3</sup> Bills of Exchange Act, 1878, passed in consequence of the decision in *Hindlaugh v. Blakey*, 3 C. P. D. 136.

<sup>4</sup> Byles on Bills, 184.

<sup>5</sup> Byles, 193.

<sup>6</sup> Byles, 194 ; stat. 1 & 2 Geo. 4, c. 78.

protest.<sup>1</sup> The acceptor for honour, if he pays the bill, has a right of action against the party for whose honour he accepts, and against all whom that party might have sued.<sup>2</sup>

**ACCESS.**—§ 1. The right of access is that possessed by the owner of land adjoining a highway (*e. g.* a road or river) to go from his land on to the highway and *vice versa* without obstruction. It is a different right from the public right of passage or navigation on the highway.<sup>3</sup> As to access of light, see *Ancient Lights ; Easement*. § 2. The term "access" is also used in questions of legitimacy to denote cohabitation or opportunity of sexual intercourse between husband and wife.<sup>4</sup> (See *Bastard*.)

**ACCESSION**, strictly speaking, is where a thing which belongs to one person becomes the property of someone else, by reason of its becoming added to or incorporated with a thing belonging to the latter. This takes place in the case of alluvion, dereliction, the addition of buildings, plants, &c. to the soil, the erection of fixtures, and where two things are so united as to form one, as by the embroidering of cloth, the painting of a picture on canvas, &c.<sup>5</sup>

§ 2. Blackstone includes under accession what is more correctly called *Specificatio*. *specificatio*, which takes place where a person makes a new thing (*species*) out of materials belonging to another, and thereby acquires the ownership of them, subject to making compensation to the former owner for their original value ; he also includes under accession the acquisition of young animals born in confinement ;" this is more correctly called accretion (*q. v.*).

**ACCESSORIUM SEQUITUR PRINCIPALE.**—An accessory thing follows the principal thing to which it is accessory. Thus, in certain cases, a fixture becomes the property of the owner of the land to which it is affixed, and crops are the property of him on whose land they grow. (See *Accession ; Accretion*.)

**ACCESSORY.**—§ 1. In criminal law, an accessory before the fact is he who, directly or indirectly, counsels, procures or commands any person to commit any felony or piracy, which is committed in consequence of his counselling, procuring or commandment.<sup>7</sup> An accessory before the fact to any felony is in all respects in the same position as if he were a principal felon.<sup>8</sup> In high treason and misdemeanor, there are no accessories, but all persons concerned therein, if guilty at all, are principals.<sup>9</sup> § 2. An accessory after the fact is a person who, knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon, in order to enable him to escape from punishment, or

Before the fact.

After the fact.

<sup>1</sup> Byles, 261.

<sup>2</sup> Smith's Merc. Law, 239.

<sup>3</sup> *Bell v. Corporation of Quebec*, 5 App. Ca. 84.

<sup>4</sup> Steph. Comm. ii. 285.

<sup>5</sup> Just. Inst. ii. 1, §§ 20 *et seq.*; Hunter's Roman Law, 128; Vangerow, Pandekten, i. 629.

<sup>6</sup> Bl. Comm. ii. 404; Kuntze, *Cursus*, §§ 508—511.

<sup>7</sup> Russell on Crimes, i. 164; Stephen's Dig. Crim. 24.

<sup>8</sup> Stat. 24 & 25 Vict. c. 94, ss. 1, 2; Greaves, Crim. Acts, 18.

<sup>9</sup> Russell, i. 167, 169.

the like.<sup>1</sup> Every accessory after the fact to any felony is guilty of a substantive felony, and is in general liable to two years' imprisonment.<sup>2</sup> An accessory after the fact to murder is liable to penal servitude for life.<sup>3</sup>

At the fact. § 3. Principals in the second degree are sometimes called accessories at the fact.<sup>4</sup> (See *Principal*, § 4; *Incite*.)

**ACCIDENT.**—Formerly, there were many cases of accidental losses which were recognized as giving a claim to relief in equity, but not at law; thus, if a deed or negotiable security were lost, equity would enforce the plaintiff's rights under the document on his giving, if necessary, a proper bond of indemnity to the defendant.<sup>5</sup> A similar jurisdiction was given to the common law courts, so far as relates to negotiable instruments, by stat. 17 & 18 Vict. c. 125, s. 87. So if an annuity was directed by a will to be secured by an investment in public stock, and an investment was accordingly made, sufficient at the time for the purpose, but afterwards the stock was reduced by act of parliament, so that it became insufficient, equity would decree the deficiency to be made up out of the residuary estate.<sup>6</sup> Since the Judicature Acts, of course, relief is given in such cases in all the divisions of the High Court.<sup>7</sup>

**ACCOMMODATION.**—As to accommodation bills, see *Bill of Exchange*.

Land.

Works.

§ 1. Accommodation land is land acquired for the purpose of being added to other land for its improvement; an accommodation road is one constructed to give access to a particular piece of land. § 2. Where a railway company takes land compulsorily, it is bound, under the 68th section of the Railways Clauses Act, 1845, to construct all gates, bridges, roads, fences, &c. necessary to make good any interruptions caused by the railway passing through the land; these are called accommodation works.<sup>8</sup>

**ACCOMPLICE.** See *Principal*, § 4; *Accessory*.

**ACCORD—ACCORD AND SATISFACTION.**—§ 1. An accord is an agreement between two or more persons, one of whom has a right of action against the other (*e.g.* for breach of a contract), that the latter shall render and the former accept something in satisfaction of the right of action, *e.g.* payment of money, delivery of goods, performance of works or services, &c. If the accord is carried out by the payment, delivery or performance, and acceptance, the arrangement is called an "accord and satisfaction" (in the old books sometimes an "accord and execution"),<sup>9</sup> and operates as a bar to the right of action. § 2. An accord may also consist of mutual promises to do and accept something in satisfaction of the right of action, but this is more in the nature of a new contract.<sup>10</sup> (See *Satisfaction*.)

Accord and satisfaction.

<sup>1</sup> Russell, i. 171; Stephen, 27.

<sup>2</sup> Stat. 24 & 25 Vict. c. 94, s. 4, and the other Acts of 1861.

<sup>3</sup> Stat. 24 & 25 Vict. c. 100, s. 67.

<sup>4</sup> Russell, i. 156.

<sup>5</sup> Snell's Eq. 335.

<sup>6</sup> *Ibid.* 342.

<sup>7</sup> Jud. Act, 1873, s. 24.

<sup>8</sup> Hodges on Railways, 361.

<sup>9</sup> *Blake's case*, 6 Rep. 43 b.

<sup>10</sup> Leake on Contracts, 465; Chitty on Contracts, 692.



**ACCOUNT.**—§ 1. An account is a list or statement of monetary transactions, such as payments, receipts, purchases, sales, debts, credits, &c., in most cases showing a balance or result of comparison between items of an opposite nature, *e.g.* receipts and payments. As to the appropriation of payments in a current account, see title *Clayton's Case*. § 2. When two persons, having had monetary transactions together, close the account by agreeing to the balance appearing to be due from one of them, this is called an account stated: it is of importance from the fact that it operates as an admission of liability by the person against whom the balance appears; or, in the language of the common law, "the law implies that he against whom the balance appears has engaged to pay it to the other;"<sup>1</sup> and on this implied promise or admission an action may be brought. § 3. When a trustee and cestui que trust agree to an account, it is called a settled account, and the Court will not as a general rule open it—that is, require the whole of it to be investigated—unless there has been some concealment or undue advantage taken by the trustee.<sup>2</sup> (See *Falsify; Surcharge*.)

Account stated.

Settled account.

§ 4. If the account is open, that is, if it has not been stated or agreed upon by the parties, either of them may bring an action against the other: if it is a mere question of indebtedness under a contract or a quasi-contract, he may sue under the contract for the balance which he alleges to be due to him; if such an action is brought in one of the Common Law Divisions, and it appears "that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way," it may be, and in practice always is, referred to a master of the Court, or official referee, or an arbitrator.<sup>3</sup>

Open account.

§ 5. But where the account is complicated or incidental questions arise,<sup>4</sup> and one of the parties wishes to have it taken under the direction of the Court, he must bring an action in the Chancery Division,<sup>5</sup> and then the transactions in question are investigated by the chief clerk in chambers, or by an official or special referee, in accordance with the directions of the Court. The "accounting party," or person from whom the account is required, draws up an account and verifies it by an affidavit, with vouchers for the larger payments: the chief clerk embodies the result in his certificate.<sup>6</sup> (See *Certificate*, § 2; *Falsify; Surcharge*.) The commonest instances of actions for accounts are actions by one partner against another for an account of the partnership dealings; by a principal against his agent (but not *vice versa*);<sup>7</sup> by a beneficiary against executors or trustees for an account of what they have received (or ought to have received) and paid in respect of the trust property; and by a

Action (suit) for account.

Accounting party.

Partnership.

Trustees'.

Mortgagees' accounts.

<sup>1</sup> Bl. Comm. iii. 164; Chitty on Contracts, 599 *et seq.*

<sup>2</sup> Daniell, Ch. Pr. 576, 1136.

<sup>3</sup> C. L. P. Act, 1854, s. 3; Day's C. L. P. Acts, 246; cf. Rules of Court, xxxiii., xl. 10.

<sup>4</sup> See *Kimberley v. Dick*, L. R., 13 Eq. 1.

<sup>5</sup> Judicature Act, 1873, s. 34. As to the old common law action of account, in which the accounts were taken before

auditors appointed by the Court, see Co. Litt. 172 a; 3 Bl. Comm. 164; Broom's Comm. C. L. 123; Haynes's Equity, 234; Snell's Eq. 409. It had long been practically obsolete,—a suit in equity being more convenient. As to accounts in admiralty actions, see Williams & Bruce, 23.

<sup>6</sup> Hunter's Suit, 109; Daniell's Ch. Pr. 1120.

<sup>7</sup> Haynes's Equity, 243.

mortgagor against a mortgagee who has entered into possession of the mortgaged property, in order to ascertain what he has received or ought to have received in respect of rents and profits, so that the amount may be set off against the amount payable on the mortgage (*infra*, §§ 7, 10).

Executors' accounts.

§ 6. Sometimes, however, the taking of an account is merely incidental to the main object of the action. Thus, in an administration action, the executors or trustees have to bring in an account (or periodical accounts from time to time, according to the nature of the trust) of what they have

Account of profits.

received and paid in respect of the estate. Again, when an action for injuries (*e.g.* infringement of a patent) is brought in the Chancery Division, it is frequently necessary to ascertain what profits the defendant has made, or an inquiry what damages the plaintiff has sustained, by the acts complained of, in order that the amount may be paid to the plaintiff as compensation; and this is done by directing an account of the profits (or an inquiry as to the damages) to be taken in chambers (see *Inquiry*, § 2).

Receiver's accounts.

So, when a receiver of real estate or of a manufactory is appointed, he is generally directed to bring in his accounts at half-yearly intervals. Committees in lunacy, also, must bring in and pass their accounts periodically.<sup>1</sup>

Simple account.

§ 7. With reference to the manner in which they are taken, accounts are of various kinds. Thus, suppose a mortgagee has entered into possession of the property, and has received rents and profits, but not sufficient to pay the interest on the debt, and an account is directed, the receipts will be put on one side and the amounts due for interest on the other, and the difference or balance will represent what the mortgagor has to pay in respect of interest: this is a simple account.

Income and capital accounts.

§ 8. In certain cases, as where trustees have to pay income to a tenant for life, the accounts are of two kinds—income accounts and capital accounts. The former show the receipts, expenses and payments on account of income (*e.g.* receipt of rents, payment of the expenses of collecting them, and payment of income to the tenant for life): the latter show the receipts, expenses and payments on account of capital (*e.g.* purchases and sales of trust property, payments of debts due by the testator, &c.).

Account with rests.

§ 9. When an accounting party has received sums which he has or ought to have employed as principal, an account with rests may be directed against him. By taking an account with rests is meant that at yearly, half-yearly or other periods in the account the receipts and payments are balanced, and the balance appears in the remainder of the account without reference to the original amounts from which it is made up. The

Rests in mortgagee's account.

object of making rests varies with the nature of the case. § 10. Thus, suppose the mortgagee, under a mortgage for 10,000*l.* with interest at five per cent. which has always been punctually paid, enters into possession of the estate, and receives out of the rents and profits the clear annual sum of say 600*l.*, being a yearly surplus of 100*l.* after providing for the interest: then if an account is directed against him at the suit of the mortgagor after he has been in possession four years, instead of the surplus income

<sup>1</sup> Pope on Lunacy, 182.

being added up and deducted from the principal (10,000*l.* - 400*l.* = 9,600*l.*) as would be the case in a simple account (*supra*, § 7), the account will be taken with yearly rests;<sup>1</sup> that is, he will be treated as if he had applied the surplus income each year in reduction of the principal, the effect of which would have been to make the interest in the second year calculated on 9,900*l.* (10,000*l.* less 100*l.*), in the third year on 9,800*l.*, and in the fourth year on 9,700*l.*, and thus to reduce the amount required for interest and increase the balance applicable in reduction of principal by 30*l.*: so that in this case the mortgagor would have to pay the mortgagee 9,570*l.* only instead of 9,600*l.* § 11. The nature of rests in an account against executors or trustees is quite different. Thus, if an executor has neglected a direction by the testator to accumulate surplus income (see *Accumulation*), or has employed money belonging to the estate in his own business, he will be charged with interest at four per cent., or if he has employed the money in his own business at five per cent., and an account with yearly or half-yearly rests will generally be directed against him: the effect of this is, that at each rest the balance due by the executor is ascertained, and interest is calculated on that balance and added as principal to the balance found at the next rest, and so on.

Rests in  
executors'  
accounts.

Thus—

Receipts for first year	..	..	..	..	..	£1,500
Less proper payments	..	..	..	..	..	500
						<hr/>
Balance ..	..	..	..	..	..	£1,000 rest.
						<hr/>
Receipts for second year	..	..	..	..	..	£1,700
Less proper payments	..	..	..	..	..	470
						<hr/>
Balance ..	..	..	..	..	..	1,230
Add interest on preceding balance at 5 per cent.					..	50
						<hr/>
						£1,280 rest.
						<hr/>

It will thus be seen that an account with rests against an executor or trustee means that he is charged with compound interest on his net receipts, because, in the case of neglect to follow a direction for accumulation, he ought to have received compound interest for the benefit of the estate, and because, in the case of the use of trust funds in his own business, he is presumed to have made profit at the rate of five per cent. compound interest.<sup>2</sup> In the case of rests against a mortgagee, on the contrary, they are directed as a fair mode of appropriating his receipts (see *Appropriation*, § 5), and do not result in charging him with compound interest.<sup>3</sup>

<sup>1</sup> Fisher on Mortgage, ii. 957; Spence's Equity, ii. 809.

<sup>2</sup> Compare the somewhat inconsistent cases of *Vyse v. Foster*, L. R., 8 Ch. 309; 7 H. L. 318; *Att.-Gen. v. Alford*, 4 D. M. & G. 843; *Jones v. Foxall*, 15 Beav. at p. 392; *Walker v. Woodward*, 1 Russ. 107.

<sup>3</sup> As to rests generally, see *Heighington v. Grant* (5 Myl. & C. 258), *Turner v. Burkinshaw* (L. R., 2 Ch. 488), *Raphael v. Boehm* (11 Ves. 92), where a very strict account with double rests was directed; *Williams v. Powell*, 15 Beav. 461. Mr. Fisher (Mortgage, ii. 959, n. (f), 961,

Legacy and succession duties accounts.

§ 12. Under the Legacy and Succession Duties Acts, executors, administrators, trustees and successors have to render accounts to the Commissioners of Inland Revenue, showing the amount or value of property chargeable with duty, the name of the person receiving it, or for whose benefit it is received, and his degree of relationship to the testator, intestate or predecessor. Accounts rendered under the Legacy Duty Acts are known as legacy, annuity and residuary accounts, according as the subject matter of duty is a legacy or annuity given by will, or the residue of a testator's or intestate's estate.<sup>1</sup>

Accounts of funds in Court.

§ 13. Accounts of the money and securities held by the Bank of England as bankers to the Chancery Division of the High Court are kept by the Paymaster-General at the Chancery Pay Office in two ways.

Causewise accounts.

§ 14. First, as to the "causewise" accounts, viz., those showing the amount of cash and securities belonging to the suitors in each cause or proceeding.<sup>2</sup> When it is desired to pay money into Court, a direction to that effect is usually obtained from the Paymaster-General, and when the money has been paid in an account of it is opened in the books both at the Paymaster-General's Office and at the Bank, entitled according to the short title of the cause or matter in which it has been paid in (thus, "The account of *Park v. Robinson*," 1875, P. 55); this is called the "general account" of the cause or matter. When the Court has ascertained that a portion of such a fund belongs to a particular person, but it cannot be immediately paid out to him (as in the case of a

General account.

Carrying over.

minor), the Court usually orders the portion to be transferred or "carried over" from the general account to another account, also kept in the name of the cause, but distinguished by the addition of the name of the person entitled, so as to release it from the general questions in the cause (*e.g.* "*Park v. Robinson*, 1875, P. 55, the account of Thomas Park, an infant"); this is called a "separate account."<sup>3</sup> Transcripts or copies of these accounts may be obtained by the persons interested.<sup>4</sup> When the dividends on an account consisting of stock have not been dealt with by the person entitled for many years it is called a "dormant account."<sup>5</sup> When money is paid in without a direction (as sometimes happens in urgent cases) it is placed to the credit of a "Chancery suspense account" at the Bank, and, on a direction being obtained, is transferred to the Chancery Pay Office account.<sup>6</sup>

Separate account.

Suspense account.

Funds of the Court of Chancery.

§ 15. Secondly, as to the accounts of funds kept without reference to the suitors interested in them. The Bank formerly had the custody of

seems to consider that the mode of making rests against executors is also applicable to mortgagees. The present writer has not been able to find any authority for this proposition, which seems to involve a confusion of two distinct doctrines.

<sup>1</sup> See Hanson on Succession Duties; Hudson on Legacy and Succession Duties.

<sup>2</sup> The phrase "causewise" probably came into use before the introduction of "matters," or the summary modes of proceeding created by various acts of parlia-

ment (*e.g.* The Trustee Relief Act, The Lands Clauses Act, &c.), under which large sums are annually paid into Court.

<sup>3</sup> Daniell, Ch. Pr. 1646. See the Chancery Funds Consolidated Rules, Orders, and Forms, 1874, *passim*. For a variety of titles of accounts, see Weekly Notes, 1877, part ii. 106 *et seq.*

<sup>4</sup> Daniell's Ch. Pr. 1636.

<sup>5</sup> Rep. Ch. Funds Comm. xxxii.

<sup>6</sup> Ch. Funds Cons. Rules, r. 31.

several funds which appeared in their books as belonging to the Court of Chancery, and were applied to certain purposes connected with the Court; the principal of these were (1) the "Suitors' Fund," and (2) the "Suitors' Fee Fund" (*q. v.*), which were by The Courts of Justice (Salaries and Funds) Act, 1869, transferred to the Commissioners for the Reduction of the National Debt, and are now invested by them, part of the profits being devoted to the payment of interest on the "Suitors' Deposit Account" (*q. v.*); and (3) the "Appeal Deposit Account" (*q. v.*), which still belongs to the Chancery Division.

§ 16. As to the similar accounts of the funds belonging to the London Bankruptcy Court and of the funds of the suitors of that Court, also kept by the Bank of England, see the ninth and following sections and the second schedule of The Courts of Justice Salaries and Funds Act, 1869. Bankruptcy  
Accounts.

§ 17. The post-office savings banks act as the bankers to the County Courts.

**ACCOUNTABLE RECEIPT** is an acknowledgment of the receipt of money to be accounted for by the person receiving it, as opposed to an acquittance or receipt for money paid in discharge of a debt.<sup>1</sup> The forgery of an accountable receipt is felony.<sup>2</sup>

**ACCOUNTANT-GENERAL** of the Court of Chancery formerly kept the accounts between the suitors of the Court of Chancery and the Bank of England. (See *Payment into Court*.) "The institution of an Accountant-General goes back to the year 1726, and had its origin in the irregularities practised by some of the Masters of the Court, who speculated with the suitors' moneys and effects, which up to that time had been placed in their custody and in that of the usher of the Court. . . . The history of the precautions taken by the Court to prevent any such malversations for the future will be found fully detailed in the report of the Chancery Funds Commission presented to parliament in 1864. It is sufficient here to state that an Accountant-General was appointed by the act 12 Geo. 1, c. 32;"<sup>3</sup> and that by the act 35 & 36 Vict. c. 44, the duties of his office were transferred to the Paymaster-General (*q. v.*). There was also an Accountant-General of the Court of Exchequer, and there is an accountant of the Court of Bankruptcy, in whose name the accounts of money belonging to bankrupts' estates and paid into Court are kept.<sup>4</sup>

**ACCOUNTANT TO THE CROWN** generally means a person falling within the purview of the act 13 Eliz. c. 4, which enumerates many officers, such as treasurers, receivers, tellers, collectors, &c., who are accountable to the crown for moneys received by them, and makes their lands liable for their crown debts. The lien of the crown attaches

<sup>1</sup> *Clark v. Newsam*, 1 Exch. at p. 138.

<sup>2</sup> Stat. 24 & 25 Vict. c. 98, s. 23; Stephen's Crim. Dig. 276.

<sup>3</sup> Second Report of Legal Dep. Comm. (1874), 51.

<sup>4</sup> Second Sched. to 32 & 33 Vict. c. 91.

from the officer's acceptance of office, so that a sale of his land after that time may be defeated by a subsequent claim of the crown. In the case of an office accepted before 1st November, 1865, the acceptance must be registered (formerly in the Common Pleas, now) in the Central Office of the Supreme Court, otherwise the officer's land is not affected by the lien,<sup>1</sup> and no acceptance of office after that date shall affect land as to a *bonâ fide* purchaser or mortgagee, unless a writ of extent or other process of execution founded on the acceptance of office has been previously issued and registered.<sup>2</sup> (See *Judgment*; *Extent*.)

Accrual of  
right.

**ACCRETION—ACCRUAL—ACCRUE—ACCRUER.—I.** A right is said to accrue when it vests in a person, especially when it does so gradually or without his active intervention, *e.g.* by lapse of time, or by the determination of a preceding right;<sup>3</sup> thus the Statute of Limitations (3 & 4 Will. 4, c. 27) contains provisions for ascertaining when the right to be barred is deemed to have first *accrued*, *i.e.* vested in the person entitled to exercise it; so by the Apportionment Act, 1870, periodical payments in the nature of income are to be considered as accruing (*i.e.* the right to the payment is to be considered as arising) from day to day (see *Apportionment*). Hence a debt *owing* is opposed to a debt *accruing*—the former being a debt payable immediately, the latter a debt payable at a future time (*debitum in præsentî solvendum in futuro*). The fact of a right accruing is called its accrual.

Of property.

II. When a fund, share, estate, security or other property is increased by additions which take place *ipso jure* or *ipso facto*, the additions are said to accrue either to the original fund, or to the person entitled to it.

Accretion.

The most important cases of this are (1) when property is increased or added to by an act of nature—as in the case of the young of animals, which belong to the owners of the parents, and in the case of alluvion (*q. v.*) and dereliction (*q. v.*); (2) where property is increased or added to by the act of the party, but not by a mode of acquisition recognized by law, as in the case of encroachment (*q. v.*) by a tenant; (3) when a fund is increased by additions which arise from the rule *accessorium sequitur principale* (*q. v.*), this is called accretion, and the additions themselves are called accretions—*e.g.* the additions to a charitable fund from the increase in the rents of the land of which it originally consisted, the savings of a married woman's separate estate, &c.;<sup>4</sup> (4) when property is divisible among several persons so that on a certain event happening one of them is excluded from participation and the others take the whole, the share of that one is said to accrue to the others, and the fact of its doing so is called its accruer—thus, if 300*l.* is given by will to three minors, A., B. and C., with a proviso that if anyone of them dies under twenty-one his share shall go to the survivors; on A.'s death under age, his share accrues

Accruer.

<sup>1</sup> Stat. 2 & 3 Vict. c. 11, s. 8; Shel-  
ford, R. P. Stat. 605.

<sup>2</sup> Crown Suits Act, 1865.

<sup>3</sup> Tacitè ei deficientium partes etiam in-

vito ad crescent. Dig. xxix. 2 fr. 53, § 1.

<sup>4</sup> *Att.-Gen. v. Marchant*, L. R., 3 Eq.  
424; *Duncan v. Cashim*, L. R., 10 C. P.  
554; *Watson's Comp. Eq.* 643.

to B. and C., who (if they both attain twenty-one) will thus take 150*l.* each, of which 100*l.* is their original and 50*l.* their accrued share; the clause containing this proviso is called a clause of accruer. The operation of the clause does not extend to the accrued shares unless that intention appears, so that if B. also died under age, C. would only take B.'s original share of 100*l.* in addition to his own 150*l.*, and the testator would die intestate as to B.'s accrued share of 50*l.* This result is always guarded against in well-drawn instruments by making the clause expressly extend to accrued shares.<sup>1</sup> (See *Jus Accrescendi*; *Survivorship*; *Accession*; *Alluvion*.)

Clause of accruer.

**ETYMOLOGY.**—Latin *accrescere*, to grow to, French *accrues*, waste lands added to a forest by the trees encroaching on it.<sup>2</sup>

**ACCUMULATION** is the putting by of dividends, rents or other income and converting it into principal by investing it and again capitalizing the income arising from the new principal, and so on. The capital and accrued income thus formed is called the accumulations.

§ 2. The accumulation clause in a will or settlement directs the trustees to accumulate the surplus income of the settled property during the minority of the children after providing for their maintenance (*q. v.*), and directs the accumulations to follow the destination of the fund out of which they have arisen.<sup>3</sup>

Accumulation clause.

§ 3. The Thellusson Act (39 & 40 Geo. 3, c. 98) forbids the accumulation of income for any longer term than one of the following periods, viz.: (a) the life of the settlor, or (b) twenty-one years from the death of the settlor, or (c) during the minority of any person living or *in ventre sa mère* at the death of the settlor, or (d) during the minority of any person who under the settlement or will would for the time being, if of full age, be entitled to the income directed to be accumulated. A direction to accumulate income beyond any of these periods is void as to the excess only; unless, of course, it exceeds the rule against perpetuities (*q. v.*), in which case it is void altogether.<sup>4</sup> (See *Cumulative*.)

Thellusson Act.

**ACKNOWLEDGMENT.**—§ 1. By the various Statutes of Limitations, a written and signed acknowledgment of the title, debt, or right to which the statute would otherwise be a bar, is sufficient to prevent the statute from applying.<sup>5</sup> What is an acknowledgment within these statutes is a question of construction to be determined by the Court in each case; there are, however, some general rules on the subject: thus, an acknowledgment under stat. 3 & 4 Will. 4, c. 42 (as to specialties), need not amount to a promise to pay, while, under stat. 9 Geo. 4, c. 14, the acknowledgment must contain, either expressly or impliedly, not only an admission of the debt, but also a promise to pay accordingly; these words in a letter: "I wish I could comply with your request, for I am

Acknowledgment under the Statutes of Limitations.

<sup>1</sup> Jarman, Wills, ii. 661; Watson, Comp. Eq. ii. 1131.

<sup>2</sup> Loysel, Inst. Cont. § 248.

<sup>3</sup> Elphinstone's Conv. 311; Watson's Comp. 585.

<sup>4</sup> Williams, R. P. 320.

<sup>5</sup> Stat. 3 & 4 Will. 4, c. 27, ss. 14, 28, 40, 42; Real Property Limitation Act, 1874; 3 & 4 Will. 4, c. 42, s. 5; 9 Geo. 4, c. 14, s. 1; 19 & 20 Vict. c. 97, s. 13.

very wretched on account of your account not being paid; there is a prospect of an abundant harvest, which must turn into a goodly sum, and considerably reduce your account; if it does not, the concern must be broken up to meet it; my hope is, that out of the present harvest you will be paid"—were held to be a sufficient acknowledgment to revive a debt under the stat. 9 Geo. 4, c. 14.<sup>1</sup> In the case of the statutes relating to debts, part payment on account of principal or interest amounts to an acknowledgment, so as to prevent the statute from running.

Acknowledgment by married woman.

§ 2. By the Fines and Recoveries Act (*q. v.*), a married woman may dispose of any lands, or any interest in land which may belong to her, as effectually as if she were a feme sole, provided that her husband concur in the conveyance or other deed; and provided that the deed "be produced and acknowledged by her as her act and deed before a judge of one of the Superior Courts at Westminster, or a master in Chancery,<sup>2</sup> or before two of the perpetual commissioners, or two special commissioners," appointed under the act.<sup>3</sup> Before taking the acknowledgment, the judge or commissioners must examine the married woman apart from her husband, as to her knowledge of the deed, and whether she freely and voluntarily consents to the same; and the judge or commissioners then sign a memorandum to that effect, endorsed or written on the deed, and also a certificate of the taking of the acknowledgment, written on a separate piece of parchment. The certificate, verified by affidavit, is then filed in the Central Office of the Supreme Court.<sup>4</sup> Dispositions by married women of reversionary interests in personal estate must be acknowledged in the same way.<sup>5</sup> (See *Fine*, §§ 9, 11; *Reversionary*; *Survivorship*.)

Acknowledgment of will.

§ 3. If a will is not signed in the presence of the witnesses, the testator must acknowledge his signature in their presence.<sup>6</sup> It is not necessary that he should say in express words to the witnesses, "That is my signature;" it is sufficient if it clearly appears that the signature was existent in the will when it was produced to the witnesses, and was seen by them when they did, at the testator's request, subscribe the will.<sup>7</sup>

Acknowledgment of satisfaction.

§ 4. If a mortgagee of copyholds by conditional surrender has not been admitted, and the mortgage is paid off, the practice is to enter on the court rolls a memorandum called an acknowledgment of satisfaction stating that the debt has been paid. This is treated as sufficient evidence of the discharge of the mortgage and as vacating the surrender.<sup>8</sup>

**ACQUIESCENCE** is where a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that under the circumstances of the case the other party may fairly infer that he has waived or abandoned his right. Thus,

<sup>1</sup> *Bird v. Gammon*, 3 Bing., N. C. 833; Chitty on Contracts, 754; 5 Scott, 213, cited Shelford, R. P. Stat. 277.

<sup>2</sup> The office of master in Chancery is now abolished. See "Master," § 3.

<sup>3</sup> 3 & 4 Will. 4, c. 74, ss. 77, 79.

<sup>4</sup> Sects. 80, 84, 85; Williams on Seisin, 111 *et seq.*; Shelford's R. P. Stat. 368 *et*

*seq.*; Judicature (Officers) Act, 1879; Rules of Court, December, 1879.

<sup>5</sup> Stat. 20 & 21 Vict. c. 5; Shelford, 405.

<sup>6</sup> Wills Act, s. 9.

<sup>7</sup> *Keigwin v. Keigwin*, 3 Curt. 607, cited Shelford, R. P. Stat.; Jarman, Wills.

<sup>8</sup> Davids. Conv. ii. (2) 667, 1332.



if A. is induced by fraud to enter into a contract, and, having discovered the fact, neglects to take proceedings to have it set aside for a great number of years, he is said to have acquiesced in, and thus affirmed, the contract. Full knowledge of the facts is essential, and this constitutes the distinction between bar by acquiescence and bar by limitation, or mere lapse of time.<sup>1</sup> (See *Estoppel*; *Laches*; *Limitation*.)

**ACQUIT—ACQUITTAL.**—§ 1. Acquit “signifieth in law to discharge or keepe in quiet,”<sup>2</sup> and is used in the old books in the sense of a release or discharge generally; but it is now chiefly applied to the case of an accused person who is acquitted or discharged of a felony by judgment, so that he can never again be tried on the same charge (see *Auterfois Acquit*), as where the jury bring in a verdict of not guilty.<sup>3</sup>

§ 2. In the old books the term is also used in a special sense to denote an obligation by a lord to his tenant. In some cases, where land was held of a mesne lord, he was bound to protect his tenant from any claims by lords paramount arising out of the services due to them by the mesne lord; this was called acquittal.<sup>4</sup> (See *Homage*, § 4.)

**ACQUITTANCE** in the old books is a receipt given in acknowledgment of the payment of money,<sup>5</sup> especially an acquittance or receipt under seal.<sup>6</sup> (See *Accountable Receipt*.)

**ACT** generally means something voluntarily done by a person: thus, where a person executes a deed he declares that he delivers it as his “act and deed,” the two words being synonymous. An “act in the law” is an operation or effect produced by the law independently of the acts or wishes of the parties: thus, a descent is an act in the law.<sup>7</sup> (See *Overt Act*.)

**ACT OF BANKRUPTCY.**—§ 1. “It is one of the principal objects of the bankrupt law, when a person becomes insolvent, to seize his remaining property and distribute it among his creditors, instead of allowing him to squander it, or to appropriate it in paying particular creditors to the prejudice of others. It is therefore of great importance that an insolvent debtor should be brought under the operation of the law as soon as possible after his affairs become embarrassed, and for this reason certain acts have been prescribed as indicia of insolvency. These acts are called acts of bankruptcy.”<sup>8</sup>

Acts of bankruptcy may be divided into three classes:—I. § 2. Those which relate to the person of the debtor, and are evidence of an intention to deprive his creditors of their remedy against his person, as when he goes or remains abroad, or otherwise conceals or absents himself with the

<sup>1</sup> Stat. 3 & 4 Will. 4, c. 27, s. 27; Shelford, R. P. Stat. 210. See Pollock on Contract, 495; *Wright v. Vanderplank*, 8 De G. M. & G. 133; *Evans v. Smallcombe*, L. R., 3 H. L. 256.

<sup>2</sup> Co. Litt. 100a.

<sup>3</sup> *Ibid.*; Archbold, Crim. Ev. 184.

<sup>4</sup> Co. Litt. 100a.

<sup>5</sup> Noy, Maxims, 95.

<sup>6</sup> Co. Litt. 373a; *Nichol's case*, 5 Rep. 43a.

<sup>7</sup> Co. Litt. 149a.

<sup>8</sup> Robson's Bankruptcy, 102.

<sup>9</sup> *Ibid.* 103.

intention or the effect of delaying or defeating his creditors (see *Keeping House*). II. § 3. Those which relate to dispositions of the debtor's property, and are evidence of an intention to deprive his creditors of their remedy against his estate; these are of two kinds:—1st. Dispositions of the whole or part of the debtor's property (not being bonâ fide assignments for value), by which the property is removed from the reach of his creditors, and the debtor is rendered insolvent. 2nd. Acts of fraudulent preference, that is, acts done with a view of giving one creditor a preference over the others (such as conveyances, mortgages, payments, contracts, judgments, &c. voluntarily entered into or suffered in contemplation of bankruptcy), provided the debtor becomes bankrupt within a certain time after the fraudulent act. III. § 4. Those which relate to the state of the debtor's circumstances and are evidence of his insolvency, but not necessarily of an intention to defeat or delay his creditors, such as a declaration by the debtor of inability to pay his debts, an execution levied against him for a sum not less than 50*l.*, or non-compliance with a debtor's summons requiring him to pay a sum not less than 50*l.* (See *Debtor's Summons*.)

to circum-  
stances.

Traders and  
non-traders.

§ 5. Acts of bankruptcy may also be divided, with reference to the status of the person committing them, into—those confined to traders (*e.g.* departing from dwelling-house, outlawry, and execution levied for not less than 50*l.*), and those applying to all debtors, whether traders or non-traders.<sup>1</sup>

§ 6. An act of bankruptcy forms the foundation of a petition for adjudication. (See *Bankruptcy*, §§ 2 *et seq.*)

**ACT OF GOD.**—§ 1. An act of God is an event which could not happen by the intervention of man; such as a death, storm, earthquake, extraordinary flood, &c.<sup>2</sup> Thus, a tenancy in tail after possibility of issue extinct is said to be created by the act of God—namely, the death of the husband or wife of the tenant in tail—for it cannot be created by the act of man, *e.g.* a divorce.<sup>3</sup> At the present day, the phrase is chiefly used in the following branches of law.

Insurance.

§ 2. In the law of insurance, an insurer is not liable to indemnify the assured against loss occasioned by an act of God; and a common carrier, being an insurer, is similarly privileged.<sup>4</sup>

Contract.

§ 3. In the law of contracts, where the performance of a contract becomes impossible through an act of God, the promisor is in many cases discharged from liability: thus, if a lessee of land covenants to leave a wood in as good a plight at the end of the lease as it was at the beginning, and afterwards the trees are blown down by tempest, he is discharged of his covenant.<sup>5</sup> Whether an event is an act of God for the purposes of a particular contract depends on the nature of the contract and the event, especially on the question whether it can be foreseen and provided against for the purposes of the contract.<sup>6</sup>

<sup>1</sup> Bankruptcy Act, 1869, s. 6.

<sup>2</sup> *Forward v. Pittard*, 1 T. R. 27; *Oakley v. Portsmouth, &c. Co.*, 11 Exch. 618.

<sup>3</sup> Co. Litt. 28 a.

<sup>4</sup> *Maude & Pollock*, Merch. Shipp. 259;

*Nugent v. Smith*, 1 C. P. D. at p. 435.

<sup>5</sup> *Shelley's case*, 1 Rep. at p. 98 a; cited and explained in *Baily v. De Crespigny*, L. R., 4 Q. B. at p. 185.

<sup>6</sup> See *Pollock on Contract*, 335.

§ 4. In the law of torts, a person is frequently discharged from the Torts. consequences of an event which has taken place indirectly through his agency, if it has been directly caused by an act of God. Thus, where a person made a reservoir by damming up a stream, and an extraordinary rainfall caused the water to burst the embankment and flood the adjoining land, the owner of which brought an action for damages against the owner of the reservoir, it was held that the action was not maintainable, because the injury was caused by the act of God.<sup>1</sup>

§ 5. "Act of God" is a classical expression: "*vis major, quam Græci θεοῦ βίαν* appellant."<sup>2</sup> (See *Vis Major*.)

**ACT OF PARLIAMENT** is an enactment of the legislature, or a formal declaration of provisions having the force of law, made by the sovereign with the advice and consent of the lords and commons in parliament.<sup>3</sup> Sometimes an act begins with a preamble stating its occasion or purpose.<sup>4</sup> § 2. Acts are either public or private. Public acts (also Public.

called statutes, or general statutes, or statutes at large) are those which relate to the community generally, or to sections of the community; all public acts are judicially noticed by the judges (see *Notice*, § 1). Some public acts (such as the Mutiny [Army Discipline] and Appropriation Acts) are enacted every year, and are hence called annual acts. Others are passed to be in force for a limited time (temporary acts), and are frequently kept in force from time to time by continuance acts.<sup>5</sup> Other varieties of acts are referred to under the title "*Statute*."

§ 3. Private Private. (formerly called special<sup>6</sup>) acts are those which relate either to particular persons (personal acts) or to particular places (local acts). Personal acts Personal; chiefly relate to the naturalization, names, estates or divorces of particular persons; local acts relate principally to railways, bridges, docks, boroughs, local. &c., and are contained partly in special acts and partly in consolidation or clauses acts (*infra*, § 5). § 4. Private acts are also divisible into (a) those which enact that they are to be judicially noticed; (b) those of which copies printed by the Queen's printers may be given in evidence; (c) those not so printed.<sup>7</sup> A private act not judicially noticed does not form part of the law of England, and therefore must be pleaded in any proceeding in which it is relied on as founding a claim or defence. (See *Bill*, § 2.)

§ 5. There is also a class of acts which may be placed midway between Special and public and private acts, namely, those which contain clauses required to be general acts. inserted in private acts of frequent occurrence. For the sake of uniformity, and to avoid the necessity of repeating such clauses in each private act, the clauses are set out in a general act, so that when a private or special act relating to the matter in question is passed, the general act is incor-

<sup>1</sup> *Nichols v. Marsland*, L. R., 10 Ex. 255; 2 Ex. D. 1. Compare *Rylands v. Fletcher*, L. R., 3 H. L. 330; *Underhill on Torts*, 13; *Nitrophosphate, &c. Co. v. L. & St. C. Docks Co.*, 9 Ch. D. 503.

<sup>2</sup> *Pollock*, 335, n.; *Dig.* xix. 2, 25, fr. 6.

<sup>3</sup> *Co. Litt.* 126 a; *Bl. Comm.* i. 85.

<sup>4</sup> *H. Cox, Instit.* 19.

<sup>5</sup> *H. Cox*, 21.

<sup>6</sup> *Co. Litt.* 126 a.

<sup>7</sup> *H. Cox*, 19; see stat. 13 & 14 Vict. c. 21, containing provisions as to the form and construction of acts of parliament.

Lands Clauses  
Acts.

porated with it. Thus the Lands Clauses Consolidation Acts, 1845, 1860 and 1869, contain the "provisions usually inserted in acts authorizing the taking of lands for undertakings of a public nature," such as provisions for ascertaining the value of land purchased under compulsory powers, for payment of the purchase-money into Court where the parties entitled to it are under disability, &c. Other acts of a similar nature are the Companies Clauses Acts, 1845 and 1863, the Railways Clauses Acts, 1845 and 1863, the Commissioners Clauses Act, 1845, the Harbours, Docks and Piers Clauses Act, 1847.<sup>1</sup>

**ACT OF STATE** is an act done by the sovereign power of a country, or by its delegate, within the limits of the power vested in him. An act of state cannot be questioned or made the subject of legal proceedings in a Court of law. Thus where a foreign sovereign contracted certain debts, and his territory was afterwards annexed by the British government, it was held that the annexation having been an act of state, the creditors could not make any claim in respect of the revenue of the annexed territory.<sup>2</sup>

Divorce.

Probate.

**ACT ON PETITION** is a convenient and summary mode of proceeding in divorce, probate and ecclesiastical matters, often resorted to for the adjudication of questions which are too important to be brought before the Court on motion merely, and yet not so important as to necessitate the pleadings and other steps involved in a regular action or suit. § 2. Thus in divorce suits, the question whether the Court has jurisdiction in the matter is generally determined by an act on petition.<sup>3</sup> In probate matters, questions of propriety of conduct, personal qualifications, jurisdiction, &c., are generally brought before the Court by act on petition.<sup>4</sup>

§ 3. The proceedings commence with the petition, setting forth the facts relied on, and the relief prayed, to which the defendant files his answer,<sup>5</sup> and the plaintiff if necessary replies, and so on until the parties are at issue, when the petition is set down for hearing as a cause.

**ACTIO PERSONALIS MORITUR CUM PERSONA**—"A personal action dies with the person"—a maxim meaning that rights of action arising out of torts, are destroyed by the death of either the injured or the injuring person. This was the universal rule at common law, and is still the rule in many cases. Thus an action for slander, battery or the like, cannot be brought after the death of either party. But an action may be maintained by the executors or administrators of a deceased person, in respect of an injury committed to his real or personal property during his lifetime, and, conversely, an action lies against the executors

<sup>1</sup> Hodges on Railways, 24; Steph. Comm. iii. 9.

<sup>2</sup> *Doss v. Secretary of State for India*, L. R., 19 Eq. 509; *Mostyn v. Fabrigas*, Smith's L. C. i. 658; *Phillips v. Eyre*, L. R., 6 Q. B. 1; *Musgrave v. Pulido*, 5 App. Ca. 102.

<sup>3</sup> Browne on Divorce, 238; Divorce Rules (1866), 56 *et seq.*; Phillimore, Eccl. Law, 1259.

<sup>4</sup> Browne's Probate Pr. 294; Probate Rules (1862), C. B., 64 *et seq.*

<sup>5</sup> In ecclesiastical practice this is called "writing to the act;" Phill. 1259.

or administrators of a deceased person, for any wrong committed by him in respect of his real or personal property—provided that in each case the action is brought within a certain time.<sup>1</sup> Further, a remedy is given to the near relatives of a person who has been killed by the wrongful act, neglect or default of another<sup>2</sup> (see *Campbell's Act*). The result, therefore, is that (a) in the event of the death of the injured person, the maxim only applies in cases of torts to the reputation and torts to the person not resulting in death, and that in all other cases the right of action survives to the representatives of the injured person; (b) in the event of the death of the tortfeasor, the maxim applies in all cases of injury to the person or reputation, so that the right of action only survives against the representatives of a tortfeasor in cases of injury to property. (See *Abatement*, § 5; *Personal*.)

**ACTION.**—§ 1. An action is a civil proceeding taken in a Court of law to enforce a right. (See *Cause of Action*.)

I. § 2. In the High Court of Justice, an action is a proceeding commenced by writ of summons, as opposed to “matters,” which are commenced by motion, petition, summons, or some similar mode, and the ordinary steps in it are as follows:—The first thing is to bring the parties before the Court. For this purpose the writ of summons is prepared, issued and served by the plaintiff on the defendant, and the defendant appears. The next thing is to ascertain what is the question or dispute between the parties: this is done (unless the parties agree to state a special case) by the pleadings: the plaintiff prepares and delivers his statement of claim, the defendant his demurrer or statement of defence, and if necessary his counter-claim or notice to third parties, as the case may be: the plaintiff delivers his reply or demurrer, and so on.

*Actions in the High Court.*

§ 3. As soon as the parties are at issue, the next thing is to ascertain which of them is in the right; if the question is one of law raised by demurrer, it is argued before the Court, and judgment given for the party in the right: if it is a question of fact, it has to be tried or referred, and when the facts of the case have been ascertained from the evidence adduced on the trial or reference (see *Verdict*; *Report*), the judgment of the Court is obtained, deciding what are the rights and liabilities of the parties on the facts as found; the costs are taxed, and the judgment is enforced if necessary by execution.<sup>3</sup>

§ 4. In addition to these usual steps, almost every action involves a number of miscellaneous proceedings, such as summonses, motions, injunctions, discovery and inspection, accounts and inquiries, commissions, new trials, appeals, &c.; while many actions come to an end before trial by discontinuance or dismissal, or by the default of one of the parties, resulting in a judgment for the other.

§ 5. Where a number of actions are brought by different plaintiffs

<sup>1</sup> Steph. Comm. iii. 370; stat. 4 Edw. 3, c. 7; 3 & 4 Will. 4, c. 42.

<sup>2</sup> *Ibid.*; stat. 9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95.

<sup>3</sup> According to the old writers, an action comes to an end when judgment is given; Litt. § 504; Co. Litt. 289a.

Test action. whose claims arise out of the same facts (as where several shareholders in a company bring separate actions against the promoters for misrepresentation, &c.), the Court generally allows one of them to be selected as a test action, on the condition that, if the plaintiff in that action fails, the other plaintiffs shall abandon their claims.<sup>1</sup> (See *Consolidation*.)

§ 6. Actions are distinguished partly by the Division of the High Court in which they are brought, partly by the object for which they are brought, as shown by the right which is sought to be enforced.

“Common law” actions.

§ 7. Actions in the Queen’s Bench, Common Pleas, and Exchequer Divisions are of great variety, the principal ones being actions for the recovery of property and debts, and for damages for a tort or breach of contract (as to which see *Tort*; *Contract*; *Debt*); there are also a few special actions, such as *quare impedit*, *replevin*, &c.<sup>2</sup> (*q. v.*).

Popular actions.

*Qui tam* actions.

§ 8. Popular actions are such as may be brought by any person, as in the case of a penal statute, which forbids some act or omission on pain of forfeiting a penalty to any such person as will sue for it. Sometimes part of the penalty is given to the crown or the public, and the rest to the informer, and then the suit is called a *qui tam* action, because it is brought by a person “*qui tam pro domino rege, &c., quam pro se ipso in hac parte sequitur*.”<sup>3</sup> (See *Informer*.)

Chancery actions.

§ 9. Actions in the Chancery Division are equally various; the principal kinds are actions for specific performance, partnership actions, actions for accounts, redemption, foreclosure, execution of trusts, administration actions, &c.<sup>4</sup> Administration actions are actions for the administration of the estates of deceased persons; that is, for having the assets collected and managed, and the debts and legacies paid under the direction of the Court, or for having the infant children of the testator or intestate made wards of Court and educated under its directions, &c. When such an action is instituted by a creditor of the deceased to enforce payment of a debt due by him, it is called a creditor’s administration action; if by a legatee to enforce payment of his legacy, a legatee’s action, &c.<sup>5</sup> (See *Administration*; *Account*, §§ 5, 6; *Inquiry*; *Certificate*; *Classification*.)

Probate actions.

§ 10. Probate actions, or actions relating to wills and letters of administration, include the action for propounding a will in solemn form (*q. v.*); the interest action, where the plaintiff claims the grant of letters of administration as one of the next-of-kin of a deceased person; and the revocation action, for revoking a probate or letters of administration.<sup>6</sup>

Admiralty actions: in rem.

§ 11. An Admiralty action may be either in rem or in personam. By proceedings in rem, the property in relation to which the claim has arisen, or the proceeds of the property when in Court, can be proceeded against and made available to answer the claim.<sup>7</sup> Thus, a claim for damage caused by collision, or for salvage or necessities, is generally enforced by

<sup>1</sup> *Amos v. Chadwick*, 4 Ch. 869; *Robinson v. Chadwick*, W. N. (1878), 75.

<sup>2</sup> See Rules of Court, App. A, pt. ii.

<sup>3</sup> Bl. Comm. iii. 161.

<sup>4</sup> Jud. Act, 1873, s. 34.

<sup>5</sup> Haynes’ Eq. 107.

<sup>6</sup> Smith’s Action, 32.

<sup>7</sup> Williams & Bruce’s Admiralty, 186.

an action in rem.<sup>1</sup> § 12. An action in rem is commenced by a writ of summons, resembling an ordinary writ except that it is addressed, not to any person by name, but to the owners of and persons interested in the particular res (vessel or cargo);<sup>2</sup> and the action is known by the name of the res, *e. g.* "The Star of India," "The Cargo ex Schiller," &c. The writ is served on the ship or cargo (see *Service*, § 10),<sup>3</sup> and then the plaintiff issues a warrant of arrest, which commands the marshal to arrest the ship or cargo.<sup>4</sup> On the warrant being served by the marshal, the ship or cargo is thereby arrested,<sup>5</sup> and remains so until it is released on bail, or sold. (See *Bail*, § 3; *Appraisalment*, § 2.) § 13. An action in personam is an action against a particular person or persons, as in an ordinary action in the High Court. Of course, if the ship or other property in relation to which a claim arises is out of the jurisdiction, the action must be in personam. § 14. The pleadings and subsequent steps in an admiralty action are similar to those in ordinary actions in the High Court, except that in collision actions "preliminary acts" (*q. v.*) have to be filed. (See *Commission*, §§ 5, 8; *Registrar and Merchants*; *Monition*.)

Admiralty actions: in personam.

The following are the principal varieties of admiralty actions:—

§ 15. An action of damage lies where damage is caused by one ship to another, or to a cargo, or to a person, or a wharf or pier, &c. (*e. g.* by collision); or where a cargo in a ship is injured by the negligence of the master or crew.<sup>6</sup> (See *Limitation of Liability*.)

Action of damage;

§ 16. An action of possession is one in which a person claims possession of a ship, either against a person wrongfully in possession or against a co-owner.<sup>7</sup> § 17. Where the owners who represent the majority of interest in a ship are about to send her on a voyage against the wishes of the minority, the minority may arrest the ship and have it detained until security is given for its safe return. This is called an action of restraint.<sup>8</sup>

of possession;

of restraint;

§ 18. The nature of actions for salvage, towage, pilotage, wages and necessities<sup>9</sup> is explained under their appropriate titles.

for salvage, &c.

§ 19. Hitherto only those actions which are governed by the provisions of the Judicature Acts have been considered; but "every writ whereunto the defendant may plead . . . is in law an action,"<sup>10</sup> and therefore proceedings by scire facias, prohibition, quo warranto, &c., are actions, though not often so called; see the various titles: also *Information*; *Relation*.

Proceedings in the nature of actions.

II. § 20. In the County Courts, actions are proceedings commenced by plaint (*q. v.*); there are no pleadings, except that the plaintiff must, in certain cases, file particulars of demand (*q. v.*), and that the defendant cannot at the trial set up certain defences unless he has given notice of his intention to do so. (See *Special Defences*.) A defendant may also

County Court actions.

<sup>1</sup> *Ibid.* 64, 187.

<sup>2</sup> Rules of December, 1875, App. A.

<sup>3</sup> *Ibid.* 2, 6.

<sup>4</sup> *Ibid.* r. 4, App. B.

<sup>5</sup> *Ibid.* r. 5. See Williams & Bruce, 193 *et seq.*

<sup>6</sup> Williams & Bruce, 61, 85, 187; Roscoe, 25.

<sup>7</sup> Williams & Bruce, 20. See also 24 Vict. c. 10, s. 8.

<sup>8</sup> Williams & Bruce, 21.

<sup>9</sup> Smith's Action, 33.

<sup>10</sup> Co. Litt. 291 a.

file a statement raising questions of law, &c.<sup>1</sup> The trial is had before the judge alone, unless one of the parties applies for a jury or assessors.<sup>2</sup>

III. § 21. As to actions in the Mayor's Court and other inferior Courts, see the titles dealing with those Courts.

Civil and  
criminal;

real ;  
personal ;  
mixed.

Local and  
transitory.

"Faint" and  
"false."

§ 22. Before the Judicature Acts, "action," or "action at law," generally meant a proceeding in one of the common law courts as opposed to a suit in equity. The frame of the writ, and the pleadings in each case, depended on the nature of the right to be enforced, and was extremely technical. In early times actions were divided into criminal and civil, criminal actions being appeals and other proceedings in the name of the crown.<sup>3</sup> In modern times, however, "action" always meant a civil action. In this sense, actions were divided into real, personal and mixed, real (or feudal) actions being those brought for the specific recovery of lands or other realty ; personal actions, those for the recovery of a debt, personal chattel or damages ; and mixed actions, those for the recovery of real property, together with damages for a wrong connected with it.<sup>4</sup> By stat. 3 & 4 Will. 4, all real and mixed actions were abolished, except the writ of right of dower, dower, quare impedit and ejectment (see those titles), and now all differences in point of form between actions under the common law jurisdiction of the High Court have been abolished.<sup>5</sup>

§ 23. Actions were also divided into local and transitory, according as they were founded on such causes of action as necessarily refer to some particular locality (as in the case of trespasses to land) or not ;<sup>6</sup> but this distinction no longer exists.<sup>7</sup> (See *Venue*.) Another now obsolete distinction is between a feint, faint or feigned action—that is, one in which the words of the writ were true, yet, for certain causes not appearing on the writ, the plaintiff had no right to recover what he claimed—and a false action, or one in which the words were false or untrue. If a person recovered land against a tenant in tail by a feint or false action, after the death of the tenant in tail his issue could recover the land back again.<sup>8</sup>

ETYMOLOGY.]—Norman French: *accion*,<sup>9</sup> from Latin *actio*.

**ACTOR** is used to denote the person who has the active claim in a judicial proceeding, *e.g.* a plaintiff, or a claimant, or a demandant under the old practice. So, in an action of replevin, although the person who actively claims the distress (the distrainor) is in point of form the defendant, he is regarded as actor equally with the plaintiff, who is in possession of the goods distrained, and merely resists the defendant's claim for their return.<sup>10</sup> The term actor is borrowed from the Roman law.<sup>11</sup>

**AD COLLIGENDA BONA.** See *Grant*, § 10.

**AD OSTIUM ECCLESIAE.** See *Dower*.

Highways.

**AD QUOD DAMNUM** is a writ by which the owner of land over which a highway passes may obtain leave to divert it. It is an original writ issuing out of Chancery, and directing the sheriff to summon a jury to inquire whether the proposed diversion will be detrimental to the public, and to return the inquisition (*q. v.*) into Chancery, where any person injured thereby might have impeached it.<sup>12</sup> Since the passing of the Highway Acts this writ has practically become obsolete. (See *Highway*.)

Franchises.

§ 2. The writ is also said to have been formerly issued before the king granted certain

<sup>1</sup> Pollock's C. C. Pr. 100 *et seq.*

<sup>2</sup> *Ibid.* 104 *et seq.*

<sup>3</sup> Co. Litt. 284 b, 287 b.

<sup>4</sup> Litt. § 494 ; Bl. Comm. iii. 117. As to real actions, see Williams on Seisin, 156 ; Roscoe on Real Actions.

<sup>5</sup> Rules of Court, i. 1.

<sup>6</sup> Bl. Comm. iii. 294.

<sup>7</sup> Rules of Court, xxxvi. 1.

<sup>8</sup> Litt. §§ 688, 689.

<sup>9</sup> Britton, 128 a.

<sup>10</sup> Co. Litt. 127 b.

<sup>11</sup> Just. Inst. iv. 6, § 2.

<sup>12</sup> Smith's L. C. ii. 151.



liberties, such as fairs, markets, &c., which might be prejudicial to others.<sup>1</sup> (See *Franchise; Mortmain.*)

**AD VALOREM.** See *Stamp*.

**ADDRESS FOR SERVICE.**—§ 1. Where the plaintiff in an action (if he appears in person), or his solicitor (if he appears by solicitor), resides or carries on business at a place more than three miles from Temple Bar, the writ of summons must be indorsed with a proper place, to be called his address for service, not more than three miles from Temple Bar, where writs, notices, summonses, orders, &c. may be left for him.<sup>2</sup> Similar provision is made for writs issued out of district registries,<sup>3</sup> and for appearances.<sup>4</sup> § 2. A petition or summons under the Trustee Relief Act must also name an address where the petitioner or applicant may be served with notices of proceedings.<sup>5</sup> (See *Service*, §§ 8 *et seq.*)

Writ of summons.

Appearance.

Originating petition or summons.

**ADEEM—ADEMPTION.**—§ 1. Ademption takes place where a legacy is given, consisting of specific property which can be identified as belonging to the testator at the time of making his will, and the testator afterwards parts with or alters the description of the property. Thus, if a testator bequeaths his gold chain to A., and afterwards sells it or converts it into a cup or the like, the legacy is adeemed, that is to say, A. gets nothing.<sup>6</sup> It seems to be doubtful whether the testator revives an adeemed specific legacy by afterwards acquiring an article which answers the description of the original legacy.<sup>7</sup> § 2. As to ademption by satisfaction, see *Satisfaction*, §§ 3, 4.

**ETYMOLOGY.**—§ 3. Latin: *adimere*, to take away. The use of the term as applied to legacies is taken from the Roman law, though there it signified to revoke.<sup>8</sup>

**ADJOURN.**—To put off to another time: *e.g.* to adjourn a summons. (See *Motion; Appeal*, § 3.)

**ADJUDICATION** is the judgment or decision of a Court. The term is principally used in bankruptcy proceedings, the adjudication being the order which declares the debtor to be bankrupt. (See *Bankrupt; Bankruptcy*, § 4.) § 2. In the winding-up or administration of companies and estates in the Chancery Division of the High Court, a day is appointed for adjudicating upon the claims sent in against the company or estate; in the case of those claims which the liquidators or executors by their affidavit state that they think ought to be allowed, the adjudication consists in the examination by the chief clerk of the claims and the reasons given for allowing them; if he or the judge is not satisfied that they ought to be allowed, the adjudication is adjourned that the claimants may prove them; in the case of those claims which the liquidators or executors think ought not to be allowed, the claimants are required by

Bankruptcy.

Adjudication on claims.

<sup>1</sup> Termes de la Ley, s. v.

<sup>2</sup> Rules of Court, iv. 1, 2.

<sup>3</sup> *Ibid.* r. 3.

<sup>4</sup> *Ibid.* xii. 7, 8.

<sup>5</sup> Daniell, Ch. Pr. 1790.

<sup>6</sup> Williams on Executors, 1225; Watson's Comp. Eq. 1242. See the curious case of *Morgan v. Thomas*, 6 Ch. D. 176.

<sup>7</sup> See notes to *Ashburner v. Macguire*, White & T. L. C. ii. 272.

<sup>8</sup> Just. Inst. ii. 20; Dig. xxxiv. 4.

notice to prove them within a specified time, and the adjudication consists in the examination of the evidence adduced. The result of the adjudication is stated in the chief clerk's certificate.<sup>1</sup> (See *Certificate*.) § 3. The adjudication (or adjudicatory part) is that part of a docket of enrolment of a decree in chancery (made under the old practice) which sets forth the mandatory part of the decree, beginning with the words: "It is therefore this present day . . . . ordered and adjudged," &c.<sup>2</sup> (See *Docket*.)

Marine insurance ;

of average.

**ADJUSTMENT**, in the law of marine insurance, is the operation of settling and ascertaining the amount which the assured, after allowances and deductions are made, is entitled to receive under the policy, and fixing the proportion which each underwriter is liable to pay.<sup>3</sup> § 2. Similarly, adjustment of average is the process of calculating the values at which the articles which are to contribute are to be taken. "The rule now adopted in England is to value the goods sacrificed as well as the goods saved at their selling price, if the ship arrives at her port of destination, and the valuation is made there ; but if she puts back to her lading port, and the average is adjusted there, the invoice or cost price is taken, no other being well ascertainable."<sup>4</sup> (See *Average*.)

Dower.

**ADMEASUREMENT**.—§ 1. Admeasurement of dower was a writ or action brought where a widow had taken or had assigned to her for her dower more than she was entitled to. In such a case the person aggrieved was entitled to have her proper share of the land ascertained by the sheriff.<sup>5</sup> This mode of proceeding was long ago superseded by the more convenient remedy of a suit in equity brought for the same purpose, and the action of admeasurement seems now to have been abolished by stat.

Pasture.

3 & 4 Will. 4, c. 27. § 2. The same remark applies to the action for admeasurement of pasture, which was anciently the remedy against a person who surcharged a common. (See *Surcharge*.) The modern remedy is a distress or action of trespass by the lord, or an action for damages (formerly one of the class of actions on the case) by any commoner aggrieved by the surcharge.<sup>6</sup>

Judicial.

**ADMINISTRATION—ADMINISTRATIVE**.—§ 1. Administration is where the rights of one or more persons in relation to an estate, property or collection of assets are adjusted and protected. The term is applied to the duties of executors, administrators, trustees, liquidators, &c., in managing the property committed to their charge, paying debts, dividing the surplus assets, &c. These duties frequently have to be performed under the direction or supervision of a Court, and this part of its business is called its administrative jurisdiction, as opposed to its jurisdiction in contentious business, in which every proceeding has for its

<sup>1</sup> Rules under Companies Act, 1862, rr. 20 *et seq.* ; Lindley on Partnerships, 1279 ; Gen. Order in Chancery, 27th May, 1865 ; Hunter's Suit, 112 ; Daniell, Ch. Pr. 1093.

<sup>2</sup> Braithw. Pr. 448.

<sup>3</sup> Smith's Merc. Law, 392 ; Maude & Pollock, Merch. Ship. 418.

<sup>4</sup> Maude & Pollock, 328.

<sup>5</sup> Co. Litt. 39a. See the proceedings described in Britton, 263a, where the admeasurement is done by extent (*q. v.*)

<sup>6</sup> Williams on Commons, 121.

main object to decide a dispute between two persons. Proceedings for the winding-up of companies, partnerships and estates of deceased persons and felons<sup>1</sup> in the Chancery Division, and proceedings in bankruptcy and lunacy, are examples of administrative business. (See *Action*, § 9.)<sup>2</sup>

§ 2. The order in which the assets (*q. v.*) of a deceased person are applied in paying his debts, so as to exhaust one class of assets before coming on another, and so as to pay one class of debts in preference to another if the assets are not sufficient for the payment of all, is called the order of administration. Thus, if a testator dies leaving as residuary personal estate sufficient to pay all his debts, they are paid out of that residue, so as to leave the legacies and real estate untouched. If the residue were not sufficient, his real estate devised for payment of debts would be taken before his real estate which had descended to his heir, and so on. If his whole property were not sufficient for the payment of all his debts, it would be applied (subject to the rule as to persons dying before 1st January, 1870, *infra*, § 3)—first, in payment of his crown debts in full, the residue in or towards payment of his judgment debts, and the ultimate residue, if any, in paying a proportion of his other debts.

The following is the order in which the various classes of assets are taken or exhausted in succession :<sup>3</sup>—

Order of administration as regards assets.

1. Personal estate not specifically bequeathed.
2. Real estate devised or ordered to be sold for payment of debts.
3. Real estate descended.
4. Real estate charged with payment of debts.
5. General pecuniary legacies.
6. Land comprised in a residuary devise, real estate specifically devised, and personal estate specifically bequeathed.<sup>4</sup>
7. Property over which the testator had a general power of appointment which he has exercised.

Order of administration :

as to assets ;

as to debts.

<sup>1</sup> Stat. 33 & 34 Vict. c. 23, s. 28; Daniell, Ch. Pr. 1990. See *Administrator*, § 2.

<sup>2</sup> Haddan's Adm. Jurisd.

<sup>3</sup> Jarman on Wills; Williams' P. P. 110 *et seq.*; White & Tudor's L. C. ii. 104, 120; Snell's Eq. 215, 221; stat. 32 & 33 Vict. c. 46. The Judicature Act, 1875, s. 10, makes alterations in the rules as to the rights of secured and unsecured creditors, &c., in the administration of an insolvent estate (*In re Coal Consumers Association*, 4 Ch. D. 625; see *Creditor*), but does not affect the order of administration, although it would seem, from the discussion on the section when the bill was before parliament (see Charley's Judicature Acts, notes to s. 25, § 1, of the 1873 Act), that the legislature intended to assimilate the rules of administration in chancery to those in bankruptcy, and thus to make all debts of a deceased person (except those mentioned in s. 32 of the Bankruptcy Act, 1869) payable *pari passu*, in which case judgment debts would lose their priority. Mr. Joshua Williams (P. P. 117) and V.-C. Malins (*Shirreff v. Hastings*, 6 Ch. D., at

p. 612), think that this is the effect of the section. It is difficult, however, to justify this construction. The section applies only to the rights of secured and unsecured creditors, and a judgment creditor is not a secured creditor within the meaning of the Bankruptcy Act, 1869, s. 16, § 5, though it has been decided that the words "creditor holding a security" (B. A. 1869, s. 12), include a judgment creditor who has seized goods of the bankrupt before the commission of an act of bankruptcy (*Slater v. Pinder*, L. R., 6 Ex. 228; *Ex parte Roche*, L. R., 6 Ch. App. 795). It has, however, been decided, that the execution creditor of a company has no priority over the other creditors (*In re Printing and Numerical Registering Co.*, 8 Ch. D. 535). See also as to this obscure section, *In re Albion Steel and Wire Co.*, 7 Ch. D. 547; *In re Richards & Co.*, 11 Ch. D. 676; *In re Crumlin Vinduct Works Co.*, 11 Ch. D. 755; *Bridgewater Co.*, 12 Ch. D. 181.

<sup>4</sup> See *Lancefield v. Iggulden*, L. R., 10 Ch. 136.

Order of administration of assets as regards debts.

1. Crown debts.
2. Judgment debts.
3. Recognizances and statutes.
4. Special and simple contract debts.
5. Voluntary bonds and covenants.

Equitable  
assets.

§ 3. In the case of a person who has died before the 1st January, 1870, his specialty debts are payable in priority to his simple contract debts, except so far as his property consists of equitable assets.<sup>1</sup> (See *Assets*, § 3.)

Bankruptcy  
and winding-  
up.

§ 4. In bankruptcy and liquidation, and in the winding-up of insolvent companies, all debts are payable *pari passu*,<sup>2</sup> except that in bankruptcy, certain debts in respect of rates and taxes and clerks' and servants' wages and salaries are payable in priority to all other debts.<sup>3</sup>

**ADMINISTRATOR**, in the most usual sense of the word, is a person to whom letters of administration, that is, an authority to administer the estate of a deceased person, have been granted by the proper Court. He resembles an executor, but, being appointed by the Court and not by the deceased, he has to give security for the due administration of the estate, by entering into a bond with sureties, called the administration bond.<sup>4</sup> As to the varieties of administrators, see *Grant*, § 5; also *Executor*; *Letters of Administration*; *Jus habens*; *Prior petens*.

Administrator  
of convict's  
property.

§ 2. By the act to abolish forfeiture for treason and felony,<sup>5</sup> where any person has been sentenced to death or penal servitude for treason or felony, the crown may commit the custody and management of his property to an administrator, who has power to pay the debts and liabilities of the convict, and to make allowances for the support of the convict's family, &c. On the completion of his sentence, or on the pardon or death of the convict, the property re-vests in him or his representatives. (See *Curator*.)

Lord High  
Admiral.

**ADMIRAL**.—I. § 1. "Very early records refer to an officer of state, to whom the keeping of the sea was entrusted by the crown. He seems to have been called *custos maris*, and in later times admiral. Whether judicial functions were originally conferred upon him or not may be matter of doubt; but as soon as maritime affairs began to assume importance, matters happening at sea, and not within any county from whence a jury could be summoned, requiring judicial investigation, were referred to him for adjudication. At what period a regular tribunal for the exercise of the duties thus cast upon the admiral was first erected, is a question much debated among antiquaries; but it is certain that in the reign of Edward III., the Court of the admiral was firmly established, and

<sup>1</sup> Williams on Executors, 1552; White & Tudor, ii. 101. This rule is not altered or extended by sect. 25, § 11, of the Judicature Act, 1873, because there is here no conflict between the rules of law and equity. In *Shattock v. S.* (L. R., 2 Eq. 182), the late Master of the Rolls decided that where the estate to be administered is the separate estate of a deceased married woman, the engagements or debts charged on it are

payable according to their priority, and not *pari passu*. This case, however, has been dissented from and practically overruled by *The London Chartered Bank of Australia v. Lemprière*, L. R., 4 P. C. 572.

<sup>2</sup> Lindley, 1341.

<sup>3</sup> Bankruptcy Act, 1869, s. 32.

<sup>4</sup> Browne, Probate Pr. 150, 197.

<sup>5</sup> 33 & 34 Vict. c. 23, ss. 9 *et seq.*

in the succeeding reign it was sufficiently powerful to assert prominent jurisdiction."<sup>1</sup> The lord high admiral had two functions, first as chief of the Court called after him (see *High Court of Admiralty*), though in practice this was presided over by his deputy, and secondly as exercising general authority over the naval strength of the kingdom.<sup>2</sup> In more modern times, however, the judge of the Admiralty Court was appointed by the crown, and the naval authority of the admiral is now always delegated to commissioners called the lords of the admiralty.<sup>3</sup>

II. § 2. Admiral is also the title of high naval officers; they are of various grades—rear-admiral, vice-admiral, admiral, admiral of the fleet—the latter being the highest.<sup>4</sup> Admirals in the navy.

ETYMOLOGY.—Spanish: *almirante*; Italian, *almiraglio*; French, *amiral*, from Arabic *amir*, commander, with the Arabic definite article "al" affixed or suffixed.<sup>5</sup>

**ADMIRALTY.**—§ 1. Admiralty matters may be said to include civil questions relating to the possession, mortgage, damage, salvage and towage of ships, and claims in respect of necessities and wages (see the various titles). They were formerly within the jurisdiction of the High Court of Admiralty (*q. v.*), which originally had exclusive jurisdiction in all matters arising wholly upon the sea, including crimes committed on the sea, and offences against discipline in the Royal Navy; but by various acts concurrent jurisdiction in criminal matters was given to other Courts, so that practically its jurisdiction was limited to civil matters.<sup>6</sup> By the Judicature Acts, 1873, 1875, its jurisdiction has been transferred to the High Court of Justice, and the Judge of the Admiralty Court made a Judge of the Probate, Divorce and Admiralty Division of the High Court.<sup>7</sup> As to the various kinds of admiralty actions, see *Action*, §§ 15 *et seq.*; also *Appraisement*, § 2; *Arrest*, § 7; *Assize*, note to § 3; *Bail*, § 3; *Caveat*, § 3; *Central Criminal Court*; *Intervene*, § 3; *Marshal*, § 2; *Monition*, § 1; *Preliminary Acts*; *Prize Court*. High Court of Admiralty.

§ 2. Some of the County Courts (*q. v.*) have jurisdiction in admiralty matters where the amount in dispute does not exceed a certain sum. (See also *Cinque Ports*; *Justices of the Peace*; *Court of Passage*.) County Courts.

**ADMISSIBLE.**—Evidence (that is, the statements of witnesses or the production of documents or things) is said to be admissible when the court or judge is bound to receive it, that is, allow it to be adduced, at a trial or other inquiry. The question whether certain evidence is admissible is one of law,<sup>8</sup> and depends either upon the nature of the fact offered to be proved (see *Relevancy*), or upon the means by which it is offered to be proved, as in the case of hearsay evidence, secondary evidence, &c. (See *Evidence*.) When a judge at a trial rejects admissible evidence, or admits inadmissible evidence, this may be a ground for a new trial. (See *Trial*.)

<sup>1</sup> Williams & Bruce's Admiralty, 3; Co. Litt. 260 b; Co. Fourth Inst. c. xxii.; Spelman's Post. Works, 217.

<sup>2</sup> Homersham Cox's Eng. Gov. 716.

<sup>3</sup> *Ibid.* 720.

<sup>4</sup> Encycl. Brit. v. *Admiral*.

<sup>5</sup> Diez, Etym. Wörtl.

<sup>6</sup> Williams & Bruce Adm.; Roscoe's Adm., *passim*; Steph. Comm. iii. 341; iv. 311; Reg. v. *Keyn*, 2 Ex. D. 63.

<sup>7</sup> Jud. Act, 1873, ss. 3, 31.

<sup>8</sup> Best on Evidence, 105.

To benefice. **ADMISSION—ADMIT.**—§ 1. Admission, in ecclesiastical law, is where the bishop, upon examination of a person presented to a benefice within his diocese, approves of him as a fit person "to serve the cure of the church."<sup>1</sup> (See *Presentation*; *Institution*; *Induction*.)

In pleading and evidence. § 2. In the law of pleading and evidence, an admission is an acknowledgment that an allegation is true. It may be made extrajudicially, as where a person admits his indebtedness. An admission in judicio may be made by a party to an action either expressly by a notice or pleading,<sup>2</sup> or impliedly by failure to deliver a pleading or to traverse an allegation made by his opponent:<sup>3</sup> sometimes the parties agree to make admissions of facts or documents in order to save the expense of proving them. (See *Special Case*; *Notice to Admit*.)

On surrender, descent, &c. **ADMIT—ADMITTANCE.**—§ 1. The lord of a manor is said to admit a person as tenant of copyhold lands forming part of the manor when he accepts him as tenant of those lands in place of the former tenant, *e.g.* on the surrender, devise, or death intestate of the former tenant: in the last case, it is called admittance on descent. In theory, the lord admits the surrenderee, devisee, or heir as a favour, and hence in the enrolment of an admittance on the court rolls it is stated that the surrenderee "prays to be admitted;" but in fact, the lord is bound to admit the new tenant if his claim is in accordance with the custom of the manor; and hence an admittance in such cases is opposed to a voluntary admittance, which takes place where the lord makes a voluntary grant. (See *Surrender*, § 3; *Grant*, § 3.)<sup>4</sup> § 2. Admittance may be either express or by implication. Express or formal admission is generally performed by the steward of the manor delivering a rod, straw, glove, or other symbol representing the seisin of the land, to the new tenant, and the admittance is then enrolled on the court rolls.<sup>5</sup> Formerly, admittances could only be made in Court, *i.e.* in the customary Court of the manor (see *Court Baron*), but this is no longer the case.<sup>6</sup> Admittance by implication is where the lord does some act showing an intention of accepting the new tenant (*e.g.* by receiving rent from him), or where the admittance of one tenant operates as the admittance of another; thus the admittance of a particular tenant may operate as the admittance of a tenant in remainder.<sup>7</sup> (See *Copyhold*; *Fine*, §§ 3 *et seq.*)

voluntary.

Express;

by implication.

**ADMONITION** is the first and lightest form of ecclesiastical censure, and is in the nature of a warning, which, if not obeyed, may be followed by a severer censure, *e.g.* suspension (*q.v.*)<sup>8</sup> (See *Monition*; *Censure*.)

Contract. **ADOPT.**—I. § 1. To adopt a contract is to accept it as binding, notwithstanding some defect which entitles the party to repudiate it. Thus,

<sup>1</sup> Phill. Eccl. Law, 567; Co. Litt. 344 a.

<sup>2</sup> Rules of Court, xxxii.

<sup>3</sup> *Ibid.* xix. 17; xxix. 10; xl. 11.

<sup>4</sup> Co. Cop. § 41.

<sup>5</sup> Elton, 59.

<sup>6</sup> 4 & 5 Vict. c. 35, s. 88.

<sup>7</sup> Elton, 139.

<sup>8</sup> See Phill. Eccl. Law, 1367, 1376.

when a person affirms a voidable contract, or ratifies a contract made by his agent beyond his authority, he is said to adopt it. So a company may be formed for the purpose of adopting a contract entered into on its behalf. (See *Trustee*, § 6; *Affirm*; *Ratify*; *Voidable*.)

II. § 2. The institution of adoption of children is not known to English law, that is, a person cannot by any declaration put a stranger in the same position as a natural-born child. The only relation resembling it in our law is that between a child and a person in loco parentis to it. (See *In Loco Parentis*.) Children.

**ADULTERATION** is the offence of wrongfully mixing cheap or inferior substances with another substance, so that the compound may be sold as pure or genuine. The act regulating the manufacture and sale of food and drugs is stat. 38 & 39 Vict. c. 63, amended by stat. 42 & 43 Vict. c. 30. The penalty for making or selling food adulterated so as to be injurious to health is 50*l.* for the first offence, and six months' hard labour for the second. The penalty for selling adulterated food in other cases, without giving notice to the purchaser, is 20*l.* The acts provide for the appointment of public analysts. § 2. The adulteration of seeds is regulated by stat. 32 & 33 Vict. c. 112, and 41 & 42 Vict. c. 17.<sup>1</sup> Food and drugs. Seeds.

**ADULTERY** is where a married person has connexion with a person other than his or her wife or husband. Adultery by the husband is a ground for judicial separation, or (when combined with other offences) for dissolution of marriage. Adultery by the wife is by itself ground for dissolution of marriage; it may also form the subject of a petition by the husband against the alleged adulterer and the wife for damages alone.<sup>2</sup> (See *Co-Respondent*; *Cruelty*; *Desertion*; *Dissolution*, § 6.)

**ADVANCEMENT**, in its most general sense, is an expenditure of capital or principal money for the benefit of a person who is, to a certain extent, dependent or unprotected. § 2. Thus, in wills and settlements containing limitations in favour of children on attaining twenty-one, power is generally given to the trustees or guardians to apply for the advancement or benefit of each child during its minority part of the capital or share of the property to which it will become entitled on attaining twenty-one. The money might, for instance, be wanted (in former days) to purchase a commission in the army, or to pay a premium on articles.<sup>3</sup> (See *Maintenance* and *Accumulation*.) Advance-ment of children;

§ 3. The stat. 22 & 23 Car. 2, c. 10, one of the statutes for the distribution of intestates' estates, provides that, in dividing the estate of an intestate, every child "who shall be advanced by the intestate in his lifetime by portion" shall only receive so much of the estate as, with the portion advanced, will make his share equal to those of the other children. An "advancement by portion" within the meaning of the statute is a sum given by a parent to establish a child in life (as by starting him by portion.

<sup>1</sup> For the history of the law, see Steph. c. 85, s. 33.  
Comm. iv. 268.

<sup>2</sup> Browne on Divorce, 143; 20 & 21 Vict. c. 85, s. 33.

<sup>3</sup> Elphinstone's Conv. 310; Watson's Comp. Eq. 584.

in business), or to make a provision for the child (as on the marriage of a daughter).<sup>1</sup> (See *Hotchpot*.)

Doctrine of  
advancement.

§ 4. The equitable doctrine of advancement is that, if a purchase or investment is made by a father, or person in loco parentis, in the name of a child, a presumption arises that it was intended as an advancement; that is, for the benefit of the child, so as to rebut what would otherwise be the ordinary presumption in such cases, of a resulting trust in favour of the person who paid the money.<sup>2</sup> (See *Trust*.)

ETYMOLOGY.]—"Advancement" seems to be an abbreviation of the expression "advancement in the world."

**ADVERSE.** See *Possession*; *Witness*.

**ADVERTISEMENT.**—When a person makes an offer by an advertisement (*e.g.* of a reward for giving information or restoring lost property), and a person performs the condition, this makes a contract on which the latter can sue the advertiser.<sup>3</sup> (See *Prospectus*.) § 2. It is an offence, punishable by a penalty of 50*l.*, to publicly advertise a reward for the return of lost or stolen property, coupled with an express or tacit promise not to make inquiries, or to repay money for or advanced on the property by a pawnbroker or other person.<sup>4</sup> (See *Libel*.)

For stolen  
property.

**ADVERTISEMENTS OF QUEEN ELIZABETH** are certain articles or ordinances drawn up by Archbishop Parker and some of the bishops in 1564, at the request of Queen Elizabeth, the object of which was to enforce decency and uniformity in the ritual of the Church. The queen subsequently refused to give her official sanction to these advertisements, and left them to be enforced by the bishops under their general powers.<sup>5</sup>

**ADVOCATE**, in its popular sense, is a person who argues cases in Court on behalf of his clients. In the technical sense, an advocate is a person admitted by the Archbishop of Canterbury to practise in the Court of Arches in the same way as a barrister practises in the temporal Courts. Formerly, the advocates of that Court formed a college, which was abolished by stat. 20 & 21 Vict. c. 77. Barristers are now allowed to practise in the Ecclesiastical Courts.<sup>6</sup> (See *Doctors Commons*.)

**ADVOCATE-GENERAL** is the adviser of the crown on questions of naval and military law.

**ADVOWSON** is the right of presenting to a rectory, vicarage or other ecclesiastical benefice whenever it is vacant. (See *Presentation*, § 2.) It

<sup>1</sup> *Taylor v. Taylor*, L. R., 20 Eq. 155.

<sup>2</sup> *Dyer v. Dyer*, 2 Cox, 92; *White & Tudor's L. C.* i. 184; *Watson's Comp. Eq.* 872; *Bennet v. Bennet*, 10 Ch. D. 474.

<sup>3</sup> Pollock on Contract, 170.

<sup>4</sup> Stat. 24 & 25 Vict. c. 96, s. 102.

<sup>5</sup> Phill. Eccl. Law, 910; *Ridsdale v. Clifton*, 2 P. D. 276; *Combe v. Edwards*, 2 P. D. 354.

<sup>6</sup> Phill. Eccl. Law, 1215 *et seq.*



may belong to a private person, or a bishop or other dignitary, or to the crown. An advowson belonging to the bishop of the diocese is technically the right of collation (*q. v.*); some advowsons are called donatives (*q. v.*), and a few (such as benefices attached to cathedrals) are elective; an ordinary advowson is sometimes called, by way of distinction, a presentative advowson. An advowson is an incorporeal hereditament, and is either appendant or in gross (see those titles).<sup>1</sup>

ETYMOLOGY.]—Norman-French: *avowesoun*; <sup>2</sup> Mediæval Latin, *advocatio*, apparently from *advocatus*, the patron or person who was bound to defend and protect the rights of the Church.

**AFFEER**, or **AFFERE**, is an old word signifying to assess or tax; it was applied principally to americiaments, which were affered or assessed by a jury.<sup>3</sup>

ETYMOLOGY.]—Norman-French: *affeurer*, to assess,<sup>4</sup> from the low Latin *afforare*, to fix a price, from *forum*, a market.<sup>5</sup>

**AFFIDAVIT**.—§ 1. An affidavit is a written statement in the name of a person called the deponent, by whom it is voluntarily signed and sworn to or affirmed. (See *Deposition*; *Examination*; *Commissioner*.) It is usually made in an action or other judicial proceeding (see *Declaration*, § 6); and in that case the affidavit consists of the title (*q. v.*), the body (which contains the statement, and is generally divided into paragraphs), the signature of the deponent, and the jurat <sup>6</sup> (*q. v.*).

Affidavits are of infinite variety, but many are known by short names which do not always explain themselves. The following are the principal:—

§ 2. When the evidence on the trial of an action is taken by affidavit, the plaintiff files his affidavits in chief, the defendant then files his affidavits in answer to the plaintiff's evidence, and the plaintiff files his affidavits in reply to the defendant's affidavits.<sup>7</sup> On interlocutory applications, evidence is usually given by affidavit.<sup>8</sup> In either case each party is as a general rule entitled to cross-examine the witnesses of the opposite party. (See *Answer*; *Deponent*.)

Evidence by affidavit.

§ 3. When an order is made against a party to an action requiring him to make discovery on oath of the documents in his possession or power relating to the matters in question in this action, he is bound to file an affidavit specifying the documents which he has at that time, or formerly had, in his possession or power, and stating that he has not and never had any others.<sup>9</sup> This affidavit is called in the Common Law Divisions an affidavit of discovery, and in the Chancery Division an affidavit of documents. (See *Discovery*; *Production*; *Privilege*; *Traverse*.)

Affidavit of discovery or documents.

§ 4. Where in a common law action extra expenses have been incurred which do not appear upon the face of the proceedings, such as witnesses'

Affidavit of increase.

<sup>1</sup> Phill. Eccl. Law, 328; Bl. Comm. ii. 21; Co. Litt. 17 b, 119 a.

<sup>2</sup> Britt. 222 a; Mirehouse on Advowsons, 6; Du Cange, s. v. *Advocatus*.

<sup>3</sup> 8 Co. 39; Co. Litt. 126 b.

<sup>4</sup> Loysel, Inst. Cout. Gloss. s. v.

<sup>5</sup> Littré, s. v. *Afforage*.

<sup>6</sup> Hunter's Suit, 77; Smith's Action (12), 81; Rules of Court, xxxvii. 3 a *et seq.* (April, 1880).

<sup>7</sup> Rules of Court, xxxviii.

<sup>8</sup> *Ibid.*, xxxvii. 2.

<sup>9</sup> *Ibid.*, xxxi. 13; Daniell's Ch. Pr. 1676.

expenses, fees to counsel, attendances, court fees, &c., an affidavit as to these is required to enable the master to allow them on taxation.<sup>1</sup> This is called an affidavit of increase.

Affidavit of means.

§ 5. An affidavit showing that a person sought to be committed for non-payment of a judgment debt has the means to pay it, is called an affidavit of means.<sup>2</sup>

Affidavit of plight.

§ 6. In probate practice, where probate is desired of a will containing alterations, &c. not evidenced by the signature of the attesting witnesses, an affidavit is required stating that the will is in the same state as when found at the decease of the testator.<sup>3</sup> This is called an affidavit of plight.

Affidavit of scripts.

§ 7. In testamentary causes in the Probate Division the plaintiff and defendant, within eight days after the defendant's appearance, must each file an affidavit stating whether or not any script is in his possession or knowledge.<sup>4</sup> (See *Script*.)

Affidavit of no settlement.

§ 8. When a married woman is entitled to property which is in Court, or the subject of administrative proceedings, it will not be delivered to her unless she and her husband make an affidavit that no settlement or agreement for a settlement of her property has been made; for if such a settlement existed the property might have to be delivered to the trustees of it.<sup>5</sup>

Affidavit of service.

§ 9. An affidavit proving the service of a writ, notice, or other document, is called an affidavit of service. (See *Service*, § 8.)

**AFFILIATION.**—An affiliation order is an order made by a magistrate on the putative father of a bastard, requiring him to pay a weekly sum to the mother for the child's maintenance. (See *Bastard*.)

**AFFINITY** is relationship by marriage; that is, the relationship between a husband and his wife's kindred, and between the wife and her husband's kindred. Affinity is a bar to marriage within the prohibited degrees: thus a man may not marry the sister of his deceased wife, for she is related to him in the second degree by affinity.<sup>6</sup> (See *Consanguinity*; *Marriage*.)

Contract.

**AFFIRM.**—I. § 1. Where a contract is voidable, but the party at whose option it is voidable elects to waive his right, and carry out the contract as if it had been valid ab initio, he is said to affirm it. Thus, where a contract is voidable for fraudulent misrepresentation, the party defrauded may call on the other party to perform it and make good his representations (*q. v.*)<sup>7</sup> The affirmation may also be implied (*q. v.*). (See *Ratification*; *Adoption*; *Rescission*.)

Appeal.

II. § 2. A Court of Appeal is said to affirm the judgment of a lower Court when it agrees with it. (See *Overrule*.)

Witness.

III. § 3. When a person called as a witness in a judicial proceeding

<sup>1</sup> Archbold, Pr. 432.

<sup>2</sup> Debtors Act, 1869, s. 5; Coe's Practice, 159.  
<sup>3</sup> Probate Rules, 1862, Non-C. 8 *et seq.*, Form 30.

<sup>4</sup> Probate Rules, 1862, C. B. 30; Rules of Court, App. B. 16; Browne's Probate Pr. 280.

<sup>5</sup> Daniell's Ch. Pr. 90.

<sup>6</sup> Steph. Comm. ii. 243.

<sup>7</sup> Pollock on Contract, 487.

either refuses from conscientious motives, or is unable from want of religious belief, to take an oath, he makes a solemn affirmation or declaration that he will speak the truth; if he wilfully and corruptly gives false evidence he is liable to punishment for perjury as if he had taken an oath.<sup>1</sup> (See *Declaration*.)

**AFFOREST** is to convert land into a forest in the legal sense of the word (*q. v.*).

**AFFRAY**.—An affray is the fighting of two or more persons in a public place to the terror of her Majesty's subjects. Taking part in an affray is a misdemeanor.<sup>2</sup> (See *Riot*; *Unlawful Assembly*.)

**AFFREIGHTMENT**.—A contract of affreightment is a contract with a shipowner to hire his ship, or part of it, for the carriage of goods. Such a contract generally takes the form either of a charter-party or of a bill of lading<sup>3</sup> (*q. v.*). (See *Freight*.)

ETYMOLOGY.]—Apparently from Italian *affrettare*, from low Latin *fretta*, freight (*q. v.*).

**AGE** is of importance in law in many ways. Thus, in private or civil law, an infant is subject to various disabilities imposed for his protection. (See *Infant*; *Minor*.) A male of fourteen, and a female of twelve, may contract a binding marriage, if the necessary consents and other requisites are present.<sup>4</sup>

§ 2. In criminal law a child under the age of seven years is incapable of committing a crime, and no act done by a child between seven and fourteen is a crime unless it be shown affirmatively that it had sufficient capacity to know that the act was wrong.<sup>5</sup>

§ 3. In the old books, "age" is commonly used to signify "full age;" that is, the age of twenty-one years.<sup>6</sup> (See *Nonage*.)

**AGENCY—AGENT**.—I. § 1. An agent is a person who acts on behalf of another person (the principal). The status of an agent, or the relation between him and his principal, is called agency. (See *Principal and Agent*.) The general rule is, that whatever a person can do in his own right he may appoint an agent to do for him; but an agent, executor, trustee, &c. cannot himself delegate his office, because the power which he possesses is not in his own right.<sup>7</sup> (See *Delegatus non potest delegare*; *Ministerial*; *Substitution*.)

§ 2. As regards third persons, agency is merely a mode by which a person can do acts through the medium of another person; an act done by an agent within the scope of his authority binds the principal in the same

<sup>1</sup> Best on Evidence, 236; stat. 3 & 4 Will. 4, cc. 49, 82; 1 & 2 Vict. c. 77; 17 & 18 Vict. c. 125; 24 & 25 Vict. c. 66; 32 & 33 Vict. c. 68; 33 & 34 Vict. c. 49.

<sup>2</sup> Russell on Crimes, i. 390.

<sup>3</sup> Maude & Pollock, Merch. Shipp. 227; Smith's Merc. Law, 295.

<sup>4</sup> Macqueen's Husb. & Wife, 11.

<sup>5</sup> Steph. Crim. Dig. 15.

<sup>6</sup> Litt. § 259.

<sup>7</sup> Smith's Merc. Law, 109.

manner as if the principal himself had done it; thus, if I authorize A. to buy goods for me, and A. does so, I am liable to pay for them.

Gratuitous.

§ 3. As regards the principal and the agent inter se. Agents are of two kinds—gratuitous and remunerated. In the case of a gratuitous agency, the principal cannot compel the agent to enter on the agency, that is, to act as his agent, unless the contract is under seal; but a gratuitous agent who acts as such is liable for gross negligence. (Compare *Bailment*.) A gratuitous agent when formally appointed is commonly called an attorney (*q. v.*). § 4. Where the agent is entitled to be paid for his services, the agency consists of a contract by the agent to perform the services, and by the principal to pay him for them. On the other hand, the principal is entitled to demand an account from his agent. (See *Account*.)

Mercantile.

§ 5. Agents employed for the sale of goods or merchandise are called mercantile agents, and are of two principal classes—brokers and factors (*q. v.*); a factor is sometimes called a commission agent, or commission merchant,<sup>1</sup> but in practice the latter terms seem to be frequently used to denote an agent who purchases goods for his principal, while “factor” generally means an agent for sale. A commission agent stands in the relation of vendor (as well as agent) to his principal, because the persons from whom he buys the goods sell to him and not to his principal.<sup>2</sup>

General.

§ 6. As regards the extent of the agent's authority (*q. v.*), he is either general or special: a general agent is one who is empowered to act for his principal in all business of a particular kind (*e. g.* to conduct a business or branch of a business, or purchase goods of a particular kind from time to time), or one who, though only appointed by his principal to do a particular act, is by occupation an agent, such as a banker or horse-dealer. A special agent is one who is authorized to do a particular act (*e. g.* to buy a horse, execute a deed, or the like),<sup>3</sup> and whose ordinary occupation is not to do such acts. In the case of a general agent, the principal is bound by all acts done by him within the scope of his ordinary employment, whether such acts were warranted by his private instructions or not, while in the case of a special agent the principal is only bound if the agent acts according to his particular commission or authority.<sup>4</sup> (See *Del Credere*; *Power of Attorney*; *Authority*; *Ratification*; *Ultra Vires*.)

Criminal law.

§ 7. In criminal law, where one person with criminal intention causes another to do without criminal intention an act which would be a crime on his part if it were done with criminal intention, then the former is guilty of the crime committed, and the latter is the innocent agent.<sup>5</sup>

As to frauds by agents, see *Fraud*.

House of  
Lords and  
Privy Council.

II. § 8. In the practice of the House of Lords and Privy Council in appeals, solicitors and other persons admitted to practise in those Courts in a similar capacity to that of solicitors in ordinary Courts, are technically called “agents.”<sup>6</sup>

<sup>1</sup> Russell's Merc. Agency, 1.

<sup>2</sup> See *Ireland v. Livingston*, L. R., 5 H. L. 395.

<sup>3</sup> Smith's Merc. Law, 128; Chitty on Contracts, 193; Russell, 61,

<sup>4</sup> Russell, 61.

<sup>5</sup> Russell on Crimes, 160; Stephen, Dig. Crim. 22.

<sup>6</sup> Macpherson, Privy C. Pr. App. 65.

**AGGRAVATION.**—In common law pleading, matter of aggravation is matter which only tends to increase the amount of damages, and does not itself constitute a right of action. (See *Assault*.)

**AGISTMENT** is where a person takes in and feeds or depastures horses, cattle or similar animals upon his land for reward. An agister is therefore a bailee for reward, and is liable for the cattle if he uses less than ordinary diligence (*e.g.* if he leaves a gate open, or if he places a horse in a field where it is likely to be attacked by a bull). An agister has no lien on the animals which he agists, unless there is an express agreement to that effect.<sup>1</sup>

**ETYMOLOGY.**—Apparently from Norman-French *a*, to; and *giste*, a feeding or resting-place for animals; from Latin *jacēre*, to lie.<sup>2</sup>

**AGREEMENT.**—I. § 1. Agreement, in its widest sense, is where In general. two or more persons concur in expressing a common intention with the view of altering their rights and duties.<sup>3</sup> An agreement of this kind has no legal effect when existing by itself, but is an essential part of every true contract, gift, payment, conveyance and compromise, and of every voluntary variation or discharge of a contract or other obligation. Thus, in a formal deed of conveyance, the introductory recital always refers to the agreement in pursuance of which the conveyance is executed, meaning not the preliminary contract of sale, but the mutual assent of the parties at the time the deed is executed.<sup>4</sup>

When analyzed the essential marks of an agreement are these: there must be at least two persons; they must definitely intend the same thing; they must communicate this intention to one another; and the object of their intention must be such as will, when carried out, alter their legal position, *e.g.* by producing the transfer of property or the creation or extinction of a right. The communication of intention may be formal or informal, simple or complicated, but it may always be reduced to the elements of a proposal made by one party and accepted by the other; so that until a proposal is absolutely accepted there is no agreement.<sup>5</sup> (See *Promise*.)

II. § 2. In its narrower and popular sense “agreement” has the same Contract. meaning as “contract,” especially “contract not under seal;”<sup>6</sup> thus an agreement for a lease is a contract to grant a lease. § 3. “Agreement” and “contract,” however, are sometimes opposed to one another, “contract” generally denoting an arrangement complete in itself, while “agreement” may denote a part of an arrangement. Thus, in a sale of a house, “contract of sale” denotes the whole arrangement between the vendor and purchaser, while each clause binding either of the parties to

<sup>1</sup> Chitty on Contracts, 435; Smith's L. C. i. 222; *Jackson v. Cummins*, 5 M. & W. 342; *Smith v. Cook*, 1 Q. B. D. 79.

<sup>2</sup> Littré, Dict. s. v. *Gîte*; Spelm. Gl. s. v. As to the officers called agistors of the royal forests, see Williams on Commons, 232.

<sup>3</sup> See Savigny, Syst. iii. 309; Pollock on Contract, 2. Agreement is “aggregatio mentium, or the union of two or more minds in a thing done or to be done.” 1

Com. Dig. 311; *Wain v. Warlters*, 5 East, 10; Smith's L. C. ii. 241.

<sup>4</sup> See an instance of an agreement operating as a conveyance, in Co. Litt. 10 a.

<sup>5</sup> For an elaborate examination of the whole subject, see Savigny, Syst. § 140; Chitty on Contracts, 8 *et seq.*; *Rossiter v. Miller*, 3 App. Ca. 1124.

<sup>6</sup> Chitty, 2.

do a specific thing is an agreement, *e.g.* a clause binding the vendor to put the property in repair before the sale is completed.<sup>1</sup> (See *Mutuality; Contract.*)

**AGRICULTURAL HOLDINGS ACT, 1875** (38 & 39 Vict. c. 92), is an act designed to give agricultural tenants compensation for so much of the value of improvements effected by them on their holdings as remains unexhausted at the determination of the tenancy, and so far to reverse the general rule of law that what is in or attached to the soil belongs to the landlord.<sup>2</sup> For this purpose the improvements entitling the tenant to compensation are divided into three classes, according to the degree of their permanence, and provisions are made for calculating the unexhausted value at the time when the tenancy comes to an end.<sup>3</sup> The act is practically permissive only, as any landlord and tenant may contract themselves out of its provisions: it is believed not to have hitherto produced much effect, except that section which entitles a tenant from year to year of agricultural land to a year's notice to quit. (See *Tenant from Year to Year; Compensation*, § 1; *Reference*, § 3; *Fixtures.*)

**AID** is to assist, supplement, or exonerate. As to aiding and abetting in the commission of a crime, see *Principal*, § 4. As to writs in aid, see *Writ*, § 5.

Execution of power.

§ 2. Where a power of appointment is imperfectly executed in point of form (as where it is executed by will instead of by deed, as directed by the instrument creating it), the High Court under its equitable jurisdiction can compel the person having the legal interest to transfer it in the manner directed by the defective appointment. This is termed aiding the defective execution.<sup>4</sup>

Defects in pleading, &c.

§ 3. In procedure, errors or omissions in pleading are said to be aided when they are cured or made of no effect by some subsequent proceeding. Thus, under the old common law practice, certain defects in point of form were aided by verdict, that is, the opposite party could not take objection to them after verdict, though for defects in point of substance he could (as a general rule) move in arrest of judgment, unless it appeared from the nature of the issue and the verdict that the same evidence had been given as would have been given if the defect had not existed.<sup>5</sup> (See *Arrest of Judgment.*) The new practice has abolished the doctrine of aider by verdict so far as civil actions are concerned, but it still applies to criminal pleading.<sup>6</sup> (See *Jeofail.*)

Feudal.

§ 4. Formerly every tenant in chivalry was liable to make payments called aids (1) to ransom his lord's person if taken prisoner; (2) to make the lord's eldest son a

<sup>1</sup> See *Wain v. Warlters*, 5 East, 10; Smith's L. C. ii. 241.

<sup>2</sup> Sect. 5; Cooke's Agric. Holdings Act, 27.

<sup>3</sup> *Ibid.* 28.

<sup>4</sup> *Tollet v. Tollet*, 2 P. Wms. 489; White & Tudor's L. C. 207.

<sup>5</sup> Smith's L. C. i. at p. 144; *Stennel v. Hogg*, 1 Wms. Saund. 260; Archbold, Pr. 479.

<sup>6</sup> Archbold, Crim. Pl. 132; the principal rules are contained in stat. 7 Geo. 4, c. 64, s. 21, and *Heyman v. R.*, L. R., 8 Q. B. p. 105.

knight; and (3) to provide a portion for the lord's eldest daughter; and every tenant in socage was liable to the two latter aids.<sup>1</sup> Aids were abolished by stat. 12 Car 2. c. 24; but parliamentary taxes for extraordinary purposes (including the land-tax before it became permanent) were called aids down to the reign of William III.

**AIR.**—Rights in respect of air are of two kinds—natural and acquired. Natural rights.  
 § 1. Every owner of land has the right to prevent his neighbours from polluting the air coming to his land, and the infraction of this natural right is a nuisance. But the right to pollute air may be acquired by prescription, and such a right is an easement.<sup>2</sup>

§ 2. It seems that by prescription or grant an owner of land may acquire the right to prevent his neighbours from obstructing the lateral access of air to his tenement. The existence of this easement is, however, not free from doubt;<sup>3</sup> it is not within the operation of the Prescription Act.<sup>4</sup> Acquired rights.

(See *Natural Rights; Easement.*)

**ALCIATUS.**—Andreas Alciatus was born in 1492, taught law at Avignon, Bourges, Bologna, &c., and died 1550. He was the founder of the so-called "elegant" school of law. His principal works are the *Annotationes; Dispunctiones; Emblemata*.<sup>5</sup>

**ALDERMEN** are members of municipal corporations. The Municipal Corporations Act, 1835, provides that in every borough to which it applies there shall be elected a mayor, and a certain number of fit persons to be called the aldermen, and a certain number of councillors, and the mayor, aldermen and councillors form the council or administrative body of the corporation. The act regulates their qualification and the mode of their election.<sup>6</sup>

**ALE-HOUSES.** See *Licence.*

**ALIA ENORMIA** ("other wrongs") was the name given to a general allegation of injuries caused by the defendant with which the plaintiff in an action of trespass under the old practice concluded his declaration. It is still used in indictments for assault, and entitles the prosecutor to give in evidence circumstances of aggravation (*q. v.*).<sup>7</sup>

**ALIAS.**—§ 1. An alias writ is one which is issued when a former writ Writ. has not produced its effect; thus, if *nulla bona* is returned to a writ of fieri facias (*q. v.*), an alias fi. fa. may be sued out.<sup>8</sup> The writ is so called from the words "as we have *formerly* commanded you" (*sicut alias præcepimus*) being inserted after the usual commencement, "We command you."<sup>9</sup> (See *Pluries; Writ.*)

<sup>1</sup> Co. Litt. 76 a, 91 a.

<sup>2</sup> Gale on Easements, 335.

<sup>3</sup> See *Aldred's case* (9 Rep. 58 b), where the court said that for stopping wholesome air an action lies, and à fortiori for infecting and corrupting the air; but this seems put on the ground of property or natural right rather than of easement. In *Dent v. Auction Mart Co.* (L. R., 2 Eq. p. 238), an

interference with the access of air was restrained on the ground of its being a nuisance.

<sup>4</sup> *Webb v. Bird*, 13 C. B., N. S. 841.

<sup>5</sup> Holtzen. Encyc. s. v.

<sup>6</sup> Grant on Corporations, 355, 415.

<sup>7</sup> Archbold, Crim. Pl. 694.

<sup>8</sup> Archbold, Pr. 585.

<sup>9</sup> Bl. Comm. iii. 283.

*Alias dictus.*

§ 2. When a person who goes by several names is indicted, he is described in the indictment as "A. B., otherwise C. D.," &c.; formerly, when pleadings, &c. were in Latin, this was expressed *alias dictus* ("otherwise called"),<sup>1</sup> and hence such a person is said to go by several aliases or false names.

**ALIBI.**—A prisoner or accused person is said to set up an alibi when he alleges that at the time when the offence with which he is charged was committed he was "elsewhere," that is, in a different place from that in which it was committed. If proved it is of course a complete answer to the charge,<sup>2</sup> and is consequently a favourite defence.<sup>3</sup>

**ALIEN—ALIENAGE.**—§. 1. An alien is a person who is not a British subject, as opposed (a) to natural-born subjects (as to these, see *Allegiance*), (b) to aliens who have become British subjects by naturalization (naturalized aliens), and (c) to denizens (*q. v.*).<sup>4</sup>

By birth, or  
by election.

§ 2. Aliens are either aliens by birth (*aliens nées*), or aliens by election. The former class includes all persons born abroad, except the children of ambassadors and persons whose fathers or paternal grandfathers were British subjects.<sup>5</sup> To the class of aliens by election belong those persons who have availed themselves of the provisions of the Naturalization Act, 1870, which allows a British subject to become an alien either by expatriation (*q. v.*), or, in certain cases, on his making a declaration of alienage.<sup>6</sup> The act also makes an Englishwoman who marries a foreigner an alien.<sup>7</sup>

Alien ene-  
mies.

§ 3. Aliens are also divisible into alien enemies and alien friends (*alien amys*), according as the state of which they are subjects is or is not at war with the United Kingdom.<sup>8</sup> Alien enemies have in theory no rights or privileges unless by the Queen's special favour.<sup>9</sup> And if they bring goods into this country after the declaration of war it is said that they are liable to be seized.<sup>10</sup> It is also said that if the plaintiff in an action is or becomes at any time before verdict an alien enemy, the Court will stay the proceedings on the application of the defendant.<sup>11</sup> Alien friends have certain disabilities; thus, an alien cannot be the owner of a British ship,<sup>12</sup> or hold certain offices, or vote at certain elections.<sup>13</sup> (See *Allegiance*; *Extraterritoriality*.)

Alien friends.

ETYMOLOGY AND HISTORY.]—Norman French: *alien*, apparently from Latin *alienigena*, "one born in a strange country, under the obedience of a strange prince or country."<sup>14</sup>

**ALIEN—ALIENATION.**—To alien is to pass property from one person to another.<sup>15</sup> Alienation is either (1) voluntary, when it takes

<sup>1</sup> Cro. Eliz. 249; Archbold, Crim. Pl. 39.

<sup>2</sup> Best on Evidence, 460.

<sup>3</sup> *Ibid.* 821.

<sup>4</sup> See Co. Litt. 129 a.

<sup>5</sup> Stat. 7 Anne, c. 5; 13 Geo. 4, c. 21.

<sup>6</sup> Natur. Act, 1870, ss. 3, 4.

<sup>7</sup> *Ibid.* s. 10.

<sup>8</sup> *Calvin's case*, 7 Co. 17; Co. Litt. 129 b.

<sup>9</sup> Steph. Comm. ii. 409.

<sup>10</sup> *Ibid.* 17.

<sup>11</sup> Archbold's Pr. 1112.

<sup>12</sup> Natur. Act, 1870, s. 14.

<sup>13</sup> Sect. 2.

<sup>14</sup> Co. Litt. 128 b; Bracton, 427 b.

<sup>15</sup> Co. Litt. 118 a; Davids. Conv. i. 70.

As to the history of alienation, see Maine's Ancient Law: *L'avalée de la Propriété*.



place with the will of the owner, as in the case of a conveyance, gift, &c. ; (2) involuntary, where his consent is immaterial, as in the case of descent, intestacy, bankruptcy, forfeiture, vesting orders, &c. ; or, (3) partly voluntary and partly involuntary, as in the case of alienation by will (devise and bequest).

**ALIENI JURIS.** See *Sui Juris*.

**ALIMONY** is a gross or annual sum of money ordered, in a suit for dissolution of marriage or judicial separation, to be paid by the husband to the wife for her support. It is either payable *pendente lite*, that is, during the suit, or is permanent.<sup>1</sup>

ETYMOLOGY.]—*Alimonium*, sustenance.

**ALIO INTUITU** (= “with another intent” than that alleged). In Divorce practice, a suit is said to be brought *alio intuitu* when it is not brought *bonâ fide* for the reason or with the object alleged.<sup>2</sup>

**ALITER** = otherwise. In old reports it is used to contrast the rules applying to two different cases.

**ALIUNDE** = from elsewhere. Thus in construing a document, explanatory evidence which appears from some other source is said to appear *aliunde*.

“**ALL THE ESTATE**” is the name given to the short clause in a conveyance or other assurance which purports to convey “all the estate, right, title, interest, claim and demand” of the grantor, lessor, &c., in the property dealt with. The clause is said to be wholly inoperative and unnecessary.<sup>3</sup> (See *General Words*; *Deed*.)

**ALLEGATION** is a statement of fact made in a legal proceeding; *e. g.* in an affidavit or pleading.<sup>4</sup>

§ 2. In ecclesiastical causes, every plea after the first is termed an Ecclesiastical allegation.<sup>5</sup> An allegation by the defendant, controverting the plaintiff's pleading. charge, seems to be called a responsive allegation, and, if the plaintiff rejoins to it, his allegation is called a counter allegation, or rejoining allegation. When a party objects to the evidence taken by the other party, he is said to give an exceptive allegation.<sup>6</sup> (See *Plea*; *Libel*; *Noviter perventa*.)

**ALLEGIANCE** “is the tie or *ligamen* which binds the subject to the

<sup>1</sup> Browne on Divorce, 157.

<sup>2</sup> *Ibid.* 131, 339.

<sup>3</sup> Davids. Conv. i. 93.

<sup>4</sup> See Rules of Court, xix.

<sup>5</sup> Phill. Eccl. Law, 1254, 1289.

<sup>6</sup> *Ibid.* 1256; Rogers, Eccl. Law, 722.

king, in return for that protection which the king affords the subject."<sup>1</sup> It consists in "a true and faithful obedience of the subject due to his sovereign,"<sup>2</sup> and is commonly said to be of four kinds—natural, acquired, local, and legal.

Natural. § 2. Natural allegiance is that which is due from all men born within the king's dominions immediately upon their birth.<sup>3</sup> A person born in the British dominions of alien parents may divest himself of this natural allegiance by making a declaration of alienage (*q. v.*)<sup>4</sup>

Acquired. § 3. Acquired allegiance is that obtained by naturalization or denization (*q. v.*).<sup>5</sup>

Local. § 4. Local allegiance is that which is due from every alien only so long as he continues within the dominions of the English crown.<sup>6</sup>

Legal. § 5. Legal allegiance is so called "because the municipal laws of this realm have prescribed the order and form of it;"<sup>7</sup> it is created by the oath of allegiance, which has to be taken on various occasions—*e. g.* by the great officers of the crown on assuming office.<sup>8</sup> It does not seem to add anything to the duties of ordinary allegiance. To the class of legal allegiance may also be referred that due from the children and grandchildren born abroad of natural-born British subjects, of which, however, they may divest themselves by a declaration of alienage (*q. v.*).<sup>9</sup>

§ 6. Allegiance is also used with the sense of locality, as where a person is said to be born within the allegiance of the crown, meaning within the British dominions.<sup>10</sup>

ETYMOLOGY.]—Norman-French: *aleggeaunce*,<sup>11</sup> *ligeaunce*,<sup>12</sup> from *lige*, pure, absolute; so that "liege homage" meant unconditional homage.<sup>13</sup> *Lige* is said to be derived from German *ledig* = free, a "ledigman" (*ligius homo*) being a man who was free from all obligations to anyone but his lord.<sup>14</sup> Originally allegiance was applied also in certain cases to the obligation due by tenants to their feudal lords.<sup>15</sup>

**ALLOCATUR**, in the practice of the Common Law Divisions of the High Court, is a certificate by a master of the result of a taxation of costs.<sup>16</sup> (Latin = it is allowed.)

**ALLOCUTUS**.—In criminal procedure, when a prisoner is convicted on a trial for treason or felony, the Court is bound to demand of him what he has to say as to why the Court should not proceed to judgment against him: this demand is called the allocutus, and is entered on the record.<sup>16</sup>

<sup>1</sup> Bl. Comm. i. 366. Allegiance to the king *de facto* is sufficient; stat. 11 Hen. 7, c. 1.

<sup>2</sup> *Calvin's case*, 7 Co. 4b.

<sup>3</sup> Bl. ii. 369.

<sup>4</sup> See *Expatriation; Alienage*.

<sup>5</sup> Co. Litt. 129 a; 7 Co. 5 b; see the Naturalization Oaths Act, 1870.

<sup>6</sup> 7 Co. 5 b; Bl. ii. 370.

<sup>7</sup> 7 Co. 5 b, 6 b.

<sup>8</sup> Promissory Oaths Acts, 1868 and 1871.

<sup>9</sup> See *Naturalization*. As to the oath

of allegiance, see the Naturalization Act, 1870, and the Naturalization Oaths Act, 1870.

<sup>10</sup> Litt. § 198; Co. Litt. 129 b; *Calvin's case*, 7 Co. 2 b.

<sup>11</sup> Britton, 170 b.

<sup>12</sup> *Ibid.* 175 a.

<sup>13</sup> Loysel, Inst. Cout. Gloss.

<sup>14</sup> Diez, Etym. Wörtl. ii. 359; see Bl. i. 367.

<sup>15</sup> Archbold, Pr. 129.

<sup>16</sup> Archbold, Crim. Pl. 173.

**ALLODIAL.**—Land is said to be allodial, or to be held by an allodial tenure, when it is the absolute property of the owner and not held by him of any lord or superior, as in the feudal system. No subject in England can hold land allodially.<sup>1</sup> (See *Feudal*.)

**ALLONGE.**—When the back of a bill of exchange or similar instrument has been filled up with indorsements, a slip of paper may be annexed to it to receive any further indorsements, and thenceforth forms part of the bill. This slip is sometimes known by the French word “allonge,”<sup>2</sup> from *allonger*, to lengthen.

**ALLOT.**—§ 1. To allot is to indicate that a portion of property held by a number of joint owners is in future to belong exclusively to a specific person called the “allottee.” Thus a partition of land is effected by allotting to each owner his share in severalty.<sup>3</sup>

§ 2. An inclosure of land under the General Inclosure Act, 1845, is carried into effect by the land being allotted in accordance with the order or act authorizing the inclosure and the rights of the persons interested. “Allotment” signifies not only the act of allotting the land, but also the portion of land allotted; the allotments are named from the purposes for which they are made, *e.g.* allotments for exercise and recreation, allotments for labouring poor, allotments to the lord, commoners, &c.<sup>4</sup> (See *Inclosure*.)

§ 3. In the law of companies, to allot shares, debentures, &c. is to appropriate them to the applicants or persons who have applied for them; this is generally done by sending to each applicant a letter of allotment, informing him that a certain number of shares have been allotted to him, and he is then called an allottee. An allotment of shares pursuant to an application for them, constitutes, with the application itself, an agreement binding both on the applicant and on the company, the application being an offer to take their shares, and the allotment an acceptance of the offer.<sup>5</sup> (See *Script*.)

§ 4. In the law of merchant shipping, an allotment of wages is where a seaman by the agreement of service stipulates for the periodical payment of sums out of his wages by the shipowner or agent. This is done by an allotment note, which gives the necessary particulars, including the name of the person to whom the allotments are to be paid, and the relation in which he or she stands to the seaman, *e.g.* wife, parent, child, &c.<sup>6</sup>

**ALLOTMENT WARDEN.**—By the General Inclosure Act, 1845, s. 108, when an allotment for the labouring poor of a district has been made on an inclosure under the act, the land so allotted is to be under the management of the incumbent and churchwarden of the parish, and

<sup>1</sup> As to the derivation of the word, see Skeat's *Etym. Dict.*

<sup>2</sup> Byles on Bills, 150.

<sup>3</sup> Litt. § 246 *et seq.*

<sup>4</sup> General Incl. Act, 1845, s. 72 *et seq.*

<sup>5</sup> Lindley on Partnership, 108; Thring on Companies, 30 *et seq.*

<sup>6</sup> Merch. Shipp. Act, 1854, s. 168; Maude & Pollock, 165.

two other persons elected by the parish, and they are to be styled "the allotment wardens" of the parish. (See *Inclosure*; *Allot*, § 2.)

**ALLOW—ALLOWANCE.**—§ 1. In procedure, to allow is to admit the validity of something contended for by one of the parties. Thus the Court allows a demurrer or plea, when it decides that it is well founded by giving judgment in favour of the person demurring or pleading.<sup>1</sup> So, when a claim against an estate in administration is made out, it is allowed,<sup>2</sup> and a taxing master allows costs which have been properly incurred. The costs, charges and expenses which are allowed to a trustee are sometimes called his just allowances.<sup>3</sup> (See *Costs*.)

Demurrer.

Claim.

"Just allowances."

Allowance pendente lite.

§ 2. In the Chancery Division, where property which forms the subject of proceedings is more than sufficient to answer all claims in the proceedings, the Court may allow to the parties interested in the whole or part of the income, or (in the case of personalty) part of the property itself.<sup>4</sup>

**ALLUVION** is where sand and earth are washed up by the sea or a river, so as to make an addition to the dry land; if it is sudden and considerable, the new land belongs (in the case of the sea) to the crown; if it is by small and imperceptible degrees, the new land belongs to the owner of the adjoining land.<sup>5</sup> (From *ad*, to, and *luvere*, to wash.) (See *Dereliction*; *Accretion*; *Accession*.)

**ALMANAC.** See *Notice*.

**ALTERATION.**—§ 1. An instrument is said to be altered when any erasure or addition is made in it so as to alter its sense or effect; thus, if a seal is added to an instrument originally not under seal so as to make it purport to be a deed, that is an alteration.<sup>6</sup>

Instrument.

§ 2. An alteration is said to be material when it affects, or may possibly affect, the rights of the persons interested in the document. Thus, if the date of a cheque is altered, that is a material alteration, because the legal obligations of the drawer may be affected by it, *e.g.* if the bank failed before it was presented.<sup>7</sup> A material alteration invalidates the instrument even as against innocent strangers.<sup>8</sup> So, the addition of a seal to an instrument is a material alteration (*supra*, § 1). As a general rule, a material alteration, when made by the misfeasance or laches of the party for whose benefit the instrument was made, invalidates it, even as against

Material.

<sup>1</sup> Rules of Court, xxviii. 8 *et seq.*; Archbold, Crim. Pl. 184.

<sup>2</sup> Daniell, Ch. Pr. 1100.

<sup>3</sup> *Ibid.* 1133.

<sup>4</sup> Stat. 15 & 16 Vict. c. 86, s. 57; Daniell, 1070.

<sup>5</sup> Bl. Comm. ii. 262. In Roman law, *alluvio* meant only an imperceptible addition (*incrementum latens*); Just. Inst. ii. 1,

§ 20: a sudden alluvion was called *avulsio*.

<sup>6</sup> *Davidson v. Cooper*, 11 M. & W. 778; 13 M. & W. 343; Leake on Contracts, 426.

<sup>7</sup> *Vance v. Lowther*, 1 Ex. D. 176; *Master v. Miller*, 4 T. R. 320; 5 T. R. 367.

<sup>8</sup> *Ibid.*

innocent strangers,<sup>1</sup> and so does an alteration made by a stranger, having the custody of the instrument, but not otherwise. (See *Void*.)

§ 3. An immaterial alteration does not appear to have any effect in Immaterial. avoiding the instrument, even if made by a party to it.<sup>2</sup>

§ 4. Alterations in wills are disregarded by the Court in granting Wills. probate, unless they are authenticated by the signatures of the testator and witnesses, or unless the fact of their having been made before execution can be proved.<sup>3</sup>

**ALTERNATIVE.** See *Relief*.

**AMALGAMATION** is where two incorporated companies or societies become united by one of them being merged in the other. The amalgamation of two companies registered under the Companies Act, 1862, is effected by one of them going into voluntary liquidation, and authorizing the liquidators to transfer or sell its property or business to the other company in consideration of shares in the latter company to be distributed among the members of the company being wound up.<sup>4</sup>

§ 2. Life assurance companies can only amalgamate with the sanction Assurance of the High Court (on application to the Chancery Division), and on companies. complying with various formalities.<sup>5</sup> § 3. Industrial and provident societies may amalgamate by special resolution.<sup>6</sup>

**AMBASSADORS** are diplomatic agents residing in a foreign country as representatives of the states by whom they are despatched. In the strict sense of the word, an ambassador can only be despatched by certain states of superior power and dignity, but, in its modern use, the word also includes resident ministers despatched by any independent state.<sup>7</sup> § 2. Ambassadors and their domestic servants are privileged from Privileges. all arrest and process; persons prosecuting or executing any process of imprisonment against any ambassador or his domestic servant without his leave are guilty of a misdemeanor.<sup>8</sup> (See *Chargé d'Affaires*; *Extra-territoriality*; *Alienage*.)

**AMBIGUITY.**—§ 1. In ascertaining the intention of a testator as expressed in his will, or of the parties to a contract, a distinction is made between patent and latent ambiguities. Thus, if a blank is left, or if Patent. there is an obvious uncertainty or inconsistency in the instrument, this is a patent ambiguity, which cannot be supplied or explained by extrinsic evidence. If, however, the instrument is apparently complete and clear, but Latent.

<sup>1</sup> Chitty on Contracts, 718; *Pigot's case*, 11 Co. 27; *Master v. Miller*, 4 T. R. 320; 1 H. Bl. 357; Smith, L. C. i. 871.

<sup>2</sup> Leake, 427.

<sup>3</sup> Stat. 1 Vict. c. 26, s. 21; the initials of the testator and witnesses in the margin are enough; *In the goods of Blewitt*, 5 P. D. 116.

<sup>4</sup> Sects. 161, 162; Thring on Companies, 189.

<sup>5</sup> Life Assurance Companies Act, 1870; Thring, 743.

<sup>6</sup> I. & P. Soc. Act, 1876, s. 16.

<sup>7</sup> Manning's Law of Nations, 106.

<sup>8</sup> Stat. 7 Anne, c. 12; Smith's L. C. i. 714; Steph. Comm. ii. 485.

it appears in the course of applying or executing it that its words are equally applicable to two different things or persons, and there is nothing in it to show which was meant, then the ambiguity is latent, and extrinsic evidence is admissible to show which was meant,—as where a testator devises his “manor of Dale,” and he has two manors of that name; or where he bequeaths property to his cousin, A. B., and he has two cousins of that name; or where persons contract with reference to a ship “Peerless,” and it appears that there are two of that name.<sup>1</sup> (See *Evidence*.)

### AMELIORATING. See *Waste*.

**AMENDMENT**, in procedure, is the alteration of a pleading, writ, petition, or the like, to make it accord with the facts of the case or with the rules of practice. Under the new practice, amendments are of three kinds. § 2. Where a person commences an action, and finds out from the defendant's pleadings or his answer to interrogatories that he has misapprehended the facts, it is generally necessary for him to amend his statement of claim (and in some cases his writ) by stating the true facts, adding or striking out parties, &c. So the defendant may find it necessary to amend his pleadings.<sup>2</sup> § 3. The Court may compel a party to amend his pleading, *e.g.* if it is calculated to embarrass his opponent.<sup>3</sup> § 4. A general power of allowing amendments is given to the Court, in order to prevent slips, bad pleading, &c., from defeating justice.<sup>4</sup> This power is sometimes exercised so late as at the trial of an action, where it is obvious that the amendment does not take the other side by surprise. (See *Confession and Avoidance*; *Variance*.)

Voluntary.

Compulsory.

Amendment of errors, &c.

**AMENDS** is compensation. By stat. 11 & 12 Vict. c. 44, when notice of an action against a justice of the peace for anything done by him in execution of his office has been given to him, he may tender the complainant such sum of money as he may think fit, as amends for the injury complained of, and, if the action is commenced, he may pay it into Court. If the jury are of opinion that the plaintiff is not entitled to more, they must give a verdict for the defendant, who is then entitled to have his costs paid out of the sum in Court, and the plaintiff only receives the balance.<sup>5</sup> Parish, borough, and special constables, and some other officers and persons, have a similar privilege.<sup>6</sup> (See *Notice of Action*.)

**AMERCEMENT**, or **AMERCIAMENT**, was a fine to which a plaintiff or demandant was liable if he failed in his action, or was nonsuited, &c. To be amerced was to be in mercy of the king, *in misericordiâ domini regis*, and the amount of the fine

<sup>1</sup> Leake on Contracts, 179; Watson's Comp. Eq. 1206.

<sup>2</sup> Rules of Court, xxvii. 2—5. As to amendment by adding or striking out parties, see *Wymer v. Dodds*, 11 Ch. D. 436.

<sup>3</sup> Rules of Court, xxvii. r. 1.

<sup>4</sup> *Ibid.* 1. 6; Rules of December, 1879, r. 5.

<sup>5</sup> Archbold, Pr. 1054.

<sup>6</sup> *Ibid.* 1059 *et seq.*

imposed seems to have been originally arbitrary,<sup>1</sup> but in modern times it was always affixed or assessed by a jury,<sup>2</sup> therein differing from a fine in the technical sense, which is assessed by the Court.<sup>3</sup>

Amerciements are now wholly obsolete.<sup>4</sup> (See *Affere*; *Fine*, § 2.)

**AMICUS CURIÆ** is a person who, being in Court and a stranger to the case then in course of discussion, gives the judge information on a question of which he may take judicial notice; *e. g.* of an unreported decision, &c. Counsel not unfrequently act as *amici curiæ* in cases in which they are not concerned.

**AMORTISE.**—§ 1. In the old writers, amortise is used in the sense Land. of conveying land in mortmain, with the licence of the superior lords and the crown.<sup>5</sup> (See *Mortmain*.)

§ 2. In its modern sense, amortisation is the operation of paying off Bonds, &c. bonds, stock, or other indebtedness of a state or corporation.

**AMOTION—AMOVE.**—§ 1. To amove is to take away, remove; and amotion is the act of so doing. (See *Amoveas Manus*.) § 2. The statute 22 Geo. 3, c. 75 (Burke's Act), empowers the governor and council of any colony to amove any person from any office, and gives the person so Amotion from office. amoved the right to appeal to the king in council, if he considers himself aggrieved. There is no regular practice applicable to appeals for amotion from office under this act.<sup>6</sup>

**AMOVEAS MANUS** is a writ issuing from the High Court of Writ of. Justice (Exchequer Division), and commanding the restitution to a person of property belonging to him which is in the possession of the crown: as where judgment is given against the crown in proceedings by extent (*q. v.*), or where in former times the property of an outlaw was seized, and the outlawry was afterwards reversed.<sup>7</sup> (See *Traverse*, § 3.)

§ 2. Under the old practice on petitions of right (*q. v.*), where the Judgment of. decision was against the crown, the judgment was called judgment of amoveas manus, because it directed that the king's hands should be amoved from the property, and possession restored to the suppliant: the modern judgment in such a case merely specifies the relief to which the suppliant is entitled, but has the same effect as a judgment of amoveas manus formerly had, the peculiarity of it being that it transfers the seisin or possession of the property to the suppliant, without any execution issuing.<sup>8</sup>

**ANCESTOR** is a deceased person from whom another has inherited land. (See *Heir*; *Predecessor*.)

<sup>1</sup> Britton, 219 b. In Britton's time other people besides parties to suits could be amerced; see 4 a, 15 a, 218 b.

<sup>2</sup> 8 Co. 39 b.

<sup>3</sup> *Ibid.* 39 a.

<sup>4</sup> Bl. Comm. iii. 376.

<sup>5</sup> Stat. 15 Rich. 2, c. 5; Bl. Comm. ii. 272. "Amortissement est congé ou octroy

que fait aucun hault justicier à personne ou gens d'église, de tenir aucun héritage en leur main à perpétuité." Grand Cout. 258.

<sup>6</sup> Macpherson, Privy C. Pr. 15, 62.

<sup>7</sup> Chitty, Pr. (12th edit.) 1318.

<sup>8</sup> Stat. 23 & 24 Vict. c. 34; Staunf. Prer. 77 b; Chitty, Prer. 349; Steph. Comm. iii. 657.

**ANCIENT DEMESNE** is a freehold tenure confined to socage lands held of manors which belonged to the crown in the reigns of Edward the Confessor and William I., and are described in Domesday Book as crown lands (*terræ regis* or *terræ regis Edwardi*). The tenants are freeholders,<sup>1</sup> and formerly had exceptional privileges, the chief of which was the right to sue and be sued on questions affecting their lands in a manorial court called the Court of Ancient Demesne;<sup>2</sup> this and most of their other privileges have been taken away,<sup>3</sup> but they still have in many instances peculiar customs of descent, dower, curtesy, &c., similar to those of borough-English and gavelkind lands.<sup>4</sup>

**ANCIENT DOCUMENTS OR WRITINGS** are documents of such a date that it cannot be reasonably expected to find living persons acquainted with the handwriting of the supposed writer. In such a case the law allows them to be compared with other ancient documents which have been preserved as authentic; but no proof of a deed more than thirty years old is required if it comes from an unsuspected repository.<sup>5</sup>

§ 2. Ancient documents are sometimes allowed to prove matters of public and general interest, such as parish boundaries, rights of common, &c., although they would otherwise be rejected for want of originality.<sup>6</sup>

§ 3. Ancient documents purporting to have been executed contemporaneously with the transactions to which they relate are receivable as evidence of ancient possession when they come from the proper custody, as an exception to the rule against secondhand evidence.<sup>7</sup> (See *Evidence*.)

Ancient  
possession.

**ANCIENT LIGHTS.** See *Easement*.

**ANCIENT MESSUAGES** are houses or buildings erected before the time of legal memory,<sup>8</sup> that is, before the reign of Richard I., although practically any house is an ancient messuage if it was erected before the time of living memory, and its origin cannot be proved to be modern. Ancient houses frequently have rights of common (*e. g.* common of estovers) attached to them and to houses built in their stead on the old site,<sup>9</sup> and the easements of light and support were formerly confined to ancient houses, but now the provisions of the Prescription Act (*q. v.*), and the modern rules applied by analogy to cases not within the act, have made the doctrine unimportant. (See *Lost Grant*.)

**ANIMALS FERÆ NATURÆ** are such as are of a wild and untameable disposition, such as deer, fish, &c. Independently of the

<sup>1</sup> "There are, however, as a rule, in manors of ancient demesne, customary freeholders, and sometimes copyholders, at the will of the lord, as well as the true tenants in ancient demesne." Elton, *Copyh.* 8 (see *Socage*, § 3); Britton, 165 a. It is right to add that some writers consider tenure in ancient demesne to be a species of copyhold tenure, but the weight of authority is the other way. See Wil-

liams on *Seisin*, 31.

<sup>2</sup> Bl. Comm. ii. 99.

<sup>3</sup> Stat. 3 & 4 Will. 4, c. 27, s. 36; 3 &

4 Will. 4, c. 74, s. 4.

<sup>4</sup> Elton, 7.

<sup>5</sup> Best on *Evidence*, 307, 335.

<sup>6</sup> *Ibid.* 633.

<sup>7</sup> *Ibid.* 635.

<sup>8</sup> Cooke, *Incl.* 35, 109.

<sup>9</sup> *Ibid.*; Williams on *Commons*, 186.



statutory provisions, known as the game laws, applicable to these animals, they are exceptions from some general rules of law: thus a man can have no complete ownership in them, although he may have the possession of them; and, therefore, as soon as they cease to be in his actual possession, any one else may seize and keep them. A man may, however, have a qualified ownership in animals *feræ naturæ*, either by taming and confining them, or by having the privilege of keeping them in a forest, park, or other franchise (*q. v.*), for in either of those cases no other person can lawfully take them so long as they remain in confinement.<sup>1</sup> (See *Occupancy*.) § 2. Again, on the death of a man, the deer in his park, the rabbits in his warren, the doves in his dove-house, and the fish in his pond, pass to his heir and not to his executors, as in the case of domestic animals and other chattels.<sup>2</sup> § 3. Animals *feræ naturæ* are the subject of larceny if they are kept for profit or any domestic purpose, or if they are ordinarily kept in a state of confinement.<sup>3</sup> (See *Game*; *Cruelty*; *Scienter*.)

**ANIMUS** = intention.

**ANNUITY** is the right to the yearly payment of a certain sum of money, granted or bequeathed by one person to another. When it charges only the person and personal representatives of the grantor, or is granted out of or charged on personal property, it is a personal annuity. When it issues out of land with a clause of distress it is a real annuity or rent-charge; without such a clause, it is a rent-seck (see *Rent*); in either case it is an incorporeal hereditament, and may be limited for life, in fee, or in tail, in the same way as land. Annuities of this kind must be registered.<sup>4</sup>

§ 2. A personal annuity may either be perpetual, for life, or for years, and a perpetual annuity may be limited either to the heirs or the executors of the grantee; in the former case it is an annuity in fee. When limited to the heirs of the body of the grantee it is an annuity in fee simple conditional, because the Statute de Donis (*q. v.*) does not apply to personal annuities.<sup>5</sup> (See *Fee*.) A personal annuity in fee descends to the heir of the grantee on his death intestate, but it is nevertheless personal estate, and therefore would not pass under a devise of real estate.

**ANNUL.**—§ 1. To annul a judicial proceeding is to deprive it of its operation, either retrospectively or only as to future transactions. Thus, annulling an adjudication in bankruptcy puts an end to the proceedings, without invalidating any acts previously done by the trustee or the Court, and makes the property of the bankrupt revert to him, unless the Court otherwise orders.<sup>6</sup>

<sup>1</sup> Bl. Comm. ii. 14, 391, 419; so the owner of a several fishery has a qualified property in the fish before they are caught. (See *Fishery*.)

<sup>2</sup> Co. Litt. 8a.

<sup>3</sup> Steph. Crim. Dig. 202; stat. 24 & 25 Vict. c. 96.

<sup>4</sup> Stat. 18 & 19 Vict. c. 15.

<sup>5</sup> Co. Litt. 20 a, 144 b; Watson, Comp. Equity, 8 *et seq.*

<sup>6</sup> Bankruptcy Act, 1869, s. 81.

To interrogatories.

**ANSWER.**—§ 1. In ordinary actions in the High Court an answer is an affidavit in answer to interrogatories; it is like any other affidavit in form, and requires to be filed; if it is longer than ten folios it must be printed.<sup>1</sup> The answer necessarily follows the terms of the interrogatories, either giving information asked for, or admitting or traversing (denying) the allegations impliedly contained in them. (See *Traverse*.) If the party interrogated fails to answer, or fails to answer fully, he may be required to answer *vivâ voce*.<sup>2</sup>

*Vivâ voce* answer.

Petition.

§ 2. A petition in the Chancery Division is said to be answered when the Master of the Roll's secretary writes on it a fiat or memorandum appointing the day on which it is to be heard.<sup>3</sup> (See *Fiat*.)

Divorce practice.

§ 3. In matrimonial suits in the Probate, Divorce and Admiralty Division an answer is the pleading by which the respondent puts forward his defence to the petition (*q. v.*); it is filed.<sup>4</sup>

Ecclesiastical practice.

§ 4. In ecclesiastical causes the defendant is said to answer the libel when he gives in an allegation (*q. v.*). But in all civil causes the plaintiff is also entitled to what are called the personal answers of the defendant, which are answers on oath to the several articles of the libel.<sup>5</sup>

In Chancery.

§ 5. Under the old chancery practice, an answer by a defendant was, in ordinary cases, not only an answer to the plaintiff's interrogatories, but also a pleading, inasmuch as it contained the defendant's statement of his case; hence, in complicated cases, answers were frequently divided into two parts, one containing the defendant's statement, or the facts on which he relied, and the other giving his answers to the interrogatories. If no interrogatories were delivered, the defendant might put in a voluntary answer, containing such facts as he thought material to his case.<sup>6</sup> A plaintiff's answer to a concise statement and interrogatories (*q. v.*) was similar to a defendant's answer to interrogatories, except that it was confined to giving the discovery required.<sup>7</sup> Every answer had to be signed by counsel, sworn by the party, and filed. (See now *Statement of Defence*.)

Admiralty.

§ 6. Under the old admiralty practice the defendant's first pleading was called his answer.<sup>8</sup> (See now *Statement of Defence*.)

**ANTE LITEM MOTAM** = "before existing or anticipated litigation." (See *Lis mota*.)

Income.

**ANTICIPATION.**—I. § 1. In conveyancing, anticipation is the act of assigning, charging or otherwise dealing with income before it becomes due. A clause restraining anticipation is generally introduced in a settlement of property on a woman, in order to protect her from the influence of her husband by preventing her from depriving herself of the benefit of the future income. Such a restraint cannot be imposed in the case of anyone except a woman, and the restraint only exists so long as she is married.<sup>9</sup>

Patent.

II. § 2. In patent law, a person is said to have been anticipated when he patents a contrivance already known within the United Kingdom.

<sup>1</sup> Rules of Court, xxxi. 6, 7.

<sup>2</sup> Rules of Court, xxxi. 10.

<sup>3</sup> Daniell, Ch. Pr. 1453.

<sup>4</sup> Browne on Divorce, 223.

<sup>5</sup> Phill. Eccl. Law, 1256, 1292.

<sup>6</sup> Hunter's Suit, 43; Daniell, Ch. Pr. 457;

Mitford, Pl. 306.

<sup>7</sup> Hunter, 49; Daniell, 1406.

<sup>8</sup> Williams & Bruce's Admiralty, 246.

<sup>9</sup> Hayes' Conv. 499 *et seq.*; Snell's Eq. 290; White & T. L. C. i. 468; *In re Ridley*, 11 Ch. D. 645.

**APOLOGY.**—When an action is threatened or brought against a person for a libel published in a newspaper, he may plead that it was inserted without actual malice, and without gross negligence, and that an apology for the libel has been published; he may also pay a sum of money into Court as amends to the plaintiff. (See *Payment into Court*.)

§. 2. Any person sued in an action for defamation may plead in mitigation of damages that he has made or offered an apology to the plaintiff.<sup>1</sup>

**APOSTASY** is a total renunciation of Christianity by one who has been educated in or professed that faith within this realm. It is punishable by incapacity to hold any office, and, for the second offence, by incapacity to bring any action or to be guardian, executor, legatee, or grantee, and by imprisonment for three years.<sup>2</sup> (See *Heresy*.)

**APOTHECARIES.** See stat. 55 Geo. 3, c. 194; 37 & 38 Vict. c. 34.

**APPARITORS** (so called from that principal branch in their office, which consists in summoning persons to *appear*) are officers of the Ecclesiastical Courts appointed to execute the proper orders and decrees of the Court.<sup>3</sup>

**APPEAL.**—I. § 1. In its most general sense an appeal is a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court or Court of Appeal. (See *Court*.) The term “appeal,” therefore, includes, in addition to the proceedings specifically so called (*infra*, §§ 2—6), the “cases” stated for the opinion of the Queen’s Bench Division and the Court for Crown Cases Reserved, &c., under various statutes (see *Case*) and proceedings in error (see *Error*).

§ 2. In the Supreme Court of Judicature, every appeal from a judgment or order of the High Court to the Court of Appeal is in the nature of a rehearing (*q. v.*), and is brought by a simple motion in the Court of Appeal, asking that the judgment or order complained of may be reversed, discharged, or varied.<sup>4</sup> § 3. Appeals can also be brought on interlocutory proceedings in chambers, from the master, chief clerk, or district registrar, to the judge in chambers. In the Common Law Divisions, an appeal lies from the judge in chambers to the Divisional Court, and thence to the Court of Appeal;<sup>5</sup> while in the Chancery Division, the judge in chambers may either direct the matter to be argued before him in Court (after which an appeal lies to the Court of Appeal) or may give leave to appeal direct to the Court of Appeal.<sup>6</sup>

§ 4. Appeals to the House of Lords are brought by petition of appeal, which is lodged by the appellant at the Parliament Office, and presented to the House at its next meeting by the Lord Chancellor or Clerk of the

Court of  
Appeal.

House of  
Lords.

<sup>1</sup> Stat. 6 & 7 Vict. c. 96.

<sup>2</sup> Stat. 9 & 10 Will. 3, c. 35; Steph. Comm. iv. 201.

<sup>3</sup> Phill. Eccl. Law, 1246.

<sup>4</sup> Smith’s Action, 214; Rules of Court, lviii.

<sup>5</sup> Rules of Court, liv. 4, 5, 6, xxxv. 7.

<sup>6</sup> *Dickson v. Harrison*, 9 Ch. D. 243.

Parliaments, after which an order requiring the respondent to lodge his printed case is issued and served on him. If he intends to contest the appeal, he enters an appearance, and the appellant gives security for costs. Each party then lodges a printed case stating the facts and reasons in his favour, and an appendix is also prepared containing printed copies of the documents and other evidence used in the Court below.<sup>1</sup>

Privy  
Council.

§ 5. In appeals to the Privy Council leave to appeal has in most instances to be obtained either from the Court below or from the Judicial Committee, and security given for the costs of the appeal. The appellant then causes a transcript of the pleadings and evidence in the Court below to be transmitted to the Colonial Office, with the reasons assigned by the judges for the decision appealed from. The appellant also prepares and lodges his petition of appeal, giving a short abstract of the proceedings. The respondent being generally aware of the appeal having been lodged, he ought to enter an appearance, and then both parties prepare their cases, and an appendix containing the material documents, &c. The cases and appendix are printed. If the respondent does not appear, two successive notices to him to do so are posted at the Royal Exchange and Lloyd's Coffee House, or the appeal is brought to his knowledge in some other way, and if he still fails to appear, the appeal is heard *ex parte*.<sup>2</sup>

Inferior  
courts.

§ 6. Appeals from inferior Courts to the High Court are generally brought in one of two ways, either by a case or special case stated for the opinion of the Appellate Court,<sup>3</sup> or by a motion to the Appellate Court.<sup>4</sup> (See *Writ of Error*; *Writ of False Judgment*.)

As to appeals in ecclesiastical cases, see *Phillimore, Eccl. Law, 1264 et seq.*

Appeal of  
felony.

II. § 7. Formerly appeal (or "appeal of felony") signified a criminal proceeding, being an accusation by one private subject against another for some heinous crime demanding punishment, rather on account of the particular injury suffered by the individual than for the offence against the public.<sup>5</sup> Appeals were of three classes, namely, by an heir for the death (by murder or homicide) of his ancestor, by a wife for the death of her husband, and by the appellant for a wrong done to himself or herself, as robbery, rape, mayhem, &c. The judgment on a conviction on an appeal was the same as on a conviction on an indictment (except in the case of mayhem, for which damages only could be recovered); but an appeal was so far considered a private action that it could be released by the party injured.<sup>6</sup> Appeals were abolished by stat. 59 Geo. 3, c. 46. (See *Trial*.)

ETYMOLOGY.]—"Appeal," in the sense of a criminal proceeding, comes from the Norman-French *apel*, from *appeler*, to accuse,<sup>7</sup> from the Latin *appellare*, to call upon.

"Appeal," in the modern sense, seems to have come direct from the Latin *appellare* (which has the same meaning<sup>8</sup>), through the ecclesiastical Courts.<sup>9</sup> Its use in the temporal Courts seems quite modern, the old terms being "error" and "rehearing."

<sup>1</sup> Appellate Jurisdiction Act, 1876; Standing Orders and Instructions (issued by the House of Lords), May, 1878; Denison & Scott's Pr., *passim*.

<sup>2</sup> Macpherson's Privy C. Pr., *passim*.

<sup>3</sup> As to County Courts, see Pollock's C. C. Pr. 238.

<sup>4</sup> Pollock, 242.

<sup>5</sup> Bl. Comm. iv. 312.

<sup>6</sup> Co. Litt. 287 b; 123 b; Litt. §§ 500 *et seq.*; Bl. iv. 316.

<sup>7</sup> Britton, 38 b.

<sup>8</sup> Dig. xlix.

<sup>9</sup> Co. Litt. 287 b.

**APPEAL DEPOSIT ACCOUNT.**—Under the former practice of the Court of Chancery, when a party wished to appeal or have a rehearing, he had to deposit 20*l.* as security for the costs of the opposite party, in case he was unsuccessful. These deposits were paid into the Bank of England to the above account, and were supposed to be paid out again on the termination of each appeal; but as it frequently happened that the parties forgot all about them, a considerable sum has accumulated on the account.<sup>1</sup> (See *Account*, § 15.)

**APPEARANCE.**—§ 1. In the primary sense of the word the parties to a proceeding or application (*e.g.* a petition, motion, summons, &c.) are said to appear on it when they are present before the Court, judge, &c., when it is heard. A party appears either in person or by his counsel or solicitor.

§ 2. In the secondary sense of the word, appearing or entering an appearance is a formal step taken by a defendant to an action after he has been served with the writ of summons: its object is to intimate to the plaintiff that the defendant intends to contest his claim, or in a friendly action to take part in the proceedings in the action. (See *Default*.) In some cases persons may appear who are not defendants to the action, *e.g.* persons desiring to intervene in probate and admiralty actions (see *Intervention*), or in actions for the recovery of land, and persons cited to appear. (See *Citation*; *Counterclaim*.)

§ 3. Appearance is effected by delivering to the proper officer of the Court a memorandum giving the title of the action, stating that the defendant appears in person or by his solicitor, as the case may be, giving the address of himself or his solicitor (see *Address for Service*), and stating whether he requires a statement of claim to be delivered. The defendant must also produce a duplicate memorandum for sealing, which he afterwards sends to the plaintiff.<sup>2</sup> § 4. Special forms of appearance are used in actions for the recovery of land: thus any person appearing in such an action may by his appearance limit his defence to a part of the property.<sup>3</sup>

§ 5. In Chancery practice, where a defendant desires to object to the regularity of the proceeding by which the plaintiff seeks to compel his appearance, he must enter a conditional appearance, and then apply to the Court to set aside the plaintiff's proceeding. This is the proper course to pursue if a plaintiff irregularly obtains an order for substituted service of a writ of summons on the defendant.<sup>4</sup>

As to appearance under protest, see *Protest*.

§ 6. If a defendant does not appear the plaintiff may in some cases sign judgment, and in other cases proceed with his action.<sup>5</sup> (See *Judgment*.)

§ 7. "Appearance" has a peculiar meaning in bailable process (see *Bail*), where, to effect a complete appearance, the defendant is required to give

Entry of appearance.

Memorandum.

Limited appearance.

Conditional appearance.

In bailable process.

<sup>1</sup> Daniell, Ch. Pr. 1350; stat. 15 & 16 Vict. c. 87; Report of Chancery Funds Commissioners (1864), xlv.

<sup>2</sup> Smith's Action, 54 *et seq.*; Rules of Court, xii.; Rules of April, 1880.

<sup>3</sup> Rules of Court, xii. 21; xiii. 7.

<sup>4</sup> Daniell, Ch. Pr. 459. As to appearing gratis under the old practice, see *ibid.* 462.

<sup>5</sup> Rules of Court, xiii.

*bail to the action*, that is, to provide two sufficient sureties, who enter into a recognizance to the effect that if judgment be given against him he shall either satisfy the plaintiff or render himself to prison; the ordinary kind of appearance was called "common appearance" by way of distinction. Bailable process having been abolished in ordinary actions, this kind of appearance now only exists in proceedings in the Mayor's Court, where, if the defendant wishes to dissolve (that is, put an end to) an attachment of his property, he must appear according to the custom, either by putting in bail, by rendering himself to prison, or by payment into Court of the debt or the value of the property attached; when he has done one of these things his appearance is said to be perfected.<sup>1</sup>

**APPENDANT** is often used in the same sense as appurtenant (*q. v.*), that is, to signify that a hereditament is annexed to another: "appendant is any inheritance belonging to another that is more superior or worthy,"<sup>2</sup> and the difference between appendant and appurtenant is merely one of name, appendant being applied to some things and appurtenant to others. Historically, the difference seems to be that rights which were originally created by implication of law and annexed to estates in land are properly called appendant, and all others appurtenant. Thus common appendant is the right which socage tenants of a manor have by the common law to feed their beasts on the wastes of the manor, while common appurtenant is a right gained from the lord by grant or prescription.<sup>3</sup> (See *Lost Grant*.) So, an advowson or seignory is said to be appendant to a manor,<sup>4</sup> because it is created and annexed to the manor by implication of law.<sup>5</sup> A corporeal hereditament cannot be appendant to another corporeal hereditament, nor an incorporeal to an incorporeal. (See *Appurtenant*; *Regardant*; *In Gross*.)

**APPENDIX.**—In the practice of the House of Lords and Privy Council in appeals, the appendix is a printed volume containing the material documents or other evidence used in the Court below, and referred to in the cases of the parties.<sup>6</sup> (See *Appeal*; *Case*.)

**APPOINTMENT** is the act of designating a person for a certain purpose, *e.g.* to an office or as trustee, or to take an estate or interest in property under a power of appointment. (See *Power*.)

Under power. § 2. An appointment of the latter kind takes effect as if the estate limited by the power had been created by the instrument which conferred it. Thus, if A. conveys land to such uses as B. shall appoint, and B. appoints to himself for life, with remainder to his eldest son in tail, this

<sup>1</sup> Brandon, For. Att. 104 *et seq.*; First Rep. C. L. Com. 89.

<sup>2</sup> Co. Litt. 121 b, where an instance is given of a thing corporeal being appendant to a thing incorporeal, namely, lands appendant to an office.

<sup>3</sup> Burton, Comp. § 1133; Elton, Commons, 14, 47, 88.

<sup>4</sup> Williams' R. P. 322.

<sup>5</sup> Ultimately, no doubt, the origin of common appendant and similar rights may be traced back to the old villis or village communities. Williams on Commons, 39.

<sup>6</sup> Standing Orders of House of Lords in Appeals; Macpherson's Privy C. Pr. 84, 237.

has the same effect as if A. had originally conveyed the land to B. for life with remainder to his eldest son. But with regard to the rule against perpetuities, there is a distinction between general and particular powers, for under a general power the donee can appoint in any manner he pleases, while under a particular power (that is, a power to appoint to one or more of a limited number of persons), no estate can be created if it would have been invalid in the original deed by reason of its infringing the rule against perpetuities.<sup>1</sup> (See *Perpetuity*.)

§ 3. An appointment to one or more of the objects of a particular power to the exclusion of the others is called an exclusive appointment. Exclusive.

§ 4. Formerly an appointment of a merely nominal share of the property to one of the objects, in order to escape the rule that an exclusive appointment could not be made unless it was authorized by the instrument creating the power, was considered illusory and void in equity, but this rule has been abolished.<sup>2</sup> Illusory.

§ 5. An appointment is excessive when it is made to persons not objects of the power, or for a greater estate or interest than is permitted by it, or subject to conditions unauthorized by it.<sup>3</sup> Excessive.

As to the defective execution of a power, see *Execution*, § 2; *Aid*, § 2.

### APPORTION—APPORTIONABLE—APPORTIONMENT.

§ 1. To apportion a thing is to divide it with reference to the interests of two or more persons. Apportionment is either in respect of contemporaneous or successive interests. An instance of the latter occurs where a lessor of land dies intestate; here the rent received on the first quarter day after his death is divided so that his personal representatives take the part due in respect of the period between the preceding quarter day and the death, and the heir takes the amount due in respect of the period between the death and the following quarter day. All periodical payments in the nature of income are now apportionable.<sup>4</sup> Successive.

§ 2. An instance of apportionment in respect of contemporaneous interests occurs where a reversion expectant on a lease devolves by law on several persons; here the rent is divided between them, according to their interests.<sup>5</sup> Contem-  
poraneous.

§ 3. A contract is said to be apportionable when the acts required to be done under it are so distinct that if one is performed without the others, the party performing it has the right of enforcing the contract pro tanto against the other party. Thus, if A. enters into a contract to supply machinery to B. for a certain price, and to keep it in order for a yearly payment, he becomes entitled to recover the price of the machinery as soon as he delivers it, without waiting for the performance of the rest of the contract.<sup>6</sup> (See *Entire*; *Sever*.) Contract.

<sup>1</sup> Sugden on Powers, 396, 470; Williams on Settlements, 43; Davids. Conv. ii. 176.

<sup>2</sup> Sugden, 449; Williams, 153; stat. 11 Geo. 4 & 1 Will. 4, c. 46, and 37 & 38 Vict. c. 37.

<sup>3</sup> Sugden, 498; Watson's Comp. Equity, 827.

<sup>4</sup> Apportionment Act, 1870; Williams' R. P. 28; *In re Griffith*, 12 Ch. D. 655; Lewin on Apport. *passim*.

<sup>5</sup> Lewin, 2.

<sup>6</sup> *Merchant Banking Co. v. Phoenix, &c.* Co., 5 Ch. D. 205.

**Condition.** § 4. At common law a condition of re-entry in a lease was said not to be apportionable by act or agreement of the parties: that is, if the lessor granted a licence to the lessee to do the act forbidden by the condition, or waived a breach already committed, the condition was gone for ever, although the licence or waiver was expressed to be limited to a particular act, or to a part of the land.<sup>1</sup> This absurd rule was abolished by stat. 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38.

**Common.** § 5. Apportionment of commons. The general rule is, that common appendant and appurtenant are apportioned by alienation of part of the land to which the common is appendant or appurtenant, so that each person may exercise his right of common in respect of his portion of the land.<sup>2</sup> § 6. When it is said that if a man, having a common appendant, purchase part of the land over which the common exists, the common shall be apportioned, but not so in the case of any other common, the meaning is that in the case of common appendant the commoner continues to have a right of common over the portion of the land which he has not purchased, while in the case of any other common his right of common is wholly destroyed by the partial unity of possession.<sup>3</sup> It is not clear whether this is now good law.

**APPRAISE—APPRAISEMENT.**—To appraise is to value. A writ or commission of appraisement is one commanding the persons to whom it is directed to ascertain and return (that is, report) the value of certain property: as where goods are forfeited to the crown.<sup>4</sup> § 2. In an admiralty action in rem, an official appraisement of the property proceeded against is made by the marshal under a commission or order of the Court, either where bail is to be given for the value of the property, or where it is to be sold.<sup>5</sup> (See *Extent*.)

**APPREHEND—APPREHENSION.**—To apprehend a person is to seize him for the purpose of taking him before a magistrate to answer for some offence alleged to be committed by him. Apprehension is either with or without a warrant. (See *Warrant*; *Arrest*.)

Things  
publici juris.

**APPROPRIATE—APPROPRIATION.**—I. § 1. In the primary sense of the word, to appropriate is to make a thing the property of a person. Thus, to appropriate a thing which is *publici juris* is to obtain a right to the exclusive enjoyment of it,<sup>6</sup> so that the appropriator becomes the owner. (See *Occupancy*.)

Sale of  
goods.

§ 2. Where a person is entitled to goods or moneys which form part of a larger quantity and are not distinguished, and afterwards the goods or moneys to which he is entitled are separated from the rest and set apart for him, they are said to be appropriated. Thus, if A. sell to B. 1,000

<sup>1</sup> *Dumfries's case*, 4 Co. 119; Smith, L. C. i. 41.

<sup>2</sup> Co. Litt. 122 a; Williams on Commons, 183.

<sup>3</sup> Co. Litt. 122 a; *Tyrringham's case*,

4 Co. 36 b; Elton, Comm. 120; Williams, 166.

<sup>4</sup> Manning's Exchequer, 143.

<sup>5</sup> Roscoe's Admiralty, 113, 187.

<sup>6</sup> *Mason v. Hill*, 5 B. & Ad. 1.



bricks, to be selected and taken away by B. from a certain stack, then, as soon as B. has selected and taken away 1,000 bricks, they are appropriated to him, and the sale, which before was executory, is now complete.<sup>1</sup>

§ 3. When money or goods are appropriated (that is, set apart) for the purpose of securing the payment of a specific debt or class of debts, they are said to be specifically appropriated for that purpose. Thus, where A. draws a bill of exchange on B. and remits to B. a bill of lading, draft, or other document of title as security for the repayment of the bill, and B. accepts the bill on that footing, the bill of lading is specifically appropriated to the payment of the bill of exchange. The consequence of such a specific appropriation is that the goods represented by the bill of lading are applicable exclusively to the payment of the bill of exchange, in whosoever hands the latter may be, and that when the bill has been satisfied, the goods represented by the bill of lading (or what remains of them after payment of the bill) revert to A., the original owner. Hence, if B. becomes bankrupt before the goods are applied in payment of the bill, and a balance remains after payment of it, the balance belongs to A.<sup>2</sup>

Specific appropriation.

II. § 4. To appropriate also means to distribute. The property in goods of a deceased person is in the executor or administrator, and it is his duty to appropriate them, that is, to distribute them among the persons entitled (legatees or next of kin, &c.) according to their rights.

Distribution.

§ 5. Appropriation of payments. If A. borrows from B. a sum of 50*l.* on the 1st January and another sum of 50*l.* on the 1st July, and on the 1st December pays him 50*l.*, saying that it is in satisfaction of the debt incurred on the 1st July, he is said to appropriate the payment to that debt. The question whether a payment is appropriated by the debtor is important in many ways; thus, if A. owes B. two sums, one of which is barred by the Statute of Limitations, while the other is not, and A. makes a payment to B. without appropriating it (which is called a general payment), then B. may appropriate it to the statute-barred debt, although he could not recover it by action. The general rule is that the debtor may appropriate the payment at the time; that if he fails to do so the creditor may do so, and that if they both fail to do so the law will appropriate the payment to the earliest debt.<sup>3</sup> (See *Clayton's Case*.)

Appropriated payment.

General payment.

§ 6. Appropriation of supplies is the mode by which parliament regulates the manner in which the public money voted in each session is to be applied to the various objects of expenditure (*e. g.* the army, navy, civil service, &c.), and the Appropriation Act is an annual act passed for the purpose.<sup>4</sup>

Supplies.

III. § 7. In ecclesiastical law appropriation is where a benefice is perpetually annexed to a spiritual corporation, either aggregate or sole, as

Benefice.

<sup>1</sup> Benjamin on Sales, 264; *Kershaw v. Kershaw*, L. R., 9 Eq. 56.

<sup>2</sup> *Ex parte Gomez*, L. R., 10 Ch. 639; *Banner v. Johnston*, L. R., 5 H. L. 157; *Steele v. Stuart*, L. R., 2 Eq. 84; *In re Entwistle*, 3 Ch. D. 477; *Ranken v. Alfaro*, 5 Ch. D. 786.

<sup>3</sup> See generally as to appropriation of payments, Chitty on Contracts, 684 *et seq.*; Leake on Contracts, 491; Snell's Equity, 418.

<sup>4</sup> Bl. Comm. i. 335, n.; Steph. Comm. ii. 579, note; Hallam, Const. H. iii. 159; Hom. Cox, Inst. of Eng. Gov.

the patron of the living. In such a case the cure of souls is generally given to a clerk who, from being in effect the deputy of the appropriator or patron, is called the vicar (*vicarius*); he is instituted and inducted in much the same way as a rector, but he has only a portion of the emoluments of the living—generally a part of the glebe and a particular share of the tithes.<sup>1</sup> In some appropriated churches the officiating minister is a perpetual curate.<sup>2</sup> (See *Impropriation*; *Tithes*.)

ETYMOLOGY.]—From Latin *ad*, to, and *proprius*, belonging. (See *Property*.)

Commons.<sup>3</sup>

**APPROVE.**—§ 1. By the Statute of Merton (20 Hen. 3, c. 4) the lord of a manor may enclose portions of the waste lands, if they are subject only to a right of common of pasture, and provided he leaves sufficient common for those entitled thereto. This is called “approving,” from *appropriare*, to appropriate.<sup>3</sup> (See *Inclosure*; *Common*.)

Crime.

§ 2. In criminal law approvement was a species of confession, by which a person indicted of a capital crime, confessed it before plea pleaded, and accused others, his accomplices, of the same crime in order to obtain his pardon. The approvement was equivalent to an indictment. It has long been obsolete.<sup>4</sup> (See *Queen's Evidence*.)

**APPURTENANT** signifies that a right is annexed to land, the connexion having arisen either by grant or by prescription from long adverse enjoyment. In such a case the appurtenant thing passes with the thing to which it is annexed whenever a conveyance or transmission of the latter takes place. The principal instances of appurtenant rights occur in the case of commons and rights of way, which may be annexed to lands or houses, and franchises, which may be annexed to manors.<sup>5</sup> (See those titles; also *Appendant*; *In Gross*; *Regardant*.)

**ARBITRAMENT AND AWARD** was the technical name for the plea used in a common law action for damages where the parties had submitted the question to an arbitrator, and he had made his award, for this was a good defence to the action.<sup>6</sup> Arbitrament (Norman French, *arbitrement*) is the old word for arbitration (*q. v.*).<sup>7</sup>

By consent.

**ARBITRATION** is the settlement of a question (usually one of fact) by the decision of one or more persons, called arbitrators, to whom the dispute is referred. As a general rule, any question which might be determined by a civil action may be referred to arbitration. Arbitration is either by consent or compulsory. § 2. Arbitration by consent is effected by a submission to arbitration; if no action has been com-

<sup>1</sup> Bl. Comm. i. 304; Phill. Eccl. Law, 268, where the history of appropriations will be found.

<sup>2</sup> Phill. 276.

<sup>3</sup> Bracton, 228a; Williams on Commons, 103; Stat. West. II. (13 Edw. I, c. 116): not from “an antient expression signifying

the same as improving,” as stated by Blackstone, ii. 34.

<sup>4</sup> Steph. Comm. iv. 394.

<sup>5</sup> Co. Litt. 121b; Williams' R. P. 328.

<sup>6</sup> Chitty on Contracts, 725.

<sup>7</sup> Termes de la Ley, s. v.

menced concerning the matter in dispute, the submission takes the form of an agreement, called an agreement of reference; if an action has been commenced, and the parties are willing to have the question decided by arbitration, an order of reference is made by a judge or the Court, and in that case the order forms the submission. Sometimes the question is referred to two arbitrators, and in the event of their disagreeing, then to an umpire (*q. v.*). Under the Common Law Procedure Act, 1854, s. 17, any written submission to arbitration may be made a rule of one of the superior Courts so as to give the Court jurisdiction to enforce or set aside the award; and the same act (s. 5) gives the arbitrator power to state a special case (*q. v.*) for the opinion of the Court on a question of law arising in the arbitration.<sup>1</sup> § 3. Compulsory arbitration is where an action has been brought and the Court or judge, being of opinion that the matter in dispute can be more conveniently decided by an arbitrator than by a jury (as where it consists of questions of account), orders it to be so determined.<sup>2</sup> Compulsory.

§ 4. The decision of the arbitrator (if he is a private person) is termed his award; it is engrossed on paper or parchment, and signed by the arbitrator, who gives notice to the parties that it is ready, and the award is then considered as published.<sup>3</sup> As to the effect of the award, see that title. If the arbitrator is a master of the Supreme Court, it is called a certificate.<sup>4</sup> (See *Umpire*; *Reference*; *Inquiry*.) Award.

As to references under the Judicature Act, see *Refer*; *Referee*; also *Inquiry*.

§ 5. Provision is also made by various Acts of Parliament for the determination of certain questions by arbitration: *e. g.* the assessment of compensation under the Lands Clauses Act (*q. v.*); disputes between railway companies under stat. 22 & 23 Vict. c. 59; disputes between masters and workmen with reference to their employment and service, &c.<sup>5</sup> Statutory.

**ARCHBISHOP** is the chief of all the clergy within his province (*q. v.*). He has two concurrent jurisdictions, one as ordinary or bishop within his own diocese, the other as superintendent throughout the whole province, by virtue of which he has the inspection of the bishops of that province as well as of the inferior clergy, or, as the law expresses it, the power to visit them. (See *Visit.*) He confirms the election of the bishops and afterwards consecrates them; and, when so directed by the Queen's writ, he calls the bishops and clergy of his province to meet him in convocation. He is also superior ecclesiastical judge within his province (see *Ecclesiastical Courts*), and a spiritual lord of Parliament. (See *Parliament*; *Estate*, § 1.) There are two archbishops, namely, of Canterbury and York, of whom the former is the superior, being called the primate of all England.<sup>6</sup> (See *Primate*.)

<sup>1</sup> Archbold's Pr. 1306 *et seq.*; Daniell, Ch. Pr. 1901 *et seq.*

<sup>2</sup> Common L. Pr. Act, 1854, s. 3 *et seq.*; Archbold, 1378.

<sup>3</sup> Smith's Action, 444 *et seq.*

<sup>4</sup> *Cruikshank v. Floating Swimming Baths Co.*, 1 C. P. D. 260.

<sup>5</sup> 5 Geo. 4, c. 96; 35 & 36 Vict. c. 46.

<sup>6</sup> Phill. Eccl. Law, 82; Steph. Comm. ii. 664.

**ARCHDEACON** is a dignitary of the Church, having an ecclesiastical jurisdiction, immediately subordinate to, but independent of, the bishop. A diocese is frequently divided into several archdeaconries. The archdeacon visits the clergy (see *Visitation*), and has a Court for hearing ecclesiastical causes.<sup>1</sup> (See *Diocesan Courts*.)

**ARCHES.** See *Court of Arches*.

**ARGUMENT.**—§ 1. The argument of a demurrer, special case, appeal or other proceeding involving a question of law, consists of the speeches of the opposed counsel; namely, the “opening” of the counsel having the right to begin (*q. v.*), the speech of his opponent, and the “reply” of the first counsel. It answers to the trial of a question of fact. (See *Trial*.)

**ARGUMENTATIVE** is used in two senses.

§ 1. In the old common law pleading, a plea was said to be argumentative if a material fact was stated, not directly, but by inference only. “Thus, to allege that E. B. was seised for life, would be to deny by implication, but by implication only, that the reversion belonged to him in fee; and, therefore, to avoid argumentativeness, a direct denial that the reversion belonged to him is added.”<sup>2</sup> This sense is obsolete.

§ 2. In the more modern sense, an affidavit is said to be argumentative if it contains, not merely allegations of fact, but arguments as to the bearing of those facts on the matter in dispute such as should be left to be advanced when the matter comes before the tribunal. This is forbidden.<sup>3</sup>

**ARMS** “in the common law signifieth anything that a man striketh or hurteth withal,” including therefore sticks, stones and fists,<sup>4</sup> as in the expression *vi et armis* (*q. v.*).

**ARRAIGN—ARRAIGNMENT.**—The arraignment of a prisoner, against whom a true bill for an indictable offence has been found by the grand jury, consists of three parts: first, calling the prisoner to the bar by name; secondly, reading the indictment to him; and thirdly, asking him whether he be guilty or not of the offence charged. On this he either confesses, pleads, or stands mute.<sup>5</sup> (See *Confession*; *Plea*; *Mute*; *Trial*; *Issue*.)

**ETYMOLOGY.**—Old French, *aragnier*, *areisnier*; Latin, *ad rationem*; to call to account.<sup>6</sup> (See *Deraign*.) To “arraigne an assize” was to bring an action.<sup>7</sup>

<sup>1</sup> Bl. Comm. i. 383; Phill. Eccl. Law, 236 *et seq.*

<sup>2</sup> Stephen, Plead. (5) 208, 422.

<sup>3</sup> Rules of Court, xxxvii. 3.

<sup>4</sup> Co. Litt. 161b.

<sup>5</sup> Archbold, Crim. Pl. 146; Stéph. Comm. iv. 389.

<sup>6</sup> Skeat's Etym. Dict. s. v.

<sup>7</sup> Litt. §§ 366, 442; Co. Litt. 262 b.

**ARRANGEMENT WITH CREDITORS.**—§ 1. The principle of administering the estate of an insolvent by private arrangement with his creditors, whether under the supervision of the Court of Bankruptcy or not, but without the debtor actually being made bankrupt, was introduced by the act 6 Geo. 4, c. 16, and developed by the act of 1849 and subsequent acts.<sup>1</sup> The arrangement was effected either by means of a deed assigning all the debtor's property to trustees for the benefit of his creditors, or by a resolution passed by the creditors, and the assent of a certain majority of the creditors to a composition offered by the debtor was binding on the minority. § 2. These acts have been repealed, and under the existing bankruptcy law arrangements consist either of a liquidation, where the debtor's property is administered in much the same manner as in bankruptcy; or a composition, when the debtor pays his creditors a fixed proportion of their debts. (See *Liquidation*; *Composition*.) § 3. An office is attached to the London Bankruptcy Court called the "Office for Registration of Arrangement Proceedings," and presided over by registrars appointed by the Chief Judge; all petitions and proceedings in liquidations and compositions are registered there.<sup>2</sup>

§ 3. As to arrangements between joint stock companies and their creditors, see 33 & 34 Vict. c. 104.

Deed of arrangement.

Arrangement by composition or liquidation.

Registration office.

Companies.

**ARRAY.** See *Challenge*, § 2, and note.

**ARREST.**—§ 1. To arrest is to stop. The term is applied to persons, to things, and to judgments.

I. § 2. To arrest a person is to restrain him of his liberty by some lawful authority. Arrest is usually made by actual seizure of the defendant's person, but any touching, however slight, of the person is sufficient for this purpose. And arrest is not confined to corporal seizure: where the officer entered the room in which the defendant was, and locked the door, telling him at the same time that he arrested him, the Court held it to be a good arrest. And if the officer say, "I arrest you," and the party acquiesce, or afterwards go with him, this is a good arrest. It seems that in order to constitute a valid arrest, the warrant should be produced, or the party arrested made aware of it.<sup>3</sup>

Person.

§ 3. Arrest in civil proceedings is now rare; the principal instances are: where a person is attached for contempt of Court (see *Attachment*, § 2; *Serjeant-at-Arms*); where the defendant in an action is suspected of intending to leave the country before final judgment (see *Debtors Act*), and in certain cases where a person has made default in the payment of a sum of money recovered or ordered to be paid by a Court or judge, in penal actions, in summary proceedings before justices of the peace,<sup>4</sup> and where the debtor has means to pay but refuses to do so.<sup>5</sup> (See *Committal*, § 3; *Debtors Act*.)

Civil proceedings.

<sup>1</sup> Robson's Bankruptcy, 4, 7, 9, 627.<sup>2</sup> *Ibid.* 648; Bankr. Rules (1870), 315.<sup>3</sup> Archbold's Pr. 606; *Codd v. Cabe*, 1

Exch. D. 352.

<sup>4</sup> Debtors Act, 1869, s. 4.<sup>5</sup> *Ibid.* s. 5.

On mesne process.

§ 4. Formerly arrest in civil proceedings was of two kinds—on mesne and on final process. At common law the object of arrest on mesne process was originally to compel a person to appear in an action, but this was afterwards altered so as to make it a means of compelling him to give special bail.<sup>1</sup> (See *Bail*, §§ 9, 10.) Arrest on mesne process was abolished by stat. 1 & 2 Vict. c. 110, in all cases except that of a defendant suspected of intending to abscond, and was abolished in that case also by the Debtors Act, 1869 (*q. v.*), another mode of arriving at the same result being substituted. Arrest on mesne process in Chancery was to compel a defendant to put in an appearance or answer to a bill of complaint,<sup>2</sup> and no longer exists, bills of complaint having been abolished.

On final process.

§ 5. Arrest on final process was a mode of execution, that is, of enforcing a judgment. The writ used was called a *capias ad satisfaciendum* (*q. v.*). But now this remedy has been much restricted, and is only available in the cases mentioned in the Debtors Act (*q. v.*). (See *Privilege*; *Detainer*: for the history of arrest, see *Smith's Action*, 103.)

Criminal proceedings.

§ 6. In criminal procedure, arrest is generally made under a writ of *capias*, or *venire facias*, or a warrant (*q. v.*). Arrest without warrant is only allowed in certain cases, as where a person is either seen committing an offence or is apparently about to commit some offence.<sup>3</sup>

Admiralty practice.

II. § 7. In admiralty actions a ship or cargo is arrested when the marshal has served the writ of summons in an action in rem.<sup>4</sup> (See *Action*, §§ 12, 17; *Bail*, § 4; *Release*.)

ETYMOLOGY.—Old English, *aresten*; old French, *arester*; from Latin, *ad* and *restare* (*re*, back, and *stare*, to remain).<sup>5</sup>

**ARREST OF JUDGMENT.**—§ 1. On a criminal prosecution, when there is some objection on the face of the record (*e.g.* a material misstatement or uncertainty in the indictment not aided, that is, not corrected, by the verdict), the defendant may at any time between conviction and sentence move the Court in arrest of judgment, and if the objection is well founded, judgment of acquittal is given, which, however, is no bar to a fresh indictment.<sup>6</sup>

§ 2. Under the old common law practice, where a defendant might have taken, but did not take, some objection of substance to the plaintiff's pleading by demurring to it, and a verdict was found for the plaintiff, the defendant might then take the objection by moving in arrest of judgment, and if the objection was well founded, judgment would not be entered for the plaintiff.<sup>7</sup> As a judgment on a verdict is, under the new practice, only entered by order of the judge or Court, this procedure is now inapplicable.<sup>8</sup>

<sup>1</sup> Bl. Comm. iii. 282 *et seq.*

<sup>2</sup> Daniell, Ch. Fr. index, title *Attachment*.

<sup>3</sup> Steph. Comm. iv. 348; stat. 24 & 25 Vict. cc. 97, 100.

<sup>4</sup> Williams & Bruce, 193.

<sup>5</sup> Skeat, Etym. Dict.

<sup>6</sup> Archbold, Crim. Pl. 177.

<sup>7</sup> Smith's *Action* (11th edit.), 183; Steph. Comm. iii. 562.

<sup>8</sup> See also Rules of Court, xix. 18. Sect. 48 of the Judicature Act, 1873, which directed motions in arrest of judgment to be heard before Divisional Courts, was repealed by the Judicature Act, 1875.

**ARSON**, at common law, is the act of unlawfully and maliciously burning the house of another man.<sup>1</sup> At the present day there is no distinction between arson and the crime of unlawfully and maliciously setting fire to a place of worship, a building used in farming, trade, or manufacture, a stack of hay, wood, &c., a ship, a mine of coal, or a public or quasi-public building. The maximum punishment for arson is penal servitude for life. Setting fire to certain other kinds of buildings, or to growing crops, wood, gorse, &c., is punishable with fourteen years' penal servitude.<sup>2</sup> (See *Malicious Injuries to Property*.)

**ARTICLED CLERK** is a pupil to a solicitor under articles of agreement containing mutual covenants binding the solicitor to teach and the articulated clerk to learn the business of a solicitor. The stat. 6 & 7 Vict. c. 73, and various other Acts contain regulations limiting the number of articulated clerks serving the same solicitor at the same time to two, fixing the time which every articulated clerk must serve (three, four, or five years, according to his education and preparation), and the number of examinations which he must pass before he can be admitted a solicitor (see *Examination ; Solicitor*), and regulating the manner in which articles of clerkship must be registered and enrolled. If the service under the articles is interrupted, or put an end to by agreement or by the death of the master, or other cause, fresh articles have to be entered into for the residue of the unexpired term of service.<sup>3</sup>

**ARTICLES** are clauses of a document, and hence "articles" sometimes means the document itself: *e.g.* articles of agreement, articles of partnership, &c.

§ 2. In criminal proceedings in the Ecclesiastical Courts, the first plea is called articles, because it runs in the name of the judge, who *articles and objects*<sup>4</sup> the facts charged against the defendant.<sup>5</sup> (See *Libel*, § 5 ; *Pleading*.)

**ARTICLES OF ASSOCIATION** are regulations for the management of a company formed under the Companies Act, 1862. They are such as the subscribers to the memorandum of association (*q.v.*) deem expedient, provided they do not infringe the provisions of the Act. They generally contain regulations as to calls, transfers of shares, general meetings, votes of members, powers of directors, &c.<sup>6</sup>

**ARTICLES OF THE PEACE** are a complaint made or exhibited to a Court by a person who makes oath that he is in fear of death or bodily harm from some one who has threatened or attempted to do him

<sup>1</sup> Steph. Comm. iv. 99 ; Russell on Crimes, ii. 896 ; Steph. Crim. Dig. 298.

<sup>2</sup> Stat. 24 & 25 Vict. c. 97.

<sup>3</sup> Archbold's Pr. 29 *et seq.* ; Steph. Comm. iii. 214 ; stat. 7 & 8 Vict. c. 86 ; 23 & 24 Vict. c. 127 ; 37 & 38 Vict. c. 68

40 & 41 Vict. c. 25.

<sup>4</sup> Phill. Eccl. Law, 1254, 1290.

<sup>5</sup> Rogers' Eccl. Law, 717.

<sup>6</sup> Thring on Companies, 134 ; Companies Act, 1862, Schedule I., Table A.

injury. The Court may thereupon order the person complained of to find sureties for the peace, and, in default, may commit him to prison.<sup>1</sup> (See *Breaches of the Peace*; *Justices of the Peace*.) It seems that articles may be exhibited in the Queen's Bench or Chancery Divisions of the High Court, or to any justice of the peace<sup>2</sup> (*q. v.*).

**ARTICLES OF RELIGION**, commonly called the Thirty-nine Articles, are those which were agreed upon by the archbishops, bishops, and the whole clergy in the Convocation of 1562. They must be subscribed by persons before being received into the ministry.<sup>3</sup>

**ARTICLES OF WAR—ARTICLES OF THE NAVY**—are regulations made by the crown for the preservation of discipline in the army and navy respectively.<sup>4</sup> (See *Court Martial*.)

**ASPORTATION — ASPORTAVIT.**—Asportation is the act of carrying away goods, especially when the act is wrongful, in which case it is either a civil injury (trespass de bonis asportatis; see *Trespass*, § 4), or a crime, namely, larceny (*q. v.*).

**ASSART** in the old forest laws was the offence of plucking up the thickets or coverts of a forest by the roots so as to make them arable land and prevent them from becoming forest again.<sup>5</sup> The laws of the forest have long since fallen into disuse,<sup>6</sup> and with them the punishment of assarting.

**ETYMOLOGY.**—Norman-French, *assartir*; old French, *essarter*; to improve land by rooting up thickets. Low Latin, *exartare*, from *ex* and *sarrivire*, to hoe or weed.<sup>7</sup>

**ASSAULT.**—§ 1. Strictly speaking, an assault is an unsuccessful attempt to do harm to the person of another, as by menacing with a stick a person who is within reach of it, although no blow be struck.<sup>8</sup> If a blow is struck, the act is a battery (*q. v.*); but in legal proceedings for an alleged battery, in order that if the plaintiff or prosecutor failed to prove the battery, he might still prove the assault, the act complained of would be described as an assault and battery, and hence in popular language the term assault has come to be treated as synonymous with battery.

Civil.      § 2. In private or civil law, an assault is a tort (*q. v.*), giving rise to a right of action for damages. (See *Son Assault Demesne*.)

Criminal.      § 3. In criminal law an assault is—(1) an attempt unlawfully to apply any actual force, however small, to the person of another, directly or indirectly; (2) the act of using such a gesture towards another person as to give him reasonable grounds to believe that the person using the gesture meant to apply actual force to his person; (3) the act of depriving

<sup>1</sup> Bl. Comm. iv. 255.

<sup>2</sup> Stat. 21 Jac. 1, c. 8.

<sup>3</sup> Phill. Eccl. Law, 125; stat. 13 Eliz.

c. 12.

<sup>4</sup> Steph. Comm. ii. 589, 595.

<sup>5</sup> Manwood's Forest, 48 a.

<sup>6</sup> Steph. Comm. i. 668.

<sup>7</sup> Britton, 184 b; Littré, Dict. s. v. *Essarter*.

<sup>8</sup> Underhill on Torts, 118.



another of his liberty. The consent of the person assaulted does not make the assault lawful if obtained by fraud. An act which is reasonably necessary for the common intercourse of life is not an assault: as where persons in a crowd push against one another.

§ 4. A common assault is a misdemeanor punishable by one year's imprisonment with hard labour. Assaults with intent to commit felony, indecent assaults, and other varieties of assault, are liable to special punishments.<sup>1</sup> Assaults on the Queen are high misdemeanors, punishable with penal servitude, or imprisonment with whipping.<sup>2</sup> (See *Battery*.)

§ 5. With certain exceptions, assaults are also punishable on summary conviction before justices of the peace; aggravated assaults on women and children being subject to special punishments.<sup>3</sup> (See *Separation Order; Battery*.)

**ASSEMBLY.** See *Unlawful Assembly*.

**ASSENT.**—The title of a legatee is not complete until the executor has assented to the legacy, and hence executors may dispose even of property specifically bequeathed if they have not assented to the bequest. The assent may be express or implied; almost any language or conduct acknowledging the right of the legatee, or from which it appears that there is nothing to prevent the legatee from having his legacy, amounts to an assent. After the assent the legatee's title to the legacy is complete, and if the legacy is specific he may bring an action to recover the property bequeathed. In the case of pecuniary legacies his only remedy is an action for the administration of the testator's estate.<sup>4</sup> (See *Action*, § 9.)

**ASSESS—ASSESSMENT.**—§ 1. To assess damages, or the value of property or some other unascertained sum, is to fix its amount. Thus, where judgment by default is obtained in an action for detention of goods or pecuniary damages, the value of the goods or the amount of the damages must be ascertained before the judgment can be executed.

§ 2. Assessment is effected by a writ of inquiry (*q. v.*), or by any mode of trial by which a question arising in an action may be tried<sup>5</sup> (*e.g.* by a jury, referee, &c.).

§ 3. Rates and taxes in respect of land and houses are calculated with reference to the estimated value of the property, which is arrived at by a process called assessment. For the purpose of levying poor rates and other local taxes the guardians of every union or parish appoint from among themselves an assessment committee, who revise the valuation lists of the rateable hereditaments in each parish prepared by the over-

<sup>1</sup> Steph. Crim. Dig. 162 *et seq.*; stat. 24 & 25 Vict. c. 100.

<sup>2</sup> Stat. 5 & 6 Vict. c. 51.

<sup>3</sup> Stephen, 167 *et seq.*; Stone's Justice

S.

of the Peace, 240.

<sup>4</sup> Williams on Executors, 1272 *et seq.*, 1783; Watson's Comp. Equity, 1247.

<sup>5</sup> Rules of Court, xxix. 4.

seers.<sup>1</sup> In London the valuation so arrived at is also made use of for the purposes of the inhabited house duty and the property or income tax in respect of land,<sup>2</sup> &c. In other places the mode of assessment for these taxes depends on the acts relating to them. (See *Income Tax*; *Inhabited House Duty*.)

### ASSESSED TAXES. See *Excise*.

**ASSESSOR** is a person called in to assist a Court in trying a question requiring technical or scientific knowledge. It is the practice of the High Court and Court of Appeal in admiralty business (following the practice of the Court of Admiralty) to call in assessors in cases involving questions of navigation or seamanship: they are called "nautical assessors," and are always Brethren of the Trinity House. § 2. Under the Judicature Act, 1873, the High Court or Court of Appeal may call in the aid of one or more assessors in any action or matter;<sup>3</sup> and by the Appellate Jurisdiction Act, 1876, provision is made for the appointment and attendance of the archbishops and bishops of the Church of England as assessors of the Judicial Committee of the Privy Council in ecclesiastical appeals.<sup>4</sup> § 3. Assessors are also employed in various inquiries of a judicial character, *e.g.* in Courts of Survey and investigations by Wreck Commissioners under the Merchant Shipping Act, 1876.<sup>5</sup>

§ 4. An assessor differs from a referee (*q. v.*) in having no voice or power in deciding questions, his duties being confined to assisting the deliberations of the Court.

**ASSETS** are property available for the payment of the debts of a person or corporation. The term is sometimes applied to the property of a living person, *e.g.* a bankrupt, or a married woman whose property has vested in her husband, and to the extent of which he is liable for her debts or liabilities contracted before marriage.<sup>6</sup> It is, however, more often applied to the property of a deceased person, or of a partnership or company which has ceased to carry on business and is being wound up. (See *Winding-up*; *Estate*.)

§ 2. The assets of a deceased person are of various kinds, according as they consist of real or personal estate belonging absolutely to the deceased, or of property over which he had merely a power of appointment. Real assets are the lands or other real property of the deceased which are liable for payment of his debts, whether he has devised or charged them for that purpose or not.<sup>7</sup> The distinction between the various classes of assets is of importance with reference to the order of their administration

Of married woman.

Of partnership or company.

Of deceased person.

Real.

<sup>1</sup> Stat. 25 & 26 Vict. c. 103; 27 & 28 Vict. c. 39, &c.

<sup>2</sup> Stat. 32 & 33 Vict. c. 67.

<sup>3</sup> Sect. 56; Rules of Court, xxxvi.

<sup>4</sup> Sect. 14; Reg. Gen., 15th Nov. 1876; 2 P. D. 384.

<sup>5</sup> As to assessors in county court actions, see Pollock, C. C. Pr. 105.

<sup>6</sup> Married Women's Prop. Act, 1874.

<sup>7</sup> Williams' R. P. 82; Williams on Real Assets; stat. 3 & 4 Will. 4, c. 104; 32 & 33 Vict. c. 46.

where the residuary estate is insufficient for payment of all the debts. (See *Administration*, § 2.)

§ 3. Another division of assets is into legal and equitable. Legal assets Legal and equitable. comprise everything which an executor takes *virtute officii*, and with which he would have been charged in an action at law by a creditor, while equitable assets are such as could only be reached by the creditor in a Court of Equity. Thus, personal estate, including leaseholds, is legal assets, while land charged or devised by a testator for payment of debts, and equitable interests in or trusts of chattels, &c., are equitable assets. The distinction is of importance with reference to the estates of persons who died before the 1st January, 1870, because in the case of such a person leaving an insolvent estate his debts are payable out of the legal assets in a different order from equitable assets.<sup>1</sup> (See for this order, *Administration*, § 3.) In the case of any person dying on or after the 1st January, 1870, his debts, whether by specialty or simple contract, are paid *pari passu* out of the assets without priority one over another,<sup>2</sup> and there is therefore no distinction between legal and equitable assets in such cases.<sup>3</sup>

§ 4. "Assets by descent" are lands which descend to an heir charged with the debts or obligations of his ancestor. The term was originally used in the law of warranty (*q. v.*) to signify land which descended to an heir of equal value to land as to which his ancestor had entered into a warranty: thus, if A. was heir to his mother, subject to his father's estate by the curtesy, and the father aliened the land with warranty and died, this warranty did not bar A.'s title to the land without assets in fee simple, that is, unless land in fee simple of equal value descended to him from his father.<sup>4</sup> The term "assets by descent" was afterwards applied where a man died leaving debts by specialty in which his heirs were bound, in which case his heir was liable to pay the debts, so far as he had assets by descent, that is, to the value of the land which descended to him.<sup>5</sup> Now that all the land left by a deceased person is liable for his debts, the term "assets by descent" has been supplanted by "real assets."

ETYMOLOGY.—Norman-French: *asetz*, *asset*, enough or satisfaction. Latin *ad* and *satis*.<sup>6</sup> (See *Marshalling*.)

**ASSIGN—ASSIGNMENT.**—I. § 1. "Assign," like "grant" (*q. v.*) is a general word signifying a transfer of property: thus we speak indifferently of granting or assigning a reversion in land.<sup>7</sup> An assignment is the act of assigning or the instrument by which it is done.

§ 2. In a conveyance to "A., his heirs and assigns," or "A., his "Assigns." executors, administrators, and assigns," &c., the word "assigns" is in reality mere surplusage, because the estate or interest passes without it (see *Words of Limitation*). In a covenant by "A., his heirs and assigns," the word "assigns" includes all those who take either immediately or remotely from or under A., whether by conveyance, devise, descent or other act of law, *e. g.* as assignee from A.'s heir, or as heir to A.'s

<sup>1</sup> White & Tudor's L. C. ii. 101.

<sup>2</sup> Stat. 32 & 33 Vict. c. 46.

<sup>3</sup> See Watson's Comp. Eq. 29.

<sup>4</sup> Stat. 6 Edw. 1; Litt. § 724; Co. Litt.

365 a, 374 b.

<sup>5</sup> Williams' R. P. 80.

<sup>6</sup> Britton, 192 b; Littre, Dict. s. v. *Assez*.

<sup>7</sup> See Woodfall's L. & T. 220, 232.

assignee, and so on<sup>1</sup> (see *Covenant*); and whether they take the fee simple, or merely a limited interest, *e. g.* by lease.<sup>2</sup>

Personal  
estate, &c.

§ 3. In its more special sense, to assign is to transfer personal estate, or chattels real, or certain rights in real or personal estate. The term is especially applied to leases, terms of years, estates for life in land or personal property, and to choses in action, and incorporeal chattels. The word "assign" is the proper technical operative word, but any expression showing an intention to make a complete transfer will constitute an assignment.<sup>3</sup> An assignment by way of sale is an absolute assignment for money: an assignment by way of mortgage is one made as security for a debt or the like—*e. g.* a bill of sale (*q. v.*).

Form of.

§ 4. Assignments of leases and terms of years must be by deed<sup>4</sup>; assignments of choses in action and incorporeal personal property do not as a rule require to be by deed. In the case of policies of life and marine assurance notice of the assignment must be given to the insurance company; in the case of patents the assignment must, and in the case of copyrights it may, be registered.<sup>5</sup>

Choses in  
action.

§ 5. Formerly choses in action were not assignable at law except in a few cases (*e. g.* bills of exchange), but choses in action arising from contract (such as debts) were assignable in equity. It was, however, necessary for the assignee to give notice of the assignment to the debtor, trustee or stakeholder, in order to prevent him from paying the money to the original creditor (the assignor) or some subsequent assignee. Thus if A. owed B. a debt and B. assigned it to C., the assignment was not complete as between C. and A. until notice of it had been given to A. And C. took the debt subject to any prior equities (*e. g.* an agreement between A. and B. by which the debt was affected). Such assignments of choses in action were called equitable assignments. Now, by the Judicature Act, 1873, an absolute assignment in writing of a legal chose in action is effectual at law as well as in equity, provided notice is given to the debtor, trustee, &c.<sup>6</sup>

Assignment  
of dower.

II. § 6. "Assign" is also sometimes used in its primary sense of marking out, allotting. Thus in ordinary cases before a widow can take possession of any of her husband's land as tenant in dower, her part must be assigned to her, either by agreement between her and the heir, or by the sheriff in execution of a judgment obtained by her.<sup>7</sup> (See *Metes and Bounds*.)

Of waste.

§ 7. Common of estovers and turbary is sometimes limited to those parts of the waste which are assigned, that is, pointed out by the owner from time to time for the purpose.<sup>8</sup>

<sup>1</sup> *Baily v. De Crespigny*, L. R., 4 Q. B. p. 186; *Spencer's Case*, 5 Co. 17 b.

<sup>2</sup> *Tait v. Gosling*, 11 Ch. D. 273.

<sup>3</sup> *Dauids. Conv.* ii. 212; *Shepp. Touch.* 266.

<sup>4</sup> Statute of Frauds, s. 4; *Woodfall*, 221; stat. 8 & 9 Vict. c. 106, s. 3.

<sup>5</sup> *Williams' P. P.* 276, 281; stat. 5 & 6 Vict. c. 45; 15 & 16 Vict. c. 83; 30 & 31

Vict. c. 144; 31 & 32 Vict. c. 86.

<sup>6</sup> Jud. Act, 1873, s. 25. See *White & Tudor's L. C.* ii. 707; *Fisher on Mortgage*, 84; *Brice v. Bannister*, 3 Q. B. D. 569.

<sup>7</sup> Co. Litt. 34 b. As to where assignment is not necessary, see Litt. § 43; *Dower*.

<sup>8</sup> *Heydon's Case*, 13 Co. 68.

As to assignment of breaches and errors, see *Breach* ; *Error*.

ETYMOLOGY.]—Norman-French : *assigner*,<sup>1</sup> from Latin *assignare*, to mark out, allot.

**ASSIGNEE** (I.) is a person to whom an assignment is made, and the term is therefore usually applied to personal property: it is, however, sometimes applied to realty; thus, we speak of the assignee of a reversion.<sup>2</sup> (See *Assignment* ; *Assign*.)

II. § 2. In the old bankruptcy law, assignees filled a similar place to that now occupied by trustees (*q. v.*). By stat. 6 Geo. 4, c. 16, the estates of bankrupts were administered by persons chosen by the creditors, and to whom the bankrupt's property was assigned by the commissioners for that purpose; they were, hence, usually called assignees, or creditors' assignees.<sup>3</sup> § 3. By stat. 1 & 2 Will. 4, c. 56, official assignees were introduced: they were permanent officials who, before their appointment, must have been engaged in commerce, &c., and one of them acted in each bankruptcy jointly with the creditors' assignees.<sup>4</sup> Creditors' Assignees. Official Assignees.

**ASSISE** or **ASSIZE** (I.) anciently signified a legislative enactment. some old statutes and ordinances are still so called, *e. g.* the assise of bread, the assise of Clarendon, the assise of the forest, &c.<sup>5</sup> Legislative.

II. § 2. An assise passed in the reign of Henry II. (probably the assise of Northampton, 1176) provided for the trial of questions of seisin and title to land by a recognition or inquiry of twelve men sworn to speak the truth: hence the proceedings, and the jurors themselves, became known as the assises. Some assises were called from the objects for which they were brought (such as the assise of common of pasture, to recover seisin of a common of pasture), but more often from the occasions which gave rise to them, *e. g.* the assises of novel disseisin, mort d'auncestor, &c.<sup>6</sup> (See the following titles.) Assises of land.

III. § 3. Magna Charta provided that assises of novel disseisin and mort d'auncestor should only be taken in the shires where the lands lay, and for this purpose justices were sent into the country once a year: hence they were called justices of assize. Afterwards the Statute of Nisi Prius (13 Edw. 1, c. 30) enacted that the justices of assize should try the issues in ordinary actions in the counties in which they arose, and return the verdict to the Court at Westminster. Hence trials before judges on circuit are said to take place at the assizes (see *Circuit* ; *Nisi Prius*), where also are held trials under commissions of "oyer and terminer" and "gaol delivery" (*q. v.*).<sup>7</sup> The assizes, therefore, are for criminal as well as civil business. The judges also sit under a commission of the peace (see *Justices of the Peace*). The assizes are usually held twice a year, after the Trials at the assizes.

<sup>1</sup> Britton, 248 a, 251 a.

<sup>2</sup> Davidson, Conv. i. 125.

<sup>3</sup> Robson's Bankruptcy, 4.

<sup>4</sup> *Ibid.* 5.

<sup>5</sup> Litt. § 234. See the extracts in Stubb's Charters, 137 *et seq.*

<sup>6</sup> Litt. § 234; Reeves' Hist. i. 86, 342 *et seq.*; Digby, Hist. R. P. 79.

<sup>7</sup> Reeves, i. 245; Smith's Action (11th edit.), 134. Justices of assize, oyer and terminer and general gaol delivery, also have jurisdiction in criminal matters formerly within the jurisdiction of the High Court of Admiralty. (Stat. 7 & 8 Vict. c. 2.)

Hilary and Trinity sittings, but in some parts of the country winter assizes are also held in the vacation after Michaelmas sittings, chiefly for criminal trials.<sup>1</sup> The jurisdiction of the Courts created by Commissions of Assize, of Oyer and Terminer, and of Gaol Delivery, is now vested in the High Court of Justice.<sup>2</sup> The judges of assize for each county are appointed by special commission from the Crown, and are hence also called commissioners of assize: they must be selected from the judges of the High Court and the Court of Appeal, or from the serjeants at law and Queen's counsel.<sup>3</sup>

ETYMOLOGY.]—Norman French: *assise*, from Latin *assidere*, to sit together, either as a legislative or as a judicial assembly.

**ASSISE OF DARREIN PRESENTMENT**, or last presentation, was a real action which lay where a man (or his ancestors under whom he claimed) had presented a clerk to a benefice, who was instituted, and afterwards, upon the next avoidance, a stranger presented a clerk, and thereby disturbed the real patron. It was abolished by stat. 3 & 4 Will. 4, c. 27, having been previously superseded in practice by the action of *quare impedit* (*q. v.*).<sup>4</sup>

**ASSISE OF MORT D'ANCESTOR** was a real action which lay to recover land of which a person had been deprived on the death of his ancestor by the abatement or intrusion of a stranger.<sup>5</sup> (See *Abatement*, § 2.) It was abolished by stat. 3 & 4 Will. 4, c. 27.

**ASSISE OF NOVEL DISSEISIN** was a real action which lay to recover land of which a person had been *recently* disseised.<sup>6</sup> It was abolished by stat. 3 & 4 Will. 4, c. 27. It was called *assisa nova disseisinæ* because the judges on circuit only tried questions of disseisin which were new, that is, which had arisen since the last eyre.<sup>7</sup>

**ASSISTANCE.** See *Writ of Assistance*.

**ASSISTANT JUDGE** is a judge of the Court of General or Quarter Sessions in Middlesex: he differs from the other justices in being a barrister of ten years' standing, and in being salaried.<sup>8</sup>

**ASSOCIATES** were formerly officers attached to the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court. "Their duties require them to be in Court whenever the judges . . . are sitting at Nisi Prius. They make out the cause list, empanel the jury, call on the causes, read aloud any documents put in and required to be read, &c."<sup>9</sup> By the Judicature (Officers) Act, 1879, the existing associates were converted into Masters of the Supreme Court (*q. v.*), and the office of associate abolished.

<sup>1</sup> Steph. Comm. iii. 351; Winter Assizes Act, 1876; Spring Assizes Act, 1879.

<sup>2</sup> Jud. Act, 1873, ss. 16, 29.

<sup>3</sup> *Ibid.* s. 37.

<sup>4</sup> Bl. Comm. iii. 245.

<sup>5</sup> *Ibid.* 185; Co. Litt. 159 a.

<sup>6</sup> Bl. Comm. iii. 187; Co. Litt. 159 a.

<sup>7</sup> Co. Litt. 153 b.

<sup>8</sup> Stat. 7 & 8 Vict. c. 71; 22 & 23 Vict. c. 4; Pritchard's Q. S. 31.

<sup>9</sup> Second Report Legal Dep. Comm. 14.

**ASSOCIATION** is a word of vague meaning, used to indicate a collection of persons who have joined together for a certain object. It is applied sometimes to large partnerships or unincorporated companies, and sometimes to corporations formed not for profit, but for some scientific, charitable, or similar purpose.<sup>1</sup> (See *Company*; *Corporation*; *Partnership*; *Articles of Association*; *Memorandum of Association*.)

**ASSUMPSIT** (Latin: "he promised") was the name for that action which lay to recover damages for breach of a simple contract—that is, a promise not under seal.<sup>2</sup> It was a species of action on the case.<sup>3</sup> (See *Action*; *Trespas*.)

**ASSURANCE—ASSURE.**—I. "Assure" and "assurance" are the old words for "convey" and "conveyance" (*q. v.*).<sup>4</sup> They are still used in this sense in the "covenant for further assurance," which occurs in every conveyance at the present day. (See *Covenant*.)

II. "Assure" and "assurance" are also equivalent to "insure" and "insurance" (*q. v.*).

**ATTACHMENT.**—§ 1. To attach a person is to arrest him under a writ called a writ of attachment: to attach property is to seize it or place it under the control of a Court.

I. § 2. Attachment of the person is of two kinds, that employed in ordinary cases of disobedience to an order, judgment, &c. or other contempt of Court committed in the course of a suit, and that employed where no suit is pending. Of person.

§ 3. The former kind is one mode of enforcing obedience to the orders of the High Court of Justice, such as injunctions, orders for discovery and production,<sup>5</sup> and certain judgments.<sup>6</sup> The writ is issued by leave of the Court or a judge on notice to the person concerned,<sup>7</sup> and directs the sheriff to arrest him.<sup>8</sup> The contemnor then remains in prison until he has cleared his contempt or is discharged. An attachment to enforce payment of a sum of money can only be issued in the cases mentioned in the Debtors Act, 1869 (*q. v.*); *e. g.* against a defaulting trustee.<sup>9</sup> (See *Committal*.) In action.

§ 4. The other kind of attachment is issued to punish disobedience to the Queen's writs, contempt of Court, disobedience to the rules or awards of a Court, abuse of the process of a Court, forgeries of writs, &c. Its peculiarity is that it "may be awarded by the discretion of the justices upon a bare suggestion, or of their own knowledge, without any appeal, indictment, or information;"<sup>10</sup> if it is awarded on the complaint of a private person, the latter is called the prosecutor,<sup>11</sup> and the proceedings Without action.

<sup>1</sup> Companies Act, 1867, s. 23.

<sup>2</sup> Dicey on Parties, 24.

<sup>3</sup> Stephen's Pl. 18.

<sup>4</sup> See Shepp. Touch. *passim*.

<sup>5</sup> Rules of Court, xxxi. 20.

<sup>6</sup> *Ibid.* xlii. *passim*.

<sup>7</sup> *Ibid.* xliv. 2.

<sup>8</sup> See Daniell's Ch. Pr. 386 *et seq.*; and the Prisons Act, 1877, s. 26. As to attachment in admiralty practice, see Williams

& Bruce's Admiralty, 299 *et seq.*, and *Monition*.

<sup>9</sup> Daniell, 907; see *Esdaile v. Visser*, 13 Ch. D. 421. The old process of attachment in Chancery to compel appearance or answer by a defendant has been abolished by the Judicature Acts.

<sup>10</sup> Hawkins' Pl. Cr. II. xxii.

<sup>11</sup> *Ibid.* § 1.

generally take the following course (see, however, note (1) *infra*): the prosecutor moves for a rule for an attachment, and on this being granted, a writ of attachment issues, which commands the sheriff to attach (*i.e.* arrest) the defendant; on the sheriff returning “cepi corpus” a motion of course is made for a habeas corpus to produce the defendant in Court, and the prosecutor then moves that the defendant be sworn to answer interrogatories; the defendant if he does not give bail is then returned to prison: the interrogatories, which in effect contain the charge against the defendant, are filed and the defendant is examined on them before a master, and the examination is referred to the Queen’s coroner and attorney, on whose report the Court sentences the defendant to fine or imprisonment, or discharges him.<sup>1</sup>

Of property. II. Attachment of property is of importance in two cases—attachment of debts, and attachment in the Mayor’s Court.

Of debts. § 5. Attachment of debts is a proceeding employed in actions in the High Court where a judgment for the payment of money has been obtained against a person to whom money is owing by another person; in such a case the judgment creditor on application to a judge at chambers may obtain an order that all debts owing or accruing<sup>2</sup> from that person (who is called the garnishee) to the judgment debtor shall be attached to answer the judgment debt. The effect of this order is to bind the debt in the hands of the garnishee as soon as he is served with the order, so that he cannot deal with it until the judgment creditor’s claim is disposed of. If he does not dispute the debt he must either pay it over to the judgment creditor or pay the amount into Court.<sup>3</sup>

Garnishee order.

§ 6. As to attachment in the Lord Mayor’s or City of London Court, see *Foreign Attachment*.

ETYMOLOGY.]—Old French: *attacher*, to hold fast, apprehend.<sup>4</sup>

**ATTAINDER** was that extinction of civil rights and capacities which formerly took place when judgment of death or outlawry was recorded against a person who had committed treason or felony. The two principal consequences were the forfeiture and escheat of the land and goods belonging to the criminal (see *Escheat*; *Forfeiture*), and the corruption of his blood, by which was meant that he became incapable of holding or inheriting land, or of transmitting a title by descent to any other person. These consequences of attainder were mitigated by various Acts of Parliament, until the statute 33 & 34 Vict. c. 23 wholly abolished attainder, corruption of blood, forfeiture, and escheat for treason or felony, preserving them, however, in the case of outlawry.<sup>5</sup>

ETYMOLOGY.]—See *Attaint*.

<sup>1</sup> Chitty’s Pr. (12th ed.), 1710 *et seq.* Order XLIV. of the Rules of Court provides that a writ of attachment shall have the same effect as a writ of attachment in Chancery: it seems to be considered by some writers that this abolishes the old common law practice above described.

<sup>2</sup> See *Accrue*, § 1.

<sup>3</sup> Rules of Court, xlv.; Coe’s Practice, 142 *et seq.*; Smith’s Action, 207; Day’s C. L. P. Acts, 313.

<sup>4</sup> Skeat’s Etym. Dict. s. v.

<sup>5</sup> See Steph. Comm. i. 442; iv. 454; Williams’ R. P. 126; Shelford’s R. P. Stat. 456.



**ATTAINT.**—I. § 1. A person was said to be attaint when he was under attainder<sup>1</sup> (*q. v.*).

II. § 2. An attaint or writ of attaint was anciently a proceeding “to enquire whether a jurie of twelve men gave a false verdict, that so the judgment following upon it may bee reversed, and the partie restored to all that he hath lost.”<sup>2</sup> For this purpose a jury (called the grand jury) was summoned by a writ of attaint to try the validity of the verdict of the first, or, as it was called for distinction, the petty jury, and if the second jury’s verdict was contrary to the first, not only was the first verdict set aside, but the first jury lost all civil rights and became liable to many barbarous punishments. Proceeding by attaint was abolished by 6 Geo. 4, c. 50, s. 60.<sup>3</sup> At the present day, when a verdict is suspected of being false or erroneous, a motion is made for a new trial. (See *Trial*.)

**ETYMOLOGY.**—Latin *attinctus*, stained, “for that if the petty jury be attainted of a false oath they are stained with perjury.”<sup>4</sup>

**ATTEMPT.**—§ 1. An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted or were successful, as where a person procures dies for the purpose of coining bad money. It is immaterial whether the offender voluntarily desists from the actual commission of the crime or not. § 2. Every attempt to commit an offence is a misdemeanor, unless it is otherwise specially provided for. Attempts to commit murder and some other crimes are felonies.<sup>5</sup> § 3. If, on the trial of a person indicted for a felony or misdemeanor, it appears to the jury that he did not commit the offence, but only attempted it, the jury may acquit him of the offence, and find him guilty of the attempt, as if he had been indicted for it.<sup>6</sup>

Conviction  
under 14 & 15  
Vict. c. 100.

**ATTENDANT TERM.** See *Term*.

**ATTEST—ATTESTATION.**—§ 1. To attest is literally to witness any act or event, but the term is now exclusively applied to the signature or execution of a document. When A. executes a deed in the presence of B., and B. signs his name on the document as a token of his having witnessed A.’s execution, B. is said to attest the execution. (See *Appointment*.) The term is even more commonly applied to wills than to deeds. A clause called an attestation clause is generally written at the foot of the instrument as a declaration by the attesting witness that the instrument was signed or executed in his presence. If the document is required to be strictly proved, the attesting witness must prove its execution, unless he is dead or cannot be found (in which case proof of his handwriting must be given), or unless the document is admitted.<sup>7</sup> § 2. An attested copy of a document seems to be an examined copy, with a certificate or memorandum of its correctness, signed by the persons who have examined it. (See *Copy*.)

<sup>1</sup> Co. Litt. 390 b.

<sup>2</sup> Finch’s Law, 484.

<sup>3</sup> Smith’s Action, 173.

<sup>4</sup> Co. Litt. 294 b, 391 b.

<sup>5</sup> Stephen’s Crim. Dig. 29; Russell on Crimes, i. 188.

<sup>6</sup> Stat. 14 & 15 Vict. c. 100, s. 9; Archbold’s Crim. Pl. 176.

<sup>7</sup> Best on Evidence, 306, 669.

**ATTORN—ATTORNMENT.**—§ 1. Attornment is the agreement of the owner of a particular estate in land to become the tenant of a person who has acquired the estate next in reversion or remainder, or the right to the rent or other services by which the land is held.<sup>1</sup> Thus if A., being entitled to land in fee simple, grants a lease of it to B., then B. is A.'s tenant. If, however, A. conveys his remainder to C., in this case B. does not stand in the relation of tenant to C., unless he agrees or consents to become his tenant. "And this yielding of consent is called an attornment."<sup>2</sup> It may be either express (in deed) or implied (in law); thus if the tenant, after notice of the grant of the reversion, pay his rent to the grantee, this is a good attornment in law.<sup>3</sup> § 2. By statute 11 Geo. 2, c. 19, s. 11, attornments made by tenants to strangers claiming title to the estate of their landlords are null and void, and their landlord's possession not affected thereby unless made with their privity and consent, or in pursuance of a judgment or order.<sup>4</sup> § 3. Formerly attornment was necessary in most cases to perfect the grant of a reversion or remainder, so that the grant was ineffectual until it was given.<sup>5</sup> Now, however, by the statute 4 Anne, c. 16, s. 9, such grants are effectual without the attornment of any of the tenants, and the grantee of a reversion may sue or distrain on the tenants for the rent if he has given them notice of the grant.<sup>6</sup>

On assign-  
ment of rever-  
sion, &c.

In mortgage.

§ 4. Where a mortgage of land or buildings is executed with the intention that the mortgagor shall remain in possession, it is (or was before the recent Act) usual to insert in the mortgage a clause of attornment by which the mortgagor attorns tenant to the mortgagee at a rent equal to the yearly interest on the debt, or sometimes in excess of the interest so as to go towards reduction of the principal. The chief advantage of this is to give the mortgagee a right of distress if the interest (or principal) is not paid. Such an attornment is now a bill of sale within the meaning of the Bills of Sale Act, 1878, and consequently if the mortgage is not registered, and the mortgagor becomes bankrupt, the mortgagee would be unable to seize any of his chattels.<sup>7</sup>

**ETYMOLOGY.**—Norman-French: *attourner*,<sup>8</sup> from the Latin *tornare*, to turn in a lathe.<sup>9</sup> *Attourner* was used not only to signify the acceptance of a new lord by the tenant, but also the transfer of the tenant's services by the old lord to the new,<sup>8</sup> so that the primary sense of the word seems to be to change or assign.

**ATTORNEY** "is an ancient English word, and signifieth one that is set in the turne, stead, or place of another; and of these some be private . . . and some be publike, as attorneys at law."<sup>10</sup>

<sup>1</sup> Co. Litt. 312 a.

<sup>2</sup> Shepp. Touch. 253; Litt. § 551.

<sup>3</sup> Shepp. Touch. 262.

<sup>4</sup> The statute proceeds: "or to any mortgagee after the mortgage has become forfeited." These words refer to the old form of mortgage on condition, and are apparently inapplicable to a modern mortgage. The question, however, has been deprived of importance by stat. 4 Anne, c. 16.

<sup>5</sup> Shepp. Touch. 253; Litt. §§ 558 *et seq.* Hence, means were appointed in cer-

tain cases to compel the tenant to attorn (Touch. 254, 256). (See *Per quæ Servitia; Quem Redditum Reddit; Quid Juris Clamat.*)

<sup>6</sup> Woodfall's L. & T. 243; *Moss v. Gallimore*, Smith's L. C. i. 629.

<sup>7</sup> Sect. 6. See *Hampson v. Fellows*, L. R., 6 Eq. 575; Pope on Bills of Sale, 12.

<sup>8</sup> Britton, 176 a, 106 a.

<sup>9</sup> Diez, i. 418.

<sup>10</sup> Co. Litt. 51 b, 128 a; Britton, 285 b; *irror*, ii. § 31.

I. § 2. A private attorney is a person appointed by another to act in his place, or represent him for a certain purpose: the document by which the appointment is made is called a power or letter of attorney. (See *Power of Attorney; Proxy; Agent; Syndic.*)

Private or  
attorney in  
fact.

II. § 3. Attorneys at law were formerly persons admitted to practise in the Superior Courts of Common Law; they conducted proceedings in those Courts for suitors who did not appear in person.<sup>1</sup> In practice every attorney was also a solicitor (*q. v.*), and was only called an attorney in formal proceedings in the Common Law Courts. Now, by the Judicature Act, 1873, the expression "attorney" is abolished, and the title "Solicitor of the Supreme Court of Judicature" is substituted.<sup>2</sup>

Public or  
attorneys at  
law.

**ATTORNEY-GENERAL** is the principal counsel of the Crown. As counsel he is bound to conduct prosecutions and other legal proceedings on behalf of the Crown, if required to do so. He also acts as representative of the Crown in matters connected with charities, patents, and in criminal proceedings instituted by government. (See *Information; Patent; Fiat.*) His functions are, however, political as well as legal, for he is almost invariably a member of the House of Commons, and is appointed to his office on the advice of the government for the time being: there is therefore a change of attorney-general on every change of government. In the House of Commons he answers questions on legal matters of public interest, and has charge of government measures relating to legal subjects. § 2. The Prince of Wales has an attorney-general; and when there is a Queen Consort she has one also.<sup>3</sup> (See *Solicitor-General.*)

**AUCTION.**—§ 1. Sales by auction of real estate are subject to the statute 30 & 31 Vict. c. 48, which makes it unlawful, in every case where a sale is stated to be without reserve, for the vendor to employ a person to bid at the sale, but the vendor may in the particulars or conditions of sale reserve the right to bid, and employ a person to bid accordingly.<sup>4</sup> § 2. At common law, the employment of a puffer made a sale by auction void in all cases: the rule has been altered by the above statute so far as sales of real estate are concerned, but still applies to sales of goods.<sup>5</sup> § 3. An auctioneer is required to take out a licence.<sup>6</sup>

**AUDIENCE.** See *Court of Audience.*

**AUDITA QUERELA**, in the old common law practice, was a writ given in order to afford a remedy to the defendant in an action where

<sup>1</sup> Bl. Comm. iii. 25.

<sup>2</sup> Jud. Act, 1873, s. 87.

<sup>3</sup> Steph. Comm. iii. 274; *Solicitor of Duchy of Cornwall v. Canning*, 5 P. D.

114.

<sup>4</sup> Dart's V. & P. 112.

<sup>5</sup> *Green v. Baverstock*, 14 C. B., N. S. 204.

<sup>6</sup> Stat. 8 & 9 Vict. c. 15; 27 & 28 Vict. c. 56, s. 14; as to what is an auction within the meaning of these acts, see Fisher's Digest, 7689.

matter of defence (such as a release) had arisen since the judgment, and on which the defendant applied to the Court, whence the name *auditâ querelâ defendantis*<sup>1</sup> "the defendant's complaint having been heard." The proceeding by *auditâ querelâ* is abolished, the present practice being to apply for a stay of execution or other relief against the judgment.<sup>2</sup>

**AUSTIN.**—John Austin was born in 1790, and entered the army at an early age. After serving five years he left the army, and was called to the bar in 1818, but gave up practice in 1825 from ill-health. In 1827 he went to Germany and studied Roman law at Heidelberg and Bonn with the view of qualifying himself for the professorship of jurisprudence at University College, London, to which post he had been appointed. In 1832 he resigned the appointment and published "The Province of Jurisprudence Determined." After that date he lived principally on the Continent until 1848, when the Revolution drove him back to England. He died about 1860. In 1861 a new edition of the "Province" was published by his widow, followed by two volumes containing his fragments. In 1869 an improved and completer edition of the whole was published by Mr. Robert Campbell, with the assistance of notes of Austin's Lectures taken by John Stuart Mill when a member of his class. Mr. Campbell published a reprint of this edition in 1873, and an abridgment in 1875. Austin's work on Jurisprudence is still a valuable and suggestive work, notwithstanding its errors and incompleteness, and notwithstanding the light which has since been thrown on the subject by the writings of Savigny, Ahrens, Kuntze, and others.

**AUTER DROIT.**—A person is said to be entitled to something in *auter droit*, *i. e.* in right of another, when he is entitled in a representative capacity: for example, as trustee, executor, guardian, &c. (See *Right; Merger.*)

**AUTER VIE.** See *Tenant for Life.*

**AUTERFOIS ACQUIT** (= "formerly acquitted") is a plea in bar to a criminal prosecution, to the effect that the prisoner has been already tried for the same offence before a court of competent jurisdiction and has been acquitted. Such a plea, if true, is a good defence. The rejection of a bill of indictment by a grand jury is not an acquittal.<sup>3</sup> (See *Plea.*)

**AUTERFOIS ATTAINT** (= "formerly attainted") is a plea in bar to a prosecution. Formerly if a man was attainted of treason or felony, he could not be indicted for another felony while the attainder remained in force, because he was considered dead in law. But by the statute

<sup>1</sup> Archbold's Pr. 510; Wms. Saund. ii. 439; Bl. Comm. iii. 405.

<sup>2</sup> Rules of Court, xlii. 22.

<sup>3</sup> Archbold's Crim. Pl. 136; Steph. Comm. iv. 401; stat. 14 & 15 Vict. c. 100, s. 28.

7 & 8 Geo. 4, c. 28, s. 4, attainder is no bar to an indictment except for the same offence, and in effect the plea of *auterfois attain* is now obsolete.<sup>1</sup>

**AUTERFOIS CONVICT** (=“formerly convicted”) is a plea in bar to a criminal prosecution, by which the prisoner alleges that he has been already tried and convicted for the same offence before a Court of competent jurisdiction. Such a plea, if true, is a good defence.<sup>2</sup>

**AUTHORITY.**—I. § 1. A person is said to be authorized or to have an authority when he is in such a position that he can act in a certain manner (defined by the authority) (a) without incurring the liability to which he would be exposed in the absence of the authority; and (b) so as to produce the same effect as if the person granting the authority had himself done the act. Thus, if I authorize A. to sell goods for me, and he does so, he incurs no obligation against me for so doing, and confers a good title on the purchaser. (See *Agent*.)

§ 2. With reference to the mode of its creation, an authority may be either express (as in the above instance), implied (or inferred),<sup>3</sup> implied in law, customary (*e.g.* the right of the lord of a manor to make grants of land in the manor<sup>4</sup>), statutory, &c. (See *Factors' Acts*.)

§ 3. With reference to its extent: an authority may be *general*, to act in all the principal's affairs, or *special*, concerning some particular object (*e.g.* to buy a particular piece of land); it may be *limited* by certain instructions as to the conduct he is to pursue, or *unlimited*, *i.e.* leaving his conduct to his discretion.<sup>5</sup> (See *Agency*.)

§ 4. A mere, bare, or naked authority is an authority which exists only for the benefit of the principal, and which, therefore, the agent must execute in accordance with his directions, as opposed to an authority coupled with an interest, where the person vested with the authority has a right to exercise it, partly or wholly, for his own benefit.<sup>6</sup> Thus, an authority to collect debts, given by the owner of a business on his assigning it to a purchaser, is an authority coupled with an interest, because the purchaser, by purchasing the business, has acquired the right to obtain the benefit of it.<sup>7</sup> A mere authority is revocable by the grantor at any time; one coupled with an interest is not. (See *Power; Warrant*.)

II. § 5. In the law relating to public administration, an authority is a body having jurisdiction in certain matters of a public nature. Thus, sanitary authorities have powers in relation to the public health; of a similar nature are prison authorities, local authorities for the execution of the Artizans' Dwellings Acts, &c. (*q.v.*), all of which have only a local

Express, implied, customary, statutory.

General, special, limited.

Mere or naked.

Coupled with an interest.

Administrative authorities.

<sup>1</sup> Archbold's Crim. Pl. 143.

<sup>2</sup> *Ibid.* 140; Steph. Comm. iv. 403; stat. 24 & 25 Vict. c. 100, ss. 44, 45.

<sup>3</sup> Smith's Merc. Law, 110, 125.

<sup>4</sup> Co. Litt. 52 b.

<sup>5</sup> Smith, 113.

<sup>6</sup> See Co. Litt. 49 b, 52 b, 113 a, 181 b.

<sup>7</sup> Chitty on Contracts, 192.

jurisdiction. Lighthouse authorities, on the other hand, are divided into general lighthouse authorities (*e.g.* the Trinity House), and local lighthouse authorities.<sup>1</sup>

Simple or  
particular  
average.

General  
average.

**AVERAGE.**—I. § 1. In the ordinary sense of the word, average is where goods on board a ship, or part of the ship herself, are lost or damaged. § 2. Simple, petty, or particular average is where any damage is done to the cargo or vessel by accident or otherwise, but not for the general benefit of the ship and cargo, such as the loss of an anchor or cable, the starting of a plank, the turning sour of a cargo of wine, “which are all losses which rest where they fall;”<sup>2</sup> that is to say, the loss in each case is borne by the owner of the thing damaged or lost, or the person who has insured him (see *Memorandum*). § 3. The term average, however, is usually applied to cases of general (or gross) average, which is a highly important branch of maritime law. General average is where any loss or damage is voluntarily and properly incurred in respect of the goods or of the ship for the general safety of the ship and cargo; in this event the law provides that an equitable adjustment and distribution of the loss shall be made between all the parties interested, each contributing his share.<sup>3</sup> The simplest and oldest case of general average occurs where goods are thrown overboard in a storm for the purpose of saving the ship and the rest of the cargo; here the several persons interested in the ship, freight and cargo must contribute rateably to indemnify the person whose goods have been sacrificed against all but his proportion of the general loss<sup>4</sup> (see *Jettison*). So where a ship was in the course of her voyage run foul of by another ship, owing to the violence of the wind and weather, and was damaged, and the master was in consequence obliged to cut away part of the rigging, the expenses of repairs were held to be a general average.<sup>5</sup> (See *Adjustment*, § 2; *Contribution*.)

ETYMOLOGY.]—Italian, *avaria*, and Dutch, *haverij*, *avarij*, signifying damage from perils of the sea; French, *avarie*; German, *havarie*, signifying (1) damage from perils of the sea; (2) harbour duty, whence it is said that the word comes from *hafen* or *haven*, a harbour; an ingenious and plausible suggestion is that it comes from the Arabic *‘awār* = damage, injury (Diez, *Etym. Wörtl.*; Littré, *Dict. s. v.*).

II. § 4. Average also denotes some petty charges, such as towage, beaconage, &c. which the owner or consignee of goods shipped on board a vessel is bound to reimburse the master or shipowner. It is generally stipulated for in the bill of lading.<sup>6</sup> (*q. v.* and *Primage*.)

<sup>1</sup> Merchant Shipp. Act, 1854, s. 389.

<sup>2</sup> Maude & Pollock's *Merc. Shipp.* 320, n. (h).

<sup>3</sup> *Ibid.* 320; Smith's *Merc. Law*, 328; *Schuster v. Fletcher*, 3 Q. B. D. at p. 425.

<sup>4</sup> *Ibid.* 321. This is the celebrated rule of the *Lex Rhodia de jactu*: “*Lege Rhodiæ cavetur, ut si levandæ navis gratia jactus mercium factus est, omnium contributione sarcitur quod pro omnibus datum est.*” Digest, XIV. 2, fr. 1.

<sup>5</sup> Maude & Pollock, 322; *Plummer v. Wildman*, 3 M. & S. 482; *Robinson v. Price*, 2 Q. B. D. 91, 295. See also *Shepherd v. Kottgen*, 2 C. P. D. 578, 585; *Atwood v. Sellar*, 5 Q. B. D. 286.

<sup>6</sup> Smith's *Merc. Law*, 319. In Molloy, however (p. 270), average, or petty average, is said to be “a small recompence or gratuity for the master's care over the lading.” The etymology of the word in this sense is unexplained.

**AVER—AVERMENT.**—§ 1. In pleading, to aver is to allege, and an averment is an allegation. § 2. The primary meaning of aver was to verify or prove to be true (*e. g.* to aver a writ<sup>1</sup>) from the old French *averer* from Latin *ad* and *verus*, true.<sup>2</sup> (See *Verification*.)

**AVOID.**—To avoid a transaction is to make it void. Thus the act 27 Eliz. c. 4 has the effect of avoiding in favour of subsequent purchasers for value, all conveyances of land made voluntarily or without consideration (see *Voluntary*); so a person is said to avoid a contract by setting up as a defence in a legal proceeding taken to enforce it, some defect which prevents it from being enforceable: thus, if an action is brought against a person on a contract either void or voidable by him, he avoids it by setting up that defence: similarly if he brings an action to have a voidable contract, settlement, &c. declared void.

**AVOIDANCE** is the operation of making a transaction void. Thus a bond is said to be conditioned for avoidance when it contains a condition providing that it shall be void on a certain event. (See *Bond*; *Condition*; *Void*.)

**AVOW—AVOWANT—AVOWRY.** See *Replevin*.<sup>3</sup>

**AVOWTERER**, according to the *Termes de la Ley*, is an adulterer with whom a married woman continues in adultery. In Britton, however, the word *avouterie* means simply adultery.<sup>4</sup>

**AWARD.**—§ 1. To award is to adjudge: thus a jury is sometimes said to award damages when it assesses the amount (see *Verdict*), and a Court awards an injunction when it grants an order for that purpose. (See *Injunction*.)

§ 2. Most commonly, however, award signifies the decision of an Arbitrator.<sup>1</sup> arbitrator or umpire. (See *Arbitration*.) No precise form of words is necessary, provided that the decision is expressed, that it follows the submission, and that it is certain and unambiguous: otherwise the whole or part of it may be set aside by the Court. It is signed by the persons making it, and is then deemed to be published so far as the authority of the arbitrator is concerned. The award is considered as published for all purposes when notice of its execution has been given to the parties. Publication of.

§ 3. An award is conclusive and binding on the parties, unless set aside, or unless the matter is referred back to the arbitrator for re-consideration. An arbitrator may, however, give his award in the shape of a special case for the opinion of the Court. (See *Special Case*.) Effect of.

§ 4. When a submission to arbitration can be made a rule of Court, the award may be enforced by execution like a judgment; when it cannot be Enforcement of.

<sup>1</sup> Litt. § 691.

<sup>2</sup> Littré, Dict. s. v.

<sup>3</sup> As to the old law of avowries, see Co. Litt. 268 a, 269 a.

<sup>4</sup> Britt. 110 a, 111 b.

made a rule of Court, it may be enforced by action; the award on a compulsory reference has the same effect as the verdict of a jury, so that judgment may be signed on it.<sup>1</sup>

ETYMOLOGY—Old French: *eswardeir*, *esgardeir*, to examine into, adjudge.<sup>2</sup>

**AWAY-GOING CROP** is one which has been sown or planted during a tenancy, but is not ready for gathering until after its expiration. Sometimes the outgoing tenant has the right to cut and take away the crop when it is ripe, either by agreement or custom; sometimes the incoming tenant is bound to buy the crop of him at a valuation.<sup>3</sup> (See *Emblements*.)

**AZO.**—Porcius Soldanus Azo was an eminent jurist of the twelfth and thirteenth centuries. He is believed to have been born at Bologna, where he afterwards taught law in public, and died about 1230. His principal works are the “*Summæ*” to the Code and Institutes of Justinian (the latter of which was employed by Bracton), the “*Lectura de Codice*,” “*Quæstiones*” and “*Glossæ*.”<sup>4</sup>

## B.

**BACKING A WARRANT** is where a magistrate indorses a warrant which has been issued by a magistrate of another district or jurisdiction, in order that it may be executed within the jurisdiction of the magistrate making the indorsement.<sup>5</sup>

**BACON.**—Francis Bacon was born on the 22nd January, 1560—1, entered as a student at Gray’s Inn about 1577, was called to the bar in 1582, entered Parliament in 1584, was made a kind of Queen’s Counsel, under Elizabeth, and King’s Counsel under James I.; was created Solicitor-General in 1607, Attorney-General in 1613, Privy Councillor in 1616, Lord Keeper in March, 1616—17; and Lord Chancellor in January, 1617—18. In 1618 he was created Baron Verulam, and 1620 Viscount St. Albans. In the following year he was accused of corruption in his office; and, on his confession, he was deprived of the Great Seal, fined and imprisoned. He was afterwards pardoned, but his health had begun to fail, and he died on the 9th April, 1626.<sup>6</sup> His principal legal works are the reading on the Statute of Uses, and some Essays on law reform, but they are insignificant compared with his philosophical writings.

<sup>1</sup> See C. L. P. Act, 1854; Archbold’s *Pr.* 1334 *et seq.*

<sup>2</sup> Skeat’s *Etym. Dict.* s. v.

<sup>3</sup> Woodfall’s *L. & T.* 714; *Wiggles-*

*worth v. Dallison*, Smith’s *L. C.* i. 598.

<sup>4</sup> Savigny, *Gesch. des R. R.* v. 1.

<sup>5</sup> Stone’s *Justice of the Peace*, 113.

<sup>6</sup> Foss’s *Biog. Dict.*



**BAIL** is security that a person or thing concerned in a civil or criminal proceeding will obey, or be dealt with in accordance with, the requirements of the Court. "Bail" also signifies the sureties who form the security.

I. § 2. In ordinary actions bail in the old sense (*infra*, § 8) has been abolished, but a somewhat analogous proceeding still exists under sect. 6 of the Debtors Act, 1869 (*q. v.*), which prevents a defendant from leaving England unless he gives security, if his evidence is necessary to the plaintiff;<sup>1</sup> and under Order XIV. of the Rules of Court, which enables a plaintiff, where the defendant has no defence, to sign judgment unless security is given. (See *Security*.)

Debtors Act,  
1869.

§ 3. Bail may still be required to be given by the defendant in certain actions for the recovery of land (see *Recovery*, § 4), and in cases where a cause, in which the cause of action does not amount to £20, is removed from an inferior Court to the High Court either before judgment or after judgment by writ of error. Bail generally consists of a bond or recognizance by the party, and two sureties. (See *Justification*.)<sup>2</sup>

Recovery of  
land.

Removal of  
cause.

II. § 4. In Admiralty actions, where a ship, cargo, or other property has been arrested, the defendant may have it released on giving bail for its value. The bail consists of two sureties, who execute a bond called a bail bond.<sup>3</sup> (See *Release*, § 9; *Appraisalment*.)

Admiralty  
actions.

III. § 5. In criminal proceedings, where a person is accused before a magistrate of an indictable offence, and there is sufficient evidence to put him on his trial, the magistrate *may*, in all cases except treason, admit the accused to bail instead of committing him to prison; in the case of a person charged with a misdemeanor the magistrate is bound to admit him to bail unless the offence falls within those mentioned in the stat. 11 & 12 Vict. c. 42, s. 23. The Queen's Bench Division has authority to admit to bail for any crime whatever. Bail consists of a recognizance entered into by the accused and one or more sureties for the payment of a sum of money if the accused fails to surrender himself for trial or departs the Court without leave. If the sureties have reason to suppose that he is about to escape, they may seize him and have him committed to prison, whereby they are discharged.<sup>4</sup>

Criminal.

§ 6. Bail in error is bail given by a defendant or prisoner during the pendency of a writ of error (*q. v.*).<sup>5</sup>

Bail in error.

IV. § 7. In a proceeding by foreign attachment, giving bail is one of the modes by which the defendant may dissolve the attachment; bail are also required to enable him to appear by means of a scire facias ad disprobandum debitum (see *Foreign Attachment*; *Scire Facias*); the bail must in either case be special bail; that is, bail to render the defendant or pay what shall be recovered against him if the plaintiff recover judgment.<sup>6</sup>

Bail in foreign  
attachment.

Formerly bail played an important part in every action at law. § 8. Before the statutes 2 Will. 4, c. 39, and 1 & 2 Vict. c. 110, the ordinary mode of commencing an action was by serving the defendant

Common bail.

<sup>1</sup> Coe's Practice, 165.

<sup>2</sup> Stat. 19 Geo. 3, c. 70; Archbold's Pr. 875, 1406, 1423.

<sup>3</sup> Williams & Bruce's Admiralty, 210 *et seq.*

<sup>4</sup> Archbold's Crim. Pl. 87; Steph. Comm. iv. 355.

<sup>5</sup> Archbold, 206.

<sup>6</sup> Brandon, For. Att. 106.

with a *capias* and notice to appear (see *Capias ad respondendum*), and there-upon the defendant appeared and put in sureties for his future attendance and obedience, which sureties were called common bail, "being the same two imaginary persons that were pledges for the plaintiff's prosecution, John Doe and Richard Roe,"<sup>1</sup> but this was abolished by the acts above mentioned, and bailable proceedings then became collateral to the main proceedings<sup>2</sup> in the action in the following manner. § 9. In certain cases the plaintiff might by making an affidavit as to the amount of the cause of action (called an affidavit to hold to bail) arrest the defendant and make him put in substantial sureties for his appearance, who were called bail below or bail to the sheriff, because they and the defendant entered into a bond (called the bail-bond) in favour of the sheriff to secure the debt sued for, and conditioned for the appearance of the defendant and the putting in of special bail in due course. If the defendant did not comply with the condition the plaintiff might take an assignment of the bail-bond from the sheriff and enforce it against the sureties, or compel the sheriff either to render the defendant (technically called "bringing in the body") or to put in special bail for him. This kind of bail is still required in proceedings by *scire facias* and attachment (*q. v.*). § 10. Special bail (bail above or bail to the action) were persons who undertook that if the defendant were condemned in the action he should pay the debt or render himself to prison. The operation of procuring special bail was called "putting in bail," and was effected by leaving a memorandum called the bail piece with the proper officer, and by the bail entering into a recognizance binding themselves as sureties for the defendant. Bail was put in *absolutely* if the plaintiff consented to the bail, or *de bene esse* if they were subject to his afterwards excepting to them; in the latter case the bail, after entering into the recognizance, made affidavits of justification, and if the plaintiff excepted to them they had to justify (see *Justification*, § 1), or the defendant might add (that is, substitute) other bail, who had to justify instead of the original bail; in either case, if the justification was successful a rule of allowance was drawn up, when the bail was said to be perfected.<sup>3</sup> The practice of giving bail below and bail above in ordinary actions was abolished by the Debtors' Act, 1869, sect. 6, doing away with arrest on mesne process, but such parts of the practice remain as are applicable to the proceedings above mentioned (§ 2).

§ 11. Another kind of bail was bail in error, given by a defendant in an action when he was going to bring error on the judgment and wished execution to be stayed in the meantime. The practice was similar to that of putting in special bail (*supra*, § 10).<sup>4</sup> Proceedings in error have been abolished<sup>5</sup> and an appeal is no stay unless so ordered.<sup>6</sup> (See *Security*.)

**BAILABLE.**—A writ or process is said to be bailable when a person arrested under it may be liberated on bail, either as a matter of right, or in the discretion of the Court. (See *Bail*.)

<sup>1</sup> 3 Bl. 287.

<sup>2</sup> Smith's Action (11), 314.

<sup>3</sup> Chitty's Pr. 727; First Rep. C. L. Comm. 88; Smith's Action (11), 233.

<sup>4</sup> Smith's Action, (11) 232.

<sup>5</sup> Appellate Jurisdiction Act, 1876, s. 11; *Justice v. Mersey, &c. Co.*, 1 C. P. D. 575; Rules of Court, lviii. 1.

<sup>6</sup> Rules of Court, lviii. 16.

**BAILEE—BAILMENT—BAILOR.**—§ 1. Bailment is a contract by which goods are delivered by one person (the bailor) to another person (the bailee) for a certain purpose, upon an express or implied promise by the bailee to return them to the bailor, or to deliver them to someone designated by him, after the purpose has been fulfilled. The bailee is bound to take a certain amount of care of the goods while in his possession, and the amount of care may be expressly fixed by the contract. Where there is no express agreement as to this, one of the following rules, founded on the presumable intention of the parties, is applied: (1) Where the bailment is for the benefit of the bailor alone, the bailee is liable only for gross negligence; (2) where it is for the benefit of the bailee alone, he is bound to use the very strictest diligence; (3) where it is for the benefit of both bailor and bailee, the bailee is only bound to use ordinary and average diligence.

Bailments are of six kinds: the classification being of importance from the different nature of the bailee's liability in each case. § 2. "The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum*. . . .

§ 3. The second sort is, when goods or chattels that are useful are lent to a friend gratis, to be used by him; and this is called *commodatum*, because the thing is to be restored in specie.<sup>1</sup>

§ 4. The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator* and the borrower *conductor*.

§ 5. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be security to him for money borrowed of him by the bailor; and this is called in Latin *vadium*, and in English a pawn or pledge (*q.v.*).

§ 6. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee who is to do the thing about them [sometimes called *locatio operis faciendi*].

§ 7. The sixth sort is, when there is a delivery of goods or chattels to somebody who is to carry them or do something about them gratis; without any reward for such his work or carriage, and this is called *mandatum*.<sup>2</sup> The general rule is, that in the first case the bailee is only answerable for gross negligence, that in the second case he is bound to use the strictest care and diligence, that in the third and fourth cases he is only bound to use ordinary care, and so in the fifth case, unless he is a common carrier (*q.v.*), and that in the sixth case the bailee is only answerable for gross negligence.<sup>3</sup> (See *Negligence; Factor*.)

**ETYMOLOGY.**—From old French *bail*, *baillir*, from Latin *bajulus*, originally = porter, in low Latin = a manager or bailiff.<sup>4</sup>

<sup>1</sup> It seems hardly necessary to remark that the *commodatum* is so called because it is a convenience or favour to the bailee.

<sup>2</sup> Per Holt, J., in *Coggs v. Bernard*, Ld. Raym. 909; Smith's L. C. i. 188; Chitty on Contracts, 428 *et seq.* The Latin terms are taken from the Corpus Juris,

especially Inst. iii. 14, 24, 26.

<sup>3</sup> See notes to *Coggs v. Bernard*, Smith's L. C. i. 207, where also Sir William Jones's criticisms on Lord Holt's classification are shown to be unfounded.

<sup>4</sup> Diez, 46; Littré, s. v.

Bailiff of  
hundred.

Special bailiff.

**BAILIFF** is an officer concerned in the administration of justice in a certain district.<sup>1</sup> Persons having the franchise of executing legal process within a liberty or other district appoint their own bailiffs for that purpose,<sup>2</sup> but usually "bailiff" signifies a sheriff's officer, being either a bailiff of a hundred, appointed over a hundred for the routine part of the sheriff's office, or a bailiff employed by the sheriff to serve writs and make arrests and executions. The sheriff being responsible for their acts, the latter class of bailiffs are annually bound to him in a bond with sureties for the due execution of their office, and thence are called bound-bailiffs, "which the common people have corrupted into a much more homely appellation."<sup>3</sup> § 2. A special bailiff is a particular person appointed by the sheriff to execute a writ at the request of the person suing it out. The sheriff is not liable to that person for the acts of his special bailiff.<sup>4</sup>

II. § 3. Bailiff also sometimes denotes "a servant that hath administration and charge of lands, goods and chattels to make the best benefit for the owner."<sup>5</sup>

**BAILIWICK** is the district in which an officer concerned in the administration of justice has authority.<sup>6</sup> The term was formerly applied to coroners and similar officers,<sup>7</sup> but at the present day it is only used to denote the county in which a sheriff has authority or a liberty exempt from the sheriff.<sup>8</sup> (See *Bailiff*.)

**ETYMOLOGY.**—The Norman-French is *baillie*,<sup>9</sup> from *bail*, a manager, official, from Latin *bajulus*, the bearer of a burden.<sup>10</sup> The last syllable is said to be Middle-English, *wick*, a village.<sup>11</sup>

**BALANCE ORDER.**—When an order for a call is made in the compulsory winding-up of a company, a copy of it is served on each of the contributories, together with a notice specifying the balance due from him in respect of the call. If default is made by any contributory in payment of the sum, another and special order, called a balance order, is made, requiring him to pay what is due from him within four days after service.<sup>12</sup>

**BANC.**—Sittings in banc were those sittings which the superior courts of common law held for the purpose of hearing and deciding questions of law, *e. g.* on demurrers, motions for new trials, &c., as opposed to sittings at the assizes or at nisi prius, and to trials at bar (see those titles). Since the Judicature Act sittings for deciding questions of law are properly called sittings of divisional courts, but the term "in banc" is still sometimes used. (Banc = bench or court; see *Common Bench*; *Queen's Bench*.)

**BANK—BANKER.**—A banker is a person who receives the money

<sup>1</sup> Co. Litt. 168 b.

<sup>2</sup> Steph. Comm. ii. 630. (See *Bailiwick*; *Non omittas*.)

<sup>3</sup> Bl. Comm. 345.

<sup>4</sup> Arch. Pr. 22.

<sup>5</sup> Co. Litt. 172 a. For the etymology of bailiff, see *Bailiwick*.

<sup>6</sup> Co. Litt. 168 b.

<sup>7</sup> Britton, 7 b.

<sup>8</sup> Bl. i. 344, ii. 38.

<sup>9</sup> Britton, 7b; William I.'s Laws, i. 2, § 1.

<sup>10</sup> Diez, Etym. Wörtl. i. 46.

<sup>11</sup> Skeat, Etym. Dict.

<sup>12</sup> Lindley on Part. 1391; Rules under Companies Act, r. 35.

of his customers on deposit, and pays it out again in a manner agreed on between them, *e. g.* by cashing cheques or drafts (*q. v.*) drawn on him by the customer. In the meantime he employs the money by lending it at interest, discounting bills, &c. The relation between banker and customer is that of debtor and creditor, not of trustee and cestui que trust or of principal and agent. Some banks are also banks of issue, that is, they issue promissory notes payable to bearer on demand (see *Bank Note*); of these the Bank of England is the most important, while it also has numerous public functions, such as paying the interest on and registering transfers of the public funds, circulating exchequer bills, making advances to the government, keeping accounts with the paymaster-general, &c.<sup>1</sup> (See *Clayton's Case*.)

Banks of  
issue.

**BANK NOTE** is a promissory note made by a banker payable to bearer on demand, and intended to circulate as money. All bank notes are treated as cash, and therefore cannot be followed or identified. (See *Possession*.) Bank of England notes are a legal tender for all sums above 5*l.*; country bank notes are not.<sup>2</sup>

**BANKRUPT.**—§ 1. A bankrupt is a person who has been adjudicated bankrupt by a Court of Bankruptcy. Such an adjudication is pronounced when it is proved to the satisfaction of the Court either that the person is unable to pay all his debts in full, or that his behaviour is such as to raise a presumption that he intends to defeat the rights of his creditors. (See *Act of Bankruptcy*.) § 2. As soon as a person becomes bankrupt, all the property to which he is at the commencement of the bankruptcy or may during its continuance become beneficially entitled (with a few exceptions), passes from him and vests in a trustee for the benefit of his creditors.<sup>3</sup> (See *Trustee*.) On the other hand, the bankrupt is protected from proceedings against him by his creditors during the bankruptcy. Bankrupts are disqualified from sitting in the House of Lords or Commons, and from filling certain offices.<sup>4</sup> Bankrupts are of two classes. § 3. If the bankrupt's estate is sufficient to pay his creditors a dividend of ten shillings in the pound, or if within three years after the close of the bankruptcy he pays to his creditors a sum making with the dividends paid in the bankruptcy the sum of ten shillings in the pound, he will be entitled to an order of discharge; in certain cases he may obtain his discharge without having fulfilled this requirement.<sup>5</sup> An order of discharge releases the bankrupt from all debts proveable under the bankruptcy (see *Debt*), with a few exceptions, and all property acquired by him after his discharge vests in him and not in his trustee.<sup>6</sup> § 4. Where the

Effects of  
bankruptcy.

Discharged  
bankrupt.

Undischarged  
bankrupt.

<sup>1</sup> Grant on Bankers; Steph. Comm. iii. 221 *et seq.*; in addition to the statutes there referred to, see the Companies Act, 1879; the Bankers Books Evidence Acts, 1876 and 1879.

<sup>2</sup> *Miller v. Race*, Smith, L. C. i. 526; Byles on Bills, 9; stat. 3 & 4 Will. 4, c. 96, s. 6. For the statutes regulating the

issue of notes by the Bank of England and country banks, see Grant on Bankers.

<sup>3</sup> Robson's Bankruptcy, 542.

<sup>4</sup> *Ibid.* 546.

<sup>5</sup> *Ibid.* 551.

<sup>6</sup> *Ebbs v. Boulnois*, 10 Ch. App. 479; *Ex parte Hemming*, 13 Ch. D. 163.

bankrupt has not obtained his discharge he is protected from his creditors for the period of three years from the close of the bankruptcy, but if at the end of that time he has not obtained his discharge, then any balance remaining unpaid in respect of any debt proved in the bankruptcy revives in the form of a judgment debt, and may be enforced against the property of the debtor in such manner as the Court in which the bankruptcy took place may direct; for this purpose the creditor desiring to enforce his claim files a statement verified by affidavit, showing that there is a balance of his debt remaining unpaid, and that the property against which payment is to be enforced is the property of the debtor; notice is served on the debtor, and the application is then heard.<sup>1</sup> (See *Bankruptcy; Insolvency.*)

**BANKRUPTCY**—I. is the name given to a variety of judicial or quasi-judicial proceedings, having for their main object the distribution of the property of an insolvent person among his creditors. Formerly, the term bankruptcy was also applied to companies (7 & 8 Vict. c. 111); the process of administering the property of an insolvent company is now called winding-up or liquidation (*q. v.*). The law of bankruptcy is founded on the principle, that when a man becomes insolvent, the property then remaining to him rightfully belongs to his creditors, and ought to be distributed rateably among them towards satisfaction of their claims, the debtor himself being released from future liability in respect of his debts, upon giving all the aid in his power towards the realization and distribution of his estate for the benefit of his creditors, and fulfilling the other conditions prescribed by the law for his discharge.<sup>2</sup> This is effected in two manners, either by bankruptcy in the strict sense of the word (*infra*, § 2), or by arrangements between the insolvent and his creditors, which form part of the law of bankruptcy, in the wide sense of the word,<sup>3</sup> and are generally carried out under the supervision of the Bankruptcy Court. (See *Arrangement; Liquidation; Composition.*)

II. § 2. Bankruptcy, in the strict sense, denotes proceedings taken to make a person bankrupt, and to administer his property for the benefit of his creditors. A bankruptcy generally consists of the following steps:—  
§ 3. The filing by a creditor in the appropriate Court of a petition, stating that the debtor is indebted to him in the sum of 50*l.* at least, that he has committed an act of bankruptcy (*q. v.*), and praying that he may be adjudicated a bankrupt.<sup>4</sup> The petition is accompanied by an affidavit verifying the statements contained in it.<sup>5</sup> A time is then appointed by the registrar of the Court for the hearing of the petition,<sup>6</sup> and a sealed copy of the petition, indorsed with notice of the time appointed for the hearing, is served on the debtor.<sup>7</sup> (See *Service.*) If the debtor intends to oppose

Petition for  
adjudication.

<sup>1</sup> Robson, 554. As to a second adjudication of bankruptcy against an undischarged bankrupt, see *Ex parte Watson*, 12 Ch. D. 380.

<sup>2</sup> Robson's Bankruptcy, 1.

<sup>3</sup> *Megrath v. Gray*, L. R., 9 C. P. 216.

<sup>4</sup> Bank. Act, 1869, s. 6. When the act

of bankruptcy consists of non-compliance with a debtor's summons (*q. v.*) the issue of the debtor's summons may be considered as the first step in the bankruptcy.

<sup>5</sup> *Ibid.* s. 80.

<sup>6</sup> Bank. Rules (1870), 34.

<sup>7</sup> *Ibid.* 60.

or show cause against the petition, he gives notice accordingly.<sup>1</sup> § 4. At the hearing, either the petition is dismissed<sup>2</sup> (as where the petitioning creditor fails to prove the statements in the petition), or the proceedings are stayed (as where the debtor gives security for the payment of the alleged debt, and the creditor is left to establish it by proceedings in the ordinary courts),<sup>3</sup> or the debtor is adjudicated bankrupt. § 5. On the debtor being adjudicated bankrupt, all his property vests in the registrar of the Court,<sup>4</sup> and all rights against him (except those arising from torts, &c.) must be enforced in the bankruptcy,<sup>5</sup> and therefore no creditor can bring an action against him. But every creditor, before he can take part in the proceedings or receive a dividend, must prove his debt by making an affidavit in a particular form.<sup>6</sup> (See *Proof*.) § 6. As soon as may be after the adjudication, a meeting of the creditors who have proved their debts is held, for the purpose of appointing a trustee and a committee of inspection (*q. v.*); this is called "the first meeting."<sup>7</sup> § 7. On the appointment of the trustee being ratified by the Court, the property of the bankrupt passes from the registrar and vests in the trustee without any transfer;<sup>8</sup> his duty is to discover, take possession of, manage, realize and distribute the property among the creditors, subject to the directions of the committee of inspection, the creditors and the Court.<sup>9</sup> § 8. When the property has been realized and distributed, an order is made that the bankruptcy has closed.<sup>10</sup> No further proceedings (except for granting the bankrupt his discharge, and for enforcing the rights of the creditors against the bankrupt if he has not obtained his discharge<sup>11</sup>) can then be taken in it, and the trustee in proper cases obtains his release.<sup>12</sup> (See *Bankrupt*, § 3.)

§ 9. Bankruptcy is usually classed under modes of acquisition;<sup>13</sup> but the acquisition of the property by the trustee is merely incidental to the main object of the bankruptcy, which is the administration of the property. (See *Administration*.)

Hearing of petition.

Adjudication.

First meeting.

Trustee.

Close of bankruptcy.

Classification.

ETYMOLOGY AND HISTORY.]—§ 10. "Bankruptcy" is derived from the Italian *banca rotta*, from the popular mediæval practice of *breaking* the *benches* or counters of merchants who failed to pay their debts.<sup>14</sup> Originally the bankruptcy law was a branch of criminal law, being directed solely to the object of preventing fraudulent traders from escaping from their creditors.<sup>15</sup> But by statutes passed in Queen Anne's reign provision was made for relieving bankrupts from their debts, and by the Bankruptcy Act, 1861, the distinction between traders and non-traders, who had hitherto not been subject to the bankruptcy law, was to that extent abolished. The distinction between bankruptcy and insolvency still exists on the continent.<sup>16</sup>

(See *Insolvency*; *Bankrupt*; *Bankruptcy Courts*; *Trader*; *Debtor*; *Creditor*; *Claim*; *Mutual Credits*; *Protected Transactions*; *Reputed Ownership*; *Certificate*.)

<sup>1</sup> Bank. Rules (1870), 36.

<sup>2</sup> Bank. Act, 1869, s. 8.

<sup>3</sup> *Ibid.* s. 9.

<sup>4</sup> *Ibid.* s. 17.

<sup>5</sup> *Ibid.* s. 12.

<sup>6</sup> Bank. Rules (1870), 67.

<sup>7</sup> Bank. Act, 1869, ss. 14, 16.

<sup>8</sup> *Ibid.* s. 17.

<sup>9</sup> *Ibid.* s. 20.

<sup>10</sup> *Ibid.* s. 47.

<sup>11</sup> *In re Pettit's Estate*, 1 Ch. D. 478;

*In re Westby*, 10 Ch. D. 776. In both these cases the question arose with reference to property acquired by the bankrupt after the close of the bankruptcy.

<sup>12</sup> Bank. Act, s. 51.

<sup>13</sup> 2 Bl. Comm. 471 *et seq.*

<sup>14</sup> Voltaire, Dict. Phil., v. *Banqueroute*; Saint Bonnet, Dict., v. *Banqueroute*, *Faillite*.

<sup>15</sup> Robson's Bank. ch. 1; 2 Bl. Com. 471.

<sup>16</sup> Holtz. Encyc., v. *Bankerott*, *Concurs*.

London Bank-  
ruptcy Court.

Court of  
Appeal.

County  
Courts.

**BANKRUPTCY COURTS.**—§ 1. The present Bankruptcy Courts are the London Bankruptcy Court, the Court of Appeal, and the local Bankruptcy Courts created by the Bankruptcy Act, 1869. § 2. The London Bankruptcy Court consists of a judge called the Chief Judge in Bankruptcy, and a number of registrars, clerks, ushers, &c.<sup>1</sup> It is a principal Court of Record, having original jurisdiction within the city of London and the metropolitan district, and appellate jurisdiction from the local Bankruptcy Courts. § 3. The Court of Appeal in Bankruptcy, which hears appeals from the London Bankruptcy Court, was formerly the Court of Appeal in Chancery;<sup>2</sup> it is now the Court of Appeal of the Supreme Court of Judicature, as constituted by the Judicature Act, 1875;<sup>3</sup> an appeal may be brought from it to the House of Lords in the same manner as before the Act of 1875, namely, by leave of the Court of Appeal.<sup>4</sup> § 4. The local Bankruptcy Courts are the provincial County Courts; that is, all the County Courts except the metropolitan ones, the district of which is included in that of the London Bankruptcy Court.<sup>5</sup>

For a history of the old Bankruptcy Courts, see Robson, *Bankruptcy*, ch. i. and ii.; and see *Commission*.

Of a Court.

**BAR.—I.** § 1. A bar is a partition across a Court of justice. In the Houses of Lords and Commons, the bar forms the boundary of the house, and therefore all persons, not being members, who wish to address the House, or are summoned to it, appear at the bar for that purpose; thus, in arguing appeals in the House of Lords, the counsel stand at the bar. § 2. In the ordinary Courts, the bar is a more or less imaginary barrier separating the bench and the front row of counsel's seats from the rest of the Court; in theory, only queen's counsel, serjeants-at-law, and a few other barristers are allowed within the bar, together with solicitors (as officers of the Court) and parties litigant who appear in person, while junior or utter barristers and the general public remain without the bar. § 2. Hence, "bar" has acquired the secondary sense of "Court" in such phrases as the "case at bar," "disclaimer at the bar," meaning "in Court," and the tertiary sense of the whole body or profession of barristers; the operation of being admitted to practise as an utter barrister is described as being "called to the bar," while serjeants and queen's counsel, on taking their degrees, are called within the bar; that is, invited by the judges to take their seat in the front row. Special pleaders and certificated conveyancers are said to be below the bar. (See *Barrister*.)

"At bar."

Call to the  
bar.

Trial at bar.

§ 3. A trial at bar is a trial by a jury before a full Court (*i. e.* three or four judges), instead of before a single judge at *nisi prius*. Trial at bar was originally the normal mode of trial; but as it made it necessary to bring up the jury and witnesses from the locus in quo to Westminster, the practice of trial at *nisi prius* was introduced. (See *Nisi Prius*.) Trials at

<sup>1</sup> Bank. Act, 1869, s. 61.

<sup>2</sup> Sect. 71.

<sup>3</sup> Jud. Act, 1875, s. 9.

<sup>4</sup> Bank. Act, 1869, s. 71.

<sup>5</sup> *Ibid.* s. 59.



bar in civil cases have long been practically obsolete, but they are still held occasionally in criminal cases of importance.<sup>1</sup> (See *Trial*.)

II. § 4. Bar also signifies a metaphorical barrier or obstacle. Thus, in the old law, a fine with proclamations levied by a tenant in tail was said to be a bar to the estate tail, because it took away the right of the issue in tail. (See *Fine*.) So a judgment is a bar to another action for the same right, and a debt or right is barred by the Statutes of Limitation when the time for the enforcing it has gone by; this is sometimes called an absolute bar, as opposed to a presumptive bar, which arises from laches or lapse of time otherwise than under the statutes.<sup>2</sup> In pleading, anything is a bar which is an answer to the plaintiff's claim; as to pleas in bar, see *Plea*.

III. § 5. In the old books "bar" frequently means a "plea in bar," and is so called "because it barreth the plaintiff of his action."<sup>3</sup> Bars in this sense were formerly divisible into many kinds, *e.g.* bars to common intent, bars to special intent, bars at large, bars material, &c., but these are all now obsolete.<sup>4</sup>

ETYMOLOGY.—Old French *barre*,<sup>5</sup> a rod or rail; of Celtic origin.<sup>6</sup>

**BARE TRUSTEE.** See *Trustee*.

**BARGAIN AND SALE.**—I. § 1. In its primary sense, "bargain and sale doth signify the transferring of the property of a thing from one to another upon valuable consideration,"<sup>7</sup> and is accordingly used with accuracy to signify an agreement for the sale of goods by which the property in them passes immediately to the purchaser, as opposed to an executory contract of sale, or contract by which the property in the goods is not to pass to the purchaser until a future time, or until some condition has been fulfilled.<sup>8</sup> (See *Contract*; *Sale*.)

II. § 2. In the law of real property, "bargain and sale" is the name for two kinds of conveyances, "bargain and sell" being the corresponding operative words (*q. v.*).

1. § 3. Before the Statute of Uses, if a person contracted with another for the sale of land for a pecuniary consideration and paid the money, but no proper conveyance (such as a feoffment) was executed to him, then although the legal estate in the land remained in the vendor, yet in equity the purchaser was looked upon as entitled to the land, and the vendor was therefore said to be seised to the use (that is, for the benefit) of the purchaser. Consequently when the Statute of Uses (*q. v.*) was passed, such a "bargain and sale" of land vested the legal estate in the purchaser without any livery of seisin.<sup>9</sup> To prevent land from being thus secretly

<sup>1</sup> Archbold. Pr. 346; Rules of Court, xxxvi. 7.

<sup>2</sup> See *Angus v. Dalton*, 3 Q. B. D. 85.

<sup>3</sup> Co. Litt. 303 b.

<sup>4</sup> Plowden, 26 *et seq.*; Heath's Maxims, 136.

<sup>5</sup> Co. Litt. 372 a.

<sup>6</sup> Skeat, Etym. Dict.

<sup>7</sup> Shep. Touch. 221.

<sup>8</sup> Benjamin on Sales, 3, 227.

<sup>9</sup> Nor is it necessary that the purchase-money should be actually paid if the deed states that it has been paid; Shepp. 222.

conveyed, the stat. 27 Hen. 8, c. 16, enacted that every bargain and sale of estates of freehold should be enrolled within six months from its date. Enrolment being considered undesirable, a bargain and sale was thenceforward only used for conveyances of estates less than freehold, as in the case of the ordinary "lease and release" (*q. v.*), and a mortgage by a freeholder for a term of years, which is at the present day appropriately made by the words "bargain and sell."<sup>1</sup>

At common  
law.

2. § 4. The words "bargain and sell" are the words commonly used in the execution of common law authorities. Thus executors having a naked power under a will to sell real estate convey by the words "bargain and sell;" such words have no effect in themselves, but merely designate the persons to whom the executors sell, and who are to take by virtue of that designation under the will.<sup>2</sup> The commonest instance of this is where a testator wishes to empower his executors to sell his copyholds, and at the same time wishes to prevent the expense of an admittance, which would be necessary if he devised the land to them; he therefore merely gives them a power of sale, which they execute by a deed called a bargain and sale.

**BARMOTE COURTS** are Courts held in certain mining districts belonging to the Duchy of Lancaster for regulation of the mines, and for deciding questions of title and other matters relating thereto.<sup>3</sup> (See *Stannaries*.)

Exchequer.

**BARON.**—§ 1. The judges of the Court of Exchequer (*q. v.*) were called barons, and the chief judge of the Court was called the Lord Chief Baron of the Exchequer. By the Judicature Acts, 1873-5, they were transferred to the High Court of Justice, of which they form the Exchequer Division. The Lord Chief Baron is also ex officio a member of the Court of Appeal. His successors will bear the same title until the office is abolished by Order in Council.<sup>4</sup> The successors of the junior barons are styled justices of the High Court.<sup>5</sup>

Husband.

Freeman.

§ 2. Baron is the old word for husband: "baron and feme" in the old books means husband and wife. § 3. "And in ancient charters and records, the barons of London and barons of the Cinque Ports, do signify the freemen of London and of the Cinque Ports."<sup>6</sup> (See *Court Baron*.)

**BARRATOR.** See *Barretry*.

**BARRATRY.**—In the law of merchant shipping, any illegal, fraudulent or knavish conduct of the master or mariners of a ship, by which the freighters or owners are injured, is, by our law, barratry. This offence may be considered, first, as an act of misfeasance or wilful neglect against

<sup>1</sup> Davids. Conv. i. 73; Williams on Seisin, 141.

<sup>2</sup> Davids. i. 73.

<sup>3</sup> Steph. Comm. iii. 347, n. (b); stat. 14

& 15 Vict. c. 94.

<sup>4</sup> Jud. Act, 1873, ss. 5, 6, 31, 32.

<sup>5</sup> Jud. Act, 1877, s. 4.

<sup>6</sup> Co. Litt. 58 a.

the owner, recognized by the common and maritime law: and, secondly, as subjecting the offender to punishments imposed by statute.<sup>1</sup> Thus the neglect to pay port dues, and smuggling, are instances of barratry giving rise to civil liability for any injury thereby caused to the owner,<sup>2</sup> and maliciously destroying or damaging a vessel is made criminal by various acts.<sup>3</sup> (See *Barretry*.)

ETYMOLOGY.]—Norman-French *barat*, fraud, chicane, the etymology of which is doubtful.<sup>4</sup>

**BARRETRY—BARRETTOR.**—§ 1. "A barrettor is a common mover, and exciter or maintainer of suits, quarrels or parts, either in Courts or elsewhere in the country."<sup>5</sup>

§ 2. Common barretry is the offence of frequently exciting and stirring up suits and quarrels between the queen's subjects, either at law or otherwise. The punishment for this offence, which is a misdemeanor, is by fine and imprisonment, and the offender is disabled from practising as a solicitor.<sup>6</sup> (See *Maintenance*.)

**BARRIER**, in the law of mines, is a wall of coal left between two mines. In the absence of an agreement, easement or custom to the contrary, every mine owner may work up to the boundary of his land, although his doing so may cause injury to his neighbour, *e.g.* by letting water into his neighbour's mine; but he is liable for injury caused by negligence or malice.<sup>7</sup> In practice, it is usual for a mine owner to work to the boundary on the dip of the coal bed, and to leave a barrier of his own mineral on the rise, so as to prevent the water of the adjacent mine on a higher level from flooding his mine. If the "upper owner" (that is, the owner of the adjacent mine on the rise) trespasses on the barrier so as to let the water through, he will be liable not only for the trespass, but also for the consequential injury.<sup>8</sup> (See *Boundaries*.)

**BARRISTER** (or "barrister at law") is a person entitled to practise as an advocate or counsel in the Superior Courts. The rank or degree of barrister can only be conferred by one or other of the Inns of Court (*q. v.*), where the candidate is required to pass through a preliminary course of study and examination.<sup>9</sup> Barristers who have attained the rank of queen's counsel or serjeants at law (*q. v.*) take precedence of those who have not, and who are sometimes called utter barristers, because formerly in arguing moots (*q. v.*) they sat "uttermost on the formes, which they call the barr."<sup>10</sup> A barrister cannot maintain an action to recover his fees for work

<sup>1</sup> Maude & Pollock, Merch. Shipp. 105.

<sup>2</sup> *Ibid.* 106.

<sup>3</sup> *Ibid.* 107.

<sup>4</sup> Britton, 224 b; Littré, s. v. *Baraterie*.

<sup>5</sup> Co. Litt. 368 a.

<sup>6</sup> Bl. Comm. iv. 134; stat. 12 Geo. 1, c. 29; Russell on Crimes, i. 362; Steph. Crim. Dig. 86.

<sup>7</sup> Gale on Easements, 442.

<sup>8</sup> Bainbridge on Mines, 425.

<sup>9</sup> Stephen's Comm. i. 19; iii. 270.

<sup>10</sup> See Manning's *Serviens ad Legem*, 262. It might at first sight be supposed that "utter barrister" means one who addresses a court from outside the bar, as opposed to queen's counsel and serjeants, who sit within the bar; but this is negated by the old use of "inner barrister" in the sense of student; Manning, *ubi supra*; Reeves, v. 247.

done as counsel, nor, on the other hand, is he liable to an action for negligence in transacting the business of his client. He is also privileged from the penalties of libel and slander for matter spoken or written by him in the course of business. (See *Privilege; Pleader; Solicitor.*)

**BASE.** See *Fee; Services.*

**BASTARD** is a child whose parents were not married at the time of its birth. Its mother is entitled to its custody, and is bound to maintain it. If she has not the necessary means, she may, in some cases, compel the putative father to pay her a weekly sum of money for its maintenance until the age of thirteen or sixteen, if so directed. § 2. A bastard is not entitled to the name of either its father or mother, nor can it be heir or next-of-kin to any one, or have an heir or next-of-kin, except its own issue; but a bastard may not marry a person who would have been related to him within the prohibited degrees if his parents had been married before his birth.<sup>1</sup> As to the old rule of "bastard issue," see *Mulier.*

**BATTEL.** See *Trial.*

**BATTERY** is an assault whereby any force, however small, is actually applied, directly or indirectly, to the person of another, or to the dress worn by him, against his will and without reasonable cause.<sup>2</sup> A battery gives rise to an action for damages, and an intentional or wilful battery is also punishable as an offence in the same way as an assault (*q. v.*). See *Tort; Crime; Justification.*

**BEARER.**—When the benefit of a security or document of title can be claimed by any person who presents it for that purpose, it is said to be a document to bearer. For instance, if a cheque is drawn thus: "pay the bearer," or "pay A. B. or bearer," or "pay cash or bearer," &c., the banker may pay it to any one who presents it, unless its negotiability is restrained. See *Bill of Exchange; Cheque; Indorsement; Negotiable; Possession.*

**BECCARIA.**—Cesare Bonesana Beccaria was born at Milan in 1735, taught political economy there and died in 1793. His chief work is on Crimes and Punishments (*Dei Delitti e delle Pene*), which has been translated into almost all European languages.<sup>3</sup>

**BEDFORD LEVEL.**—Lands within the Bedford Level are subject to various provisions as to registration of conveyances, contained in the stat. 15 Car. 2, c. 17.<sup>4</sup>

<sup>1</sup> Steph. Comm. ii. 297; stat. 7 & 8 Vict. c. 101; Bastardy Acts of 1872 and 1873; Co. Litt. 243 b; Litt. §§ 399 *et seq.* As to the etymology of the word, see Diez, i. 57.

<sup>2</sup> Stephen's Crim. Dig. 162; Russell on Crimes, i. 957; Underhill on Torts, 119; Broom, C. C. L. 687.

<sup>3</sup> Holtz. Encycl.

<sup>4</sup> Dart, V. & P. 685; *Willis v. Brown*, 10 Sim. 127.

**BEER-HOUSE.** See *Licence*.

**BEGIN.** See *Right to Begin*.

**BENCH** signifies a high seat or tribunal, especially the seat of a judge in court, "and is properly applied to the justices of the Court of Common Pleas, because the justices of that Court sit there as in a certaine place: . . . and legall records tearme them *justiciarii de banco*," justices of the bench.<sup>1</sup> The Court was also called the Common Bench, to distinguish it from the King's Bench (*q. v.*). § 2. "Bench" is also used to denote the whole body of judges, or a particular class of them, as opposed to the "bar," which denotes the barristers.

As to bench-warrants, see *Warrant*.

**BENCHERS** are the members of an Inn of Court (*q. v.*), to whom "is chiefly committed the government and ordering of the house, as to men meetest, both for their age, discretion and wisdomes."<sup>2</sup> They decide questions as to calling persons to the bar and of disbaring those who have been called.<sup>3</sup>

**BENEFICE** is a large word, and is taken for any ecclesiastical promotion or spiritual living whatsoever.<sup>4</sup> Ordinarily, however, it denotes what is technically called "a benefice with cure of souls," that is, the office and emoluments of a rector or vicar of a parochial church, including the cure of souls, and in the case of a rector the freehold of the parsonage house, the glebe, the tithes and other dues, or, in the case of a vicar, a proportion of these emoluments.<sup>5</sup> (See *Advowson*; *Appropriation*; *Curate*.)

**BENEFICIARIES** are persons for whose benefit property is held by trustees, executors, &c. (See *Trust*.)

**BENEFIT BUILDING SOCIETY** is the old-fashioned name for what is now more commonly called a building society (*q. v.*).

**BENEFIT OF CLERGY** was originally the exemption of the persons of clergymen from criminal process before the secular Courts, in a few particular cases. Afterwards the clergy arrogated to themselves this exemption in the case of all crimes, and finally extended it not only to "every little subordinate officer belonging to the church or clergy, but even many that were totally laymen:"<sup>6</sup> every one that could read being entitled to the *privilegium clericale*. The stat. 4 Hen. 7, c. 13, limited the right in the case of laymen to one exemption, and directed them to be burnt in the hand in order that they might not claim it twice. After being delivered from the secular Court, the offender underwent a mock

<sup>1</sup> Co. Litt. 71 b.

<sup>2</sup> See Manning's *Serviens ad Legem*, 261.

<sup>3</sup> Steph. Comm. i. 19.

<sup>4</sup> 2 Inst. 29.

<sup>5</sup> Bl. Comm. i. 384 *et seq.*

<sup>6</sup> *Ibid.* iv. 365.

trial in the ecclesiastical Courts. The privilege of clergy was restricted by various statutes, and finally abolished by stat. 7 & 8 Geo. 4, c. 28.

**BENEVOLENT SOCIETIES** are societies established and registered under the Friendly Societies Act, 1875, for any charitable or benevolent purposes.<sup>1</sup> In their constitution and management such societies resemble friendly societies (*q. v.*)

**BENTHAM.**—Jeremy Bentham was born in London in 1748, was educated at Westminster and Oxford, entered at Lincoln's Inn in 1673, travelled in Russia and the east of Europe, and died on the 6th June, 1832. His works fill nine octavo volumes; the principal legal ones are the Fragment on Government, Principles of Morals and Legislation, Judicial Evidence, and numerous writings on codification and law reform;<sup>2</sup> many of his suggestions have been carried into effect; most of the others are impracticable.

**BEQUEATH—BEQUEST.**—§ 1. To bequeath property is to leave it by will, and a bequest is a gift by will; the terms are only applied to personal property. A residuary bequest is a gift of the residue of the testator's personal estate, namely, of what is left after payment of debts and legacies, &c. (See *Residue*; *Legacy*; *Legatee*; *Devise*.)

**Specific.** § 2. A specific bequest (not a specific legacy) is where a testator bequeaths to a person all his property of a certain class or kind, *e.g.* all his pure personalty.<sup>3</sup>

**Executory.** § 3. An executory bequest is the bequest of a future, deferred, or contingent interest in personalty. (See *Executory Interest*.)

**ETYMOLOGY.**—Anglo-Saxon *bicwedhan*, to declare.<sup>4</sup>

**BEYOND THE SEAS.** See *Absence beyond Seas*.

**BIGAMY.**—Every person who, having a wife or husband still living, goes through the form of marriage with any other person, commits the felony called bigamy, and is liable on conviction to seven years penal servitude. A person marrying again during the lifetime of his or her wife or husband is not guilty of bigamy if the wife or husband has been continually absent for seven years, and has not been known by such person to be living within that time,<sup>5</sup> nor of course is it bigamy for divorced persons to marry again.<sup>6</sup> (See *Divorce*.)

**BILL** primarily means a letter or writing. In addition to the kinds of bill described under subsequent titles, the word has the following meanings in law:—

**Parliamentary bills.** § 2. In parliamentary practice bills are incomplete acts of parliament.

<sup>1</sup> Friendly Soc. Act, 1875, c. 8, s. 3. See the Fourth Report of the Friendly Soc. Comm. (p. xxxi), which gives a description of the "Order of Cemented Bricks," a benevolent society confined to officers of the royal navy, and established partly for convivial purposes and partly for "distributing discriminating charity in de-

serving naval cases."

<sup>2</sup> Bentham's Works by Bowring.

<sup>3</sup> *Shepherd v. Beetham*, 6 Ch. D. 597.

<sup>4</sup> Skeat, Etym. Dict.

<sup>5</sup> Stat. 24 & 25 Vict. c. 100, s. 57; Stephen's Crim. Dig. 174; Russell on Crimes, iii. 264.

<sup>6</sup> Steph. Comm. iv. 279.

When a bill has passed both houses of parliament and received the royal assent, it becomes an act of parliament (*q. v.*).<sup>1</sup> Bills, like acts, are divided into public and private, but bills which, though they are local in their nature, are yet of public interest (*e. g.*, bills affecting crown property or the metropolis, &c.), are sometimes called hybrid bills, and are introduced as public bills.<sup>2</sup> § 3. A bill of attainder is a bill formulating an accusation against a peer or other high personage in a matter of public importance, declaring him to be attainted and his property to be forfeited. It resembles an impeachment (*q. v.*), except that it may be introduced in either house, and requires no evidence in the judicial sense.<sup>3</sup>

§ 4. In criminal procedure, an indictment is presented to the grand jury under the name of a bill, and is not technically an indictment until so found by the jury. (See *Indictment*.)

§ 5. "Bill" also signifies the draft of a patent for a charter, commission, dignity, office or appointment; such a bill is drawn up in the Attorney-General's Patent Bill Office, is submitted by a Secretary of State for her Majesty's signature, when it is called the Queen's Bill; it is countersigned by the Secretary of State and sealed by the Privy Seal, and then the patent is prepared and sealed. (See *Crown Office*.)<sup>4</sup>

ETYMOLOGY.]—Middle-English, *bille*, a letter, writing. Law Latin, *billa*, a corruption of *bulia*, a sealed writing. Classical Latin, *bulia*, a seal or stud of metal.<sup>5</sup>

**BILL OF COMPLAINT.** § 1. Under the practice of the Court of Chancery, before the Judicature Acts (*q. v.*), an ordinary suit was commenced by filing or exhibiting a bill of complaint, which was a printed document in the form of a petition, addressed in ordinary cases to the Lord Chancellor, containing a statement of the plaintiff's case, and concluding with a prayer asking for the relief which he filed the bill to obtain. A bill, therefore, consisted of four parts:—(1.) The *title*, giving the description of the court and the names of the plaintiffs and defendants; (2.) The *address* to the Lord Chancellor. (3.) The *statement* or stating part; and (4.) The *prayer*.<sup>6</sup> The bill was signed by the counsel who had settled it. § 2. The bill by which a suit was commenced was called an *original* bill, as opposed to an *amended* bill (see *Amendment*). The bill was served on the defendant as a writ is under the new practice. It therefore combined the functions of a writ of summons and a statement of claim (*q. v.*).

§ 3. The bill being the first step in a suit, the word "bill" was often used as synonymous with "suit;" and in this sense bills were of three kinds, *original*,—*in the nature of original*, and *not original*. § 4. A bill was called original when it related to matters not already before the court, and either prayed relief or was filed for some subsidiary purpose. § 5. Bills praying relief were of infinite variety according to the right or equity sought to be maintained; bills having special names were interpleader and certiorari bills (see those titles); bills *quia timet*, to prevent an anticipated loss or injury; and *bills of peace*, to establish a right which might otherwise be made the subject of repeated litigation. These kinds of bills were, however, rare in practice. § 6. Bills not praying relief were of two kinds—(1), bills to perpetuate the testimony of witnesses (see *Perpetuation of Testimony*); (2), bills of discovery (see *Discovery*),<sup>7</sup> of which the principal

Title,  
address,  
statement,  
prayer.

Original and  
amended bills.

Original.

Bills for relief,

not for relief.

<sup>1</sup> May, Parl. Pr. 479 *et seq.*; Steph. Comm. ii. 383.

<sup>2</sup> May, 693, 732.

<sup>3</sup> Bl. Comm. iv. 259.

<sup>4</sup> Rep. Comm. on Fees, 9, 5.

<sup>5</sup> Skeat, Etym. Dict.

<sup>6</sup> For specimens of Bills see Hunter's

Suit; Daniell's Pr. 297, and Forms. Under the practice before the stat. 15 & 16 Vict. c. 86, a bill in Chancery consisted of nine parts.

<sup>7</sup> Mitford, 145; Daniell, 259, 1408; Haynes's Eq. 185; Snell's Eq. 495,

parts were the *stating part*, containing the statement of facts; the *charging part*, alleging that the defendants set up a certain defence and charging or asserting matter to avoid it (see *Avoidance*); and the *interrogating part*, in which the essential statements were repeated in the form of interrogatories (*q. v.*) (Mitford on Pleading, 42 *et seq.*) Strange as it may seem, this barbarous form of pleading is still used in the United States.

**English bill.** § 7. Formerly an ordinary suit in Chancery was called a suit by English bill, by way of distinction from suits on the common law side of the Court, which were conducted in Norman French or Latin (Mitford, 8). (See *Chancery*.)

**In the nature of original and not original.** § 8. Bills in the nature of original bills, and bills not original, have long ceased to be of practical interest: they included *supplemental bills*, filed to supply defects or omissions in original bills; *bills of revivor*, to revive abated suits (see *Revivor*); and *bills of review*, filed to obtain the reversal or alteration of a decree made in a former suit between the same parties.<sup>1</sup>

**Fishing bill.** § 9. Where a person filed a bill claiming relief, but not knowing whether the real facts would support his case and hoping to find out by interrogatories facts on which to found his claim, the bill was called a fishing bill.

(See *Suit*; *Action*; *Chancery*; *Information*; *Pleading*.)

**BILL OF COSTS** is an account of fees, charges and disbursements by a solicitor in a legal business. As to costs generally and their taxation, see those titles. It may here be mentioned that the Court has jurisdiction under the Attorneys and Solicitors Act, 1843, to make an order for the delivery by a solicitor of a bill of costs against his client; this is necessary where the solicitor claims a lien on a fund or on papers in his possession, so that they cannot be dealt with until his costs have been paid.<sup>2</sup> Also under the Attorneys and Solicitors Act, 1870, a solicitor may make an agreement in writing with his client as to his remuneration by a gross sum, percentage, salary or otherwise; such an agreement, however, is liable to be reviewed by a taxing master.<sup>3</sup>

**BILL OF EXCEPTIONS.**—Under the former common law practice if a judge at the trial of an action misdirected the jury on a point of law, or improperly received or rejected evidence, he might be required to seal a bill of exceptions, which was a document containing a statement of the objections taken by the party aggrieved. The bill was then argued before the Court of Error, and if the objections were held to be well founded there was a trial *de novo*. Bills of exceptions have been abolished.<sup>4</sup> The same result is now obtained by a motion for a new trial. (See *Trial*.)

**BILL OF EXCHANGE** is an unconditional written order from A. to B., directing B. to pay C. a certain sum of money therein named, either on demand or at sight, or at any certain period after date or after sight. (See *Days of Grace*.) A. is called the drawer, B. the drawee, and C. the payee; sometimes A., the drawer, is himself the payee. § 2. When B., the drawee, has, by accepting the bill, undertaken to pay it, he is called the acceptor.<sup>5</sup> (See *Accept*.)

Acceptance.

<sup>1</sup> Mitford, 33 *et seq.*; Daniell, 1377.

<sup>2</sup> Daniell, Ch. Fr. 1728; Archbold's Pr. 121.

<sup>3</sup> Daniell, 1738.

<sup>4</sup> Archbold's Pr. 376; Rules of Court, lviii. 1.

<sup>5</sup> Byles on Bills, 1, 78; Smith's Merc. Law, 203 *et seq.* The Bills of Exchange Act is the act of 18 & 19 Vict. c. 67, passed to prevent delay in actions on bills of exchange. It was virtually repealed by the Rules of Court of April, 1880.



§ 3. If a bill is made payable to C. without more, it is not transferable.<sup>1</sup> To order. Usually, however, a bill is made payable either to "C. or order," or to "C. or bearer." In the former case C. can transfer the bill by a written Indorsement. order to pay to someone else (D.), who then becomes the holder of it, and can transfer it to E., and so on. This order is generally written on the back of the bill, and is called an indorsement, C. being then the indorser, and D. the indorsee. If the bill is payable to C. or bearer, C. To bearer. can transfer it to D. by merely delivering it to him. A bill payable to order may be converted into a bill to bearer if the payee or indorsee indorses it in blank. (See *Indorsement*.) Holder is a general word ap- Holder. plied to anyone in actual or constructive possession of a bill, and entitled to recover and receive its contents from the parties to it, viz., the acceptor, Parties. drawer, and indorsers.

§ 4. The legal effect of *drawing* a bill is a conditional contract by the drawer to pay the bill if the drawee dishonours it, either by failing to accept it, or, having accepted it, by failing to pay it at maturity. The effect of *accepting* a bill is an absolute contract by the acceptor to pay of acceptor, the bill. The effect of *indorsing* a bill is a conditional contract by the of indorser. indorser to pay his immediate or any succeeding indorsee, or the bearer, in case of the acceptor's default.<sup>2</sup> But if the bill is not presented for payment at the proper time, all the antecedent parties, except the acceptor, are discharged from liability,<sup>3</sup> and the liability of a party may be qualified by the terms of his acceptance or indorsement (see those titles).

§ 5. When the drawee of a bill fails to accept it on its being presented to him for that purpose it is said to be dishonoured by non-acceptance; Dishonour. when the acceptor of a bill fails to pay it on presentation at the proper time it is said to be dishonoured by non-payment. § 6. As a general Notice of dishonour. rule it is incumbent on the holder of a bill which has been dishonoured to give prompt notice of the fact to the antecedent parties, otherwise they will be discharged from all liability.<sup>4</sup>

§ 7. When a bill is made payable at a certain time (*e.g.*, thirty days after date or sight), on that time arriving the bill is said to be at maturity or due. After that time it is said to be overdue or afterdue. The nego- Maturity. tiability of an overdue bill is qualified. (See *Negotiable; Equity*.) Overdue.

§ 8. Bills of exchange, promissory notes, and a few other instruments, differ from other simple contracts, first, in their negotiability (*q. v.*), and Peculiarities of bills, &c. secondly, in being presumed to have been given or transferred for valuable consideration until the contrary is proved.<sup>5</sup>

§ 9. An accommodation bill is one to which a person has put his name as acceptor, drawer, or indorser, without consideration, for the purpose Accommoda- tion bills. of benefiting or accommodating another person who desires to raise money on the bill and is to provide for it when due.<sup>6</sup> When one person does this in consideration of another doing the same for him, the bills are called mutual accommodation bills. As between the accommodating and the

<sup>1</sup> Byles, 82, 147.<sup>2</sup> *Ibid.* 2 *et seq.*<sup>3</sup> *Ibid.* 215.<sup>4</sup> *Ibid.* 269 *et seq.*<sup>5</sup> *Ibid.* 2, 118.<sup>6</sup> *Ibid.* 129.

accommodated parties, of course the ordinary rules of the liability of acceptor, drawer, &c. do not apply, nor do they apply where a person takes an accommodation bill with notice of its character.

**Inland.** § 10. Bills of exchange are either inland or foreign. Inland bills are those which are both drawn and payable within the limits of the British Islands; all others are foreign bills. Foreign bills differ from inland bills principally in being frequently drawn in sets or parts,<sup>1</sup> and in requiring to be protested on dishonour in order to charge the drawer.<sup>2</sup>

**Foreign.**

**Parts.** (See *Protest*.) Exemplars or parts of a bill are separate copies, each part being numbered and referring to the other parts, but all the parts are signed by the drawer and are otherwise identical with one another. All the parts together make a set, and the whole set constitutes but one bill, so that the payment of one part extinguishes all. The object of drawing a bill in parts is to guard against loss and to facilitate negotiation.<sup>3</sup>

**Set.**

**Bills of Exchange Act.** § 11. Formerly there was a peculiar mode of suing on bills of exchange provided by the act 18 & 19 Vict. c. 67, under which a person sued on a bill was not allowed to defend the action unless he showed a *prima facie* defence. This principle has now been extended to all actions where the writ is specially indorsed for a liquidated money claim, and the special procedure on bills of exchange has been abolished.<sup>4</sup>

As to the history of bills of exchange, see Jevons on Money, 300.

**BILL OF HEALTH** is a document given to the master of a ship by the consul of the port from which he comes, describing the sanitary state of the place. "It may be a clean, suspected, or foul bill. The first is given where no disease of an infectious or contagious kind is known to exist; the second where, though no such disease has appeared, there is reason to fear it; and the last, when such a disease actually exists at the time of the ship's departure. The latter subjects the ship to the full period of quarantine"<sup>5</sup> (*q. v.*).

**BILL OF LADING.**—§ 1. "Where a ship is not chartered wholly to one person, but the owners offer her generally to carry the goods of any merchants who may chose to employ her, or where, if chartered to one merchant, he offers her to several sub-freighters for the conveyance of their goods, she is called a general ship. In these cases the contract entered into by and with the owners, or the master on their behalf, is evidenced by the bill of lading. This is a document which is signed and delivered by the master to the shippers on the goods being shipped. In practice, when goods are shipped, an acknowledgment is given by the mate, known as the "mate's receipt." This is afterwards exchanged by the captain or the broker of the ship for the bill of lading. Several parts, that is to say copies, of the bill of lading are commonly made out; one

**Mate's receipt.**

**Parts of bill.**

<sup>1</sup> Byles, 390.

<sup>2</sup> *Ibid.* 255.

<sup>3</sup> *Ibid.* 385.

<sup>4</sup> Rules of Court, XIV.; Rules of April, 1880.

<sup>5</sup> Maude & Pollock on Merch. Shipp. 104.

or more of these is sent by the shipper of the goods to the person for whom they are intended (the consignee), one is retained by the shipper himself, and another is kept by the master for his own guidance.<sup>1</sup>

§ 2. A bill of lading specifies the name of the master, the port and destination of the ship, the goods, the consignee, and the rate of freight.<sup>2</sup> Contents of.

§ 3. A bill of lading is a negotiable instrument, and the property in the goods which it represents is transferred by its indorsement and delivery, subject to any rights of stoppage in transitu, liability to freight, &c.<sup>3</sup> Qualities of.  
(See *Affreightment*.)

**BILL OF PEACE.**—Formerly, where the same question had been frequently litigated in the same manner (as where repeated actions of ejectment had been brought for the same land), or where it was likely to be contested in a multiplicity of suits (as where the tenants of a manor had a dispute with the lord), a bill might have been filed in Chancery to restrain the vexatious or unnecessary litigation by perpetual injunction; this was called a bill of peace.<sup>4</sup> Now there cannot be an injunction by one branch of the High Court to restrain proceedings in another; provision is, however, made for staying proceedings, or for transferring them to the division in which other proceedings are pending. Moreover, any matter of equity on which an injunction might have been obtained before the Judicature Acts, may now be relied on as a defence.<sup>5</sup>

**BILL OF PROOF.**—In a proceeding for foreign attachment, it is a rule that the garnishee cannot raise the defendant's want of title as a defence to the attachment, and, therefore, he cannot show that the property to be attached really belongs to a third person: the real owner, however, is permitted to do this by what is called a bill of proof, which is a claim by him to be admitted to prove that the property is his; thus, if the defendant delivered to the garnishee goods belonging to A., and the plaintiff issues an attachment against them, A. must file a bill of proof in order to show his right to the goods; having filed his bill, he is called the approver. The plaintiff appears to the bill of proof, and the approver delivers the probation, which is in the nature of a declaration, and sets forth the approver's title; the plaintiff then pleads and the issue is tried as in ordinary cases, the approver being in the position of real plaintiff.<sup>6</sup> Approver. Probation.

**BILL OF REVIEW—BILL OF REVIVOR.** See *Bill of Complaint*.

**BILL OF SALE** is a deed assigning personal property.

I. § 2. A bill of sale of ordinary chattels by way of absolute assignment is not very common, except in cases where the thing sold is of some importance, as where a sheriff sells goods under an execution.<sup>7</sup> Bill of sale by way of assignment.

<sup>1</sup> Maude & Pollock, *Merch. Shipp.* 255; *Smith's Merc. Law*, 302.

<sup>2</sup> See the form, Maude & Pollock, 256.

<sup>3</sup> *Ibid.* 257, 315; stat. 18 & 19 Vict. c. 111; *Fuentes v. Mentis*, L. R., 3 C. P. at p. 276. As to the rights of the holder of one part of a bill of lading drawn in a

set, see *Glyn, Mills & Co. v. East and West India Dock Co.*, 5 Q. B. D. 129.

<sup>4</sup> Daniell, *Ch. Pr.* 1532.

<sup>5</sup> *Jud. Act*, 1873, s. 24.

<sup>6</sup> *Brandon, For. Attach.* 128.

<sup>7</sup> *Smith's Merc. Law*, 484.

Bill of sale of ship.

§ 3. A bill of sale is the usual,<sup>1</sup> and in the case of registered ships the only, mode of transferring ships; a bill of sale of a registered ship, under the Merchant Shipping Act, 1854,<sup>2</sup> is in the form given in the act, specifying the number and date of registry, the description of the ship, &c.; it is under seal and must be registered.<sup>3</sup>

§ 4. Formerly bills of sale were divided into two kinds,—the grand bill of sale, which conveyed the ship from the builder to the purchaser or first owner, and the ordinary bill of sale by which any subsequent transfer was made; but these terms are not now used.<sup>4</sup>

Bill of sale by way of mortgage.

II. § 5. The most usual kind of bill of sale, and that to which the term is in practice applied, is a bill of sale of chattels (*e.g.* furniture, horses, stock-in-trade, &c.) by way of mortgage to secure a debt, being an assignment with a covenant for reconveyance on payment of the debt, similar in most respects to a mortgage of land. (See *Mortgage*.) It is with reference to these instruments that the Bills of Sale Acts<sup>5</sup> are of importance; they were passed to prevent frauds “committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property” which really belongs to some one else. The Bills of Sale Act, 1878, provides in effect that unless a bill of sale, together with an affidavit verifying its execution, is filed in the Central Office of the Supreme Court<sup>6</sup> within seven days from its execution, it shall be void against the trustee in bankruptcy or liquidation of the grantor, against his assignees for the benefit of his creditors, and against his execution creditors, so far as regards any of the goods which remain in his actual or apparent possession.<sup>7</sup> (See *Possession; Order and Disposition; Attornment*, § 4.)

Bills of Sale Acts.

**BILLS OF MORTALITY** were returns of deaths in London before the present system of registration was instituted. (See *Registration of Births, Deaths and Marriages*.) The returns covered the greater part of the district now known as the Metropolis (*q. v.*).

**BIRTH.** See *Registration of Births, Deaths and Marriages; Concealment of Birth; Abortion*.

**BISHOP** is an ecclesiastical dignitary, being the chief of the clergy within his diocese, subject to the archbishop of the province in which his diocese is situated; most of the bishops are also members of the House of Lords (*q. v.*). § 2. Every bishop is elected by the dean and chapter of the bishopric on the nomination of the crown, the election being a mere form.<sup>8</sup> (See *Congé d'élire; Letter Missive*.)

<sup>1</sup> *The Sisters*, 5 Rob. 159; Maude & Pollock, *Merc. Shipp.* 22.

<sup>2</sup> Sect. 55.

<sup>3</sup> Maude & Pollock, 22—25; Smith's *Merc. Law*, 188.

<sup>4</sup> Maude & Pollock, 22.

<sup>5</sup> Bills of Sale Act, 1878, repealing the

former statutes, 17 & 18 Vict. c. 36; and 29 & 30 Vict. c. 96.

<sup>6</sup> Judicature (Officers) Act, 1879, s. 4; Rules of Court, LXA (December, 1879, and April, 1880).

<sup>7</sup> See Pope on Bills of Sale.

<sup>8</sup> Phill. Eccl. Law, 41.

§ 3. The principal powers and duties of a bishop consist in ordaining priests and deacons, licensing curates, consecrating churches, and visiting the clergy in his diocese. (See *Visitation*.) He is an ecclesiastical judge, but his principal jurisdiction is exercised by his chancellor (*q. v.*).<sup>1</sup> He also has certain duties under the Church Discipline Act and the Regulation of Worship Act, 1874 (*q. v.*).

§ 4. The term "suffragan bishop" (*suffragari*, to help) appears to have Suffragan. two meanings: (1) a bishop consecrated to supply the place of the bishop of a see, when absent therefrom: the duties of the suffragan being confined to conferring of orders, confirming, &c. The stat. 26 Hen. 8, c. 14, created certain sees of suffragan bishops, and made provision for their appointment. (2) In a less proper sense, all the provincial bishops, with respect to the archbishop, are sometimes called his suffragans.<sup>2</sup> (See *Ordinary*; *Ecclesiastical Courts*; *Dean and Chapter*.)

**BLACKSTONE.**—William Blackstone was born on the 10th July, 1723, educated at the Charterhouse and Oxford, called to the bar in 1746, elected to the Viner professorship in 1758, and appointed solicitor-general to the Queen in 1763. In 1765 he published his *Lectures in the form of "Commentaries on the Laws of England."* In 1768 he entered parliament, and in 1770 was made a judge of the King's Bench; shortly afterwards he was removed into the Common Pleas. He died on the 14th February, 1780. In addition to his famous *Commentaries*, he was the author of an *Analysis of the Laws of England*, of a work on the *Charters*, of some law tracts, and of several volumes of reports.<sup>3</sup>

**BLANK.** See *Acceptance*; *Indorsement*.

**BLASPHEMY** is the offence of speaking matter relating to God, Jesus Christ, the Bible or the Book of Common Prayer, intended to wound the feelings of mankind or to excite contempt and hatred against the Church by law established, or to promote immorality. According to some opinions it is also blasphemy to speak words denying the truth of Christianity in general, or the existence of God, even if spoken decently and in good faith. Blasphemy is a misdemeanor (*q. v.*)

It is also a misdemeanor to publish a blasphemous libel, that is, a document containing blasphemous matter.<sup>4</sup> (See *Apostasy*; *Heresy*.) Blasphemous libel.

**BLENDED FUND.**—§ 1. Where a testator directs his real and personal estate to be sold, and disposes of the proceeds as forming one aggregate, this is called a blended fund. The expression is chiefly used in cases where part of the testator's disposition fails, by lapse or otherwise, so that it becomes a question, whether so much of the undisposed of portion as consists of or arises from land goes to the testator's heir-at-Conversion.

<sup>1</sup> Steph. Comm. ii. 671.

<sup>2</sup> Phill. 96.

<sup>3</sup> Foss, Bibl. Dict.

<sup>4</sup> Stephen's Crim. Dig. 97; Shortt on Copyright, 301.

law or next of kin. The leading case on this point is *Ackroyd v. Smithson*,<sup>1</sup> where the testator ordered his real and personal estate to be sold, and gave the proceeds to several legatees, some of whom died during the lifetime of the testator, so that their shares lapsed: it was held that so much of their shares as consisted of personal estate went to the testator's next of kin, and so much as consisted of the proceeds of real estate, went to the testator's heir-at-law, although the real estate had been sold. The rule is a branch of the doctrine of conversion (*q. v.*)

Charitable legacies.

§ 2. Where charitable legacies are made payable out of a fund consisting partly of personal property and partly of the proceeds of realty, the funds are generally distinguished as pure and impure personality. (See *Personalty*; *Abatement*, § 4.)

De facto.

**BLOCKADE**, in international law, is where two powers are at war, and one maintains such a naval force near the shore or ports of the other as to prevent access to them, or, as it is sometimes put, the vessels must be so disposed that there is an evident danger in entering the port or approaching the shore, notwithstanding that the blockading squadron may be accidentally absent for a time, *e. g.* from being blown off by the wind. § 2. A blockade de facto is where the blockade has not been notified (as is usually done) by the belligerent to neutral governments, so that every approaching vessel has to be warned off by the squadron. Vessels attempting to pass a blockade are liable to confiscation (*q. v.*).

**BLOOD**, in law, is (1) that quality or relationship which enables a person to take by descent, sometimes called in the old books "blood inheritable;"<sup>2</sup> and (2) a number of persons connected by blood relationship, that is, by being descended from one or more common ancestors.

§ 2. Blood is of two kinds,—the whole blood and the half blood. One person is said to be of the whole blood to another when they are both descended from the same pair of ancestors, *e. g.* two brothers who have the same father and mother.<sup>4</sup> Two persons are said to be of the half blood to one another when they are descended from one common ancestor only, *e. g.* two brothers who have the same father, but different mothers.<sup>5</sup> Formerly, relations by the half blood were incapable of inheriting to one another, but now they are admitted in the table of descent after the relation of the whole blood of the same degree and his issue where the common ancestor is a male, and next after the common ancestor when the common ancestor is a female.<sup>6</sup> In the distribution of the personal estate of an intestate, there is no difference between the half blood and the whole blood.<sup>7</sup>

<sup>1</sup> 1 Bro. C. C. 503; White and Tudor, L. C. i. 783; *Jessopp v. Watson*, 1 M. & K. 665.

<sup>2</sup> Manning's Law of Nations, 400 *et seq.*

<sup>3</sup> Co. Litt. 12 a.

<sup>4</sup> *Ibid.* 14 a.

<sup>5</sup> Litt. § 6.

<sup>6</sup> Inheritance Act, s. 9; Williams, R. P. 109. For an explanation of the latter part of the rule, see Bythewood's Conv. (Sweet) i. 146, n. (a).

<sup>7</sup> Williams, R. P. 405.

**BLOUNT.**—Thomas Blount was born at Bordesley, in Worcestershire, about 1619, and was called to the bar at one of the Temples. He died 26th December, 1679. His principal legal works are (1) the *Νομολεξικον*, or Law Dictionary, “interpreting such difficult and obscure words and terms as are found either in our common or statute, ancient or modern laws” (London, 1671, fol.; reprinted with corrections and additions, 1691). (2) *Fragmenta Antiquitatis*, Ancient Tenures of Land and Jocular Customs of some Manors, &c. (London, 1679, 8vo.; edited by Beckwith, 1784; re-edited, 1815; and, lastly, by W. C. Hazlitt, 1874, but this last is not properly an “edition,” for the whole matter is re-arranged on Mr. Hazlitt’s own plan). (See Wood’s *Ath. Ox.* ii. col. 73.)

**BOARD OF TRADE** is that committee of the Privy Council which is appointed for the consideration of matters relating to trade and foreign plantations.<sup>1</sup> It has the general superintendence of matters relating to merchant ships and seamen<sup>2</sup> (including the power of stopping unseaworthy ships,<sup>3</sup> and of instituting inquiries and investigations into shipping casualties),<sup>4</sup> of matters relating to railways (especially as regards the inspection and control of railways before and after their opening for traffic, the sanctioning of bye-laws, and the investigation of accidents),<sup>5</sup> of matters relating to the registration of joint-stock companies,<sup>6</sup> designs,<sup>7</sup> &c., &c.

**BODY POLITIC or POLITIQUE** is the old term for a corporation.<sup>8</sup>

**BONA FIDES**—“good faith;” *bonâ fide*—“in good faith,” that is, honestly, without fraud, collusion or participation in wrong-doing. The phrase want of good faith is chiefly used not so much to denote that kind of fraud which makes a contract or other transaction voidable as between the parties to it, as to denote that kind of collusion or knowledge which disentitles the party to set up a claim against a person who would otherwise be liable to him. Thus the general rule is that a person who takes a negotiable instrument in good faith for valuable consideration can sue the person liable on the instrument, notwithstanding a defect in the title of the person from whom he acquired it: if, however, he had notice of the defect in the title, then he would not have taken the instrument in good faith, and would be unable to sue on it.<sup>9</sup> (See *Negotiable*.)

§ 2. The phrase “*bonâ fide*” is often used ambiguously: thus the expression “a *bonâ fide* holder for value” may either mean a holder for real value as opposed to a holder for pretended value, or it may mean a holder for real value without notice of any fraud, &c.<sup>10</sup>

<sup>1</sup> Merchant Shipping Act, 1854, s. 2.

<sup>2</sup> *Ibid.* s. 6.

<sup>3</sup> M. S. Act, 1876.

<sup>4</sup> *Ibid.*; M. S. Act, 1854, s. 507.

<sup>5</sup> Hodges on Railways, 410 *et seq.*

<sup>6</sup> Companies Act, 1862, s. 174.

<sup>7</sup> Steph. Comm. ii. 462.

<sup>8</sup> Statute of Uses, s. 1; Co. Litt. 95a, 250a.

<sup>9</sup> *Goodman v. Harvey*, 4 Ad. & El. 870.

<sup>10</sup> Byles on Bills, 121. As to what is a “*bonâ fide* traveller” within the meaning of the licensing acts, see *Roberts v. Humphreys*, L. R., 8 Q. B. 483; as to a “*bonâ*

**BONA NOTABILIA.**—Before the creation of the Probate Court (*q. v.*) wills were proved before the bishop of the diocese in which the property of the deceased was situated: if the deceased had *bona notabilia*, or chattels to the value of one hundred shillings, in two distinct dioceses, then the will was proved before the metropolitan of the province.<sup>1</sup>

**BONA VACANTIA** are goods which are found without any apparent owner. They vest in the crown by exception to the general rule as to occupancy (*q. v.*). Such are wrecks, treasure trove, waifs and estrays.<sup>2</sup> (See those titles.)

**BONA WAVIATA** are waifs (*q. v.*).

Single.

Double or conditional.

Form of.

**BOND** is a contract under seal to pay a sum of money,<sup>3</sup> or a sealed writing distinctly acknowledging a debt, present or future;<sup>4</sup> and when this is all the bond is called a single one—*simplex obligatio*. A double or conditional bond is where a condition is added that if the obligor does or forbears from doing some act the obligation shall be void. Formerly such a condition was sometimes contained in a separate instrument, and was then called a defeazance (*q. v.*). The person who binds himself is called the obligor, and the person in whose favour the bond is made is called the obligee. The bond usually consists of (i) the obligation or operative part, by which the obligor binds himself to pay the money; (ii) any recitals which may be necessary to explain the nature of the transaction; and (iii) the condition, which sets out the acts on the performance of which the bond or obligation is to cease to be of effect. Thus in an ordinary sureties' bond for the payment of a debt, the obligation binds the sureties to pay a sum double the amount of the debt, and hence called the penalty: the recitals then explain the circumstances under which the bond is given, and the condition declares that in the event of the debtor paying the debt with interest, &c. on a certain day, the obligation shall be void, that is, the sureties shall no longer be liable for the debt.

Varieties of.

§ 2. As to administration, bail, bottomry and replevin bonds, see those titles. Voluntary bonds are bonds given without valuable consideration. (See *Administration*, § 2.)

Effect of.

§ 3. Formerly the common law rule was that on non-performance of the condition of a bond on the day fixed the penalty was absolutely forfeited and recoverable by the obligee in full; Courts of Equity gave relief against penalties on payment of the sum or damages actually due or sustained, and by various acts (4 & 5 Anne, c. 16; 8 & 9 Will. 3, c. 11) the obligee was prevented from recovering even at law more than the

fide shareholder," see *Bloxam v. Metropolitan Rail. Co.*, L. R., 3 Ch. 337; as to a "bonâ fide parishioner," see *Etherington v. Wilson*, 1 Ch. D. 160.

<sup>1</sup> Bl. Comm. ii. 509.

<sup>2</sup> Steph. Comm. ii. 529.

<sup>3</sup> Sheppard, Touch. (367), adds, "or to do some other thing." At the present day a contract under seal to do anything other than the payment of money is more commonly called a covenant (*q. v.*).

<sup>4</sup> Davids, Conv. v. (ii.) 268.



sum or damages actually due or sustained.<sup>1</sup> At the present day, therefore, a bond merely amounts to a covenant to pay a sum of money, and is adopted partly because the form is sanctioned by antiquity, and partly because it is sometimes more flexible than an ordinary covenant. Formerly bonds, like other specialty contracts, had the advantage of binding the lands of the debtor after his decease, while simple contracts did not; but this difference no longer exists (see *Contract; Administration*, § 3); and at the present day almost the only advantage which a bond has over an ordinary contract to pay money is that the period fixed by the Statute of Limitations within which to bring an action is twenty years instead of six.<sup>2</sup>

II. § 4. The term "bond" is also applied to instruments of indebtedness issued by companies and governments to secure the repayment of money borrowed by them. Sometimes the bond is in the form of a promissory note (in which case it may also be called a debenture, *q. v.*):<sup>3</sup> sometimes it consists of an undertaking to pay the principal and interest, secured by a mortgage or hypothecation of the property of the company or government; sometimes a mortgage of this kind is contained in a trust-deed or a "general bond" by which the property is conveyed to trustees for the bondholders. A bond issued by a government cannot be the subject of an action against the government.<sup>4</sup> (See *Lloyd's Bonds*.)

Bonds of companies, &c.

**BOOTY OF WAR.** See *Capture*.

**BOROUGH** (in the old sense of the word) is "an ancient town, holden of the king or any other lord, which sendeth burgesses to the parliament."<sup>5</sup> Many of these boroughs, however, having been disfranchised in modern times, are now only boroughs to this extent, that the land within them is held by tenure in burgage or subject to the custom of borough-English (*q. v.*). At the present day "borough" almost always means either a borough corporate (or municipal borough), or a parliamentary borough,<sup>6</sup> most (if not all) municipal boroughs being also parliamentary. § 2. As to municipal boroughs, see *Municipal Corporation*.

§ 3. A parliamentary borough is a town which returns one or more members to parliament:<sup>7</sup> some of these towns are ancient boroughs, others are towns on which the right of returning members has been conferred by statute.<sup>8</sup>

Parliamentary boroughs.

§ 4. In the case of a municipal borough regulated by the Municipal Corporations Act, 1835, the income of its property forms a fund called the borough fund, out of which the expenses of the corporation are

Borough fund,

<sup>1</sup> Leake on Contracts, 575.

<sup>2</sup> Stat. 3 & 4 Will. 4, c. 42.

<sup>3</sup> See *Crouch v. Credit Foncier*, L. R.,

8 Q. B. 374.

<sup>4</sup> *Ibid.*; and *Twyecross v. Dreyfus*, 5 Ch. D. 605.

<sup>5</sup> Litt. § 164; Co. Litt. 109 a.

<sup>6</sup> See Bl. Comm. i. 115; Steph. Comm. i. 125.

<sup>7</sup> See Parliamentary and Municipal Registration Act, 1878, s. 4.

<sup>8</sup> Stat. 2 Will. 4, c. 45; 30 & 31 Vict. c. 102.

and rate.

paid; and if it is not sufficient for the purpose, they are authorized to levy a rate, called a borough rate, on the occupiers of property within the borough.<sup>1</sup>

§ 5. As to sessions of the peace in boroughs, see *Commission of the Peace*; *Recorder*.

**BOROUGH COURTS** are Courts existing in many boroughs in England, and having a local jurisdiction in civil matters. They are Courts of record, and are generally held by prescription or charter. In ordinary cases, the recorder of the borough is the judge. As to the procedure in them, see the Borough and Local Courts Act, 1872.<sup>2</sup> The tendency now is to transfer business from these Courts to the County Courts.<sup>3</sup> (See *Mayor's Court of London*; *Salford Hundred Court*; *Recorder*.)

**BOROUGH-ENGLISH.**—Some boroughs have a custom that if a man has issue many sons and dies, the youngest son shall inherit all the tenements which were his father's within the borough, as heir unto his father by force of the custom; this is called "borough-English."<sup>4</sup> In some places the custom extends to collateral heirs, so that the youngest brother succeeds instead of the eldest.<sup>5</sup>

§ 2. There is also a special kind of borough-English, by which the land descends to the younger son if he be not of the half-blood, and if he be, then to the eldest son.<sup>6</sup>

**BOTE** is the old-fashioned name for estovers (*q. v.*). In Anglo-Saxon *bōt* meant (1) improvement or repair; (2) a fine or compensation for a wrongful act.<sup>7</sup>

**BOTTOMRY** is an agreement entered into by the owner of a ship or his agent, whereby, in consideration of a sum of money advanced for the use of the ship, the borrower undertakes to repay the same with interest, if the ship terminate her voyage successfully, and binds or hypothecates the ship and freight, or the cargo, for the performance of his contract, the debt being lost in case of the non-arrival of the ship. The instrument by which this is effected is sometimes in the shape of a deed-poll, and is then called a bottomry bill; sometimes in that of a bond.<sup>8</sup> § 2. The most important case of borrowing money on bottomry is where the master of a ship is at a foreign port, and finds it absolutely necessary to obtain money, and can only do so by executing an instrument of hypothecation.<sup>9</sup> (See *Necessaries*; *Respondentia*.)

By master of  
ship.

<sup>1</sup> Stat. 5 & 6 Will. 4, c. 76, s. 92; 35 & 36 Vict. c. 91; Grant on Corporations, 487. As to district rates or borough rates leviable in parishes, &c. lying partly within and partly without the borough, see stat. 8 & 9 Vict. c. 110.

<sup>2</sup> Steph. Comm. iii. 292.

<sup>3</sup> Stat. 15 & 16 Vict. c. 54, s. 7; 30 & 31 Vict. c. 142, s. 29.

<sup>4</sup> Litt. § 165. As to the origin of the

custom, see Litt. § 211; 2 Bl. 83; Maine's Early Inst. 222.

<sup>6</sup> Co. Litt. 110 b.

<sup>6</sup> *Ibid.* 140 b.

<sup>7</sup> Schmid, Ges. gl. s. v.; Co. Litt. 41 b, 127 a.

<sup>8</sup> Smith's Merc. Law, 416; Fisher on Mortgage, 84; Williams and Bruce's Admiralty, 31.

<sup>9</sup> Smith, 418.

§ 3. A rule peculiar to bottomry and respondentia bonds is, "that if securities of this sort are given at different periods of a voyage, and the value of the ship is insufficient to discharge them all, the last in point of date is entitled to priority of payment; because the last loan furnishes the means of preserving the ship, and without it the former lenders would have entirely lost their security."<sup>1</sup> (See *Salvage*.)

§ 4. A bottomry bond may be enforced by a proceeding in rem in the Admiralty Court. (See *In Rem*.)<sup>2</sup>

Priority of.  
Enforcement of.

ETYMOLOGY.]—Dutch: *bodmerie*, from *bodem*, the keel of a ship.<sup>3</sup>

**BOUGHT AND SOLD NOTES** are documents which are usually delivered by brokers to their principals on the conclusion of a contract of sale and purchase, the bought note being delivered to the buyer, and the sold note to the seller. The notes should contain the names of both the contracting parties, the quantity of the article bought and sold, and the price if agreed upon. They should also substantially correspond with each other; for otherwise, where the same broker acts for both parties, the bought and sold notes do not constitute a binding contract, and where the same broker does not act for both parties, it will be a question for the jury by which note the parties intended to be bound. The notes constitute the original contract between the parties, and are the proper evidence, but not necessarily the only evidence of it.<sup>4</sup> (See *Broker*; *Agent*.)

**BOUNDARIES.**—§ 1. A boundary is that imaginary line which divides two pieces of land from one another. The line is generally, but not necessarily, marked or indicated on the surface of the land by a wall, fence, ditch or other object. Where land belonging to a private person adjoins the sea or a public tidal river, the boundary is usually the line of medium high tide, while, in the case of a non-tidal or private stream, the boundary between the adjoining estates is presumed *primâ facie* to be the medium filum of the stream. Ditches and fences between adjoining estates are also presumed to be party boundaries, and to belong to the owners as tenants in common.<sup>5</sup> The same rule generally applies to a party wall<sup>6</sup> (*q. v.*).

Land adjoining sea or river.

Fences and walls, &c.

§ 2. Every owner of land is so far liable to keep up a fence or other material boundary that he is liable for a trespass if he allows his animals to stray on to the land of his neighbour.<sup>7</sup> There are, however, cases in which a person is absolutely bound to keep up a fence, or the like, between his own and his neighbour's land; such a liability may arise by prescription.<sup>8</sup> A tenant is also bound, in the absence of an agreement to the contrary, to maintain the fences of the property demised to him, and if the demised land adjoins land belonging to himself, he is under an obligation to keep the boundaries distinct during the term.<sup>9</sup>

Liability to maintain.

<sup>1</sup> Smith, 421.

<sup>2</sup> Maude and Pollock, Merch. Shipp.

441.

<sup>3</sup> Molloy de Jure Mar. 294.

<sup>4</sup> Russell on Merc. Agents, 4.

<sup>5</sup> Hunt on Boundaries, 1, 4, 12, 25.

<sup>6</sup> *Watson v. Gray*, 14 Ch. D. 192; *Gale on Easements*, 513.

<sup>7</sup> *Gale*, 515.

<sup>8</sup> *Ibid.* 516; *Hunt*, 32.

<sup>9</sup> *Hunt*, 81; *Att.-Gen. v. Fullerton*, 2 V. & B. 264.

Remedy.

§ 3. Where there is a dispute between two adjoining owners as to the boundary between their lands, the question may, in a simple case, be determined by an action of trespass or recovery of land; but where the boundaries have been confused, so that it becomes necessary to establish old boundaries, to direct intermingled land to be separated, or an equivalent set out, or the like, the proper remedy is an action in the Chancery Division for a commission to ascertain the boundaries.<sup>1</sup> A landlord is also entitled to this remedy if the tenant has confused the boundaries of his own and the demised land.<sup>2</sup> (See *Perambulation*.)

Inspection of mine.

§ 4. If a mine owner trespasses on his neighbour's land by excavating beyond the boundary, he may be restrained by injunction; and for this purpose, in a case of suspected trespass by underground working, the Court will, if necessary, allow an inspection; that is, give the plaintiff leave to go on and into the land of the defendant and see whether he is really working under the plaintiff's land.<sup>3</sup> (See *Barrier*.)

Inclosure Commissioners.

§ 5. As to the jurisdiction of the Inclosure Commissioners in respect of boundaries, see stat. 8 & 9 Vict. c. 118; 9 & 10 Vict. c. 70. Their jurisdiction extends not only to land in process of enclosure under the acts, but also to any land which belongs to separate owners, but which is intermixed or inconveniently subdivided.<sup>4</sup>

**BOUNDS.**—In the law of mines, the trespass committed by a person who excavates minerals underground beyond the boundary of his land is called working out of bounds. The person on whose land the trespass is committed may bring an action for damages in one of the common law Divisions of the High Court, or an action in the Chancery Division for an injunction, and an account of the minerals taken, in which case he may obtain an inspection.<sup>5</sup> (See *Boundaries*, § 4; *Barriers*.)

**BOVILL'S ACT.** See *Partnership Act*.

**BRACTON.**—Henricus de Bracton is the author of a work entitled *De Legibus et Consuetudinibus Angliæ*, written during the reign of Henry III. He is said to have been a judge under that king. The work itself is a systematic exposition of the English law, being to some extent an adaptation of Azo's *Summa* to the Institutes of Justinian. It is a work of great historical interest, and is still occasionally cited on obscure questions of law. The only complete editions are the folio of 1569 and the quarto reprint of 1640, both printed in an inconvenient and repellent form. A new edition, under the editorship of Sir Travers Twiss, is now being published by the Record Commissioners.<sup>6</sup> (See *Britton*; *Glanville*.)

**BRANDING IN THE HAND.** See *Benefit of Clergy*.

<sup>1</sup> Hunt, 205; *Wake v. Conyers*, 1 Eden, 331; *White and Tudor*, L. C. ii. 394.

<sup>2</sup> *Spike v. Harding*, 7 Ch. D. 871. In this case, however, an inquiry in chambers was directed instead of a commission being issued.

<sup>3</sup> Hunt, 67.

<sup>4</sup> Cooke on Inclosure, 144.

<sup>5</sup> Bainbridge on Mines, 506.

<sup>6</sup> See Reeves, Hist. ii. 86; Güterbock on Bracton.

**BRAWLING.**—By stat. 5 & 6 Edw. 6, c. 4, if any person, by words only, quarrelled, chided or brawled in a church or churchyard, the ordinary (*i. e.* the bishop) was to suspend him, if a layman, *ab ingressu ecclesiæ*, and if a clerk in holy orders, from the ministration of his office during pleasure. And if any person in a church or churchyard proceeded to smite or lay violent hands upon another, he was excommunicated ipso facto: if he struck the person with a weapon, or drew any weapon with intent to strike, he was, on conviction by a jury, to have one of his ears cut off, or if he had no ears, to be branded with the letter F in his cheek, in addition to being excommunicated.<sup>1</sup> (See *Excommunication*.) By the stat. 23 & 24 Vict. c. 32, the jurisdiction of the Ecclesiastical Courts over laymen for brawling was taken away, and all riotous, violent or indecent behaviour in any church or recognized place of religious worship was made a misdemeanor, punishable on summary conviction by fine or imprisonment.<sup>2</sup>

**BREACH** is the invasion of a right or the violation of a duty. The word is used in a literal sense in such phrases as “breach of close,” which is an old-fashioned name for the tort of breaking a man’s close—in other words, trespassing on his land, more generally called trespass quare clausum fregit (see *Trespass*, § 1),<sup>3</sup> also in “pound-breach” and “prison-breach,” the last of which is a criminal offence (see the titles).  
Of close.  
Of pound.  
Of prison.

§ 2. More usually “breach” is applied to the violation of an obligation. Breach of a contract, promise or covenant is the failure to perform it (see *Performance*); it converts the right under the contract, &c. into a right to obtain a remedy for the breach, generally a right of action (see *Remedy*).<sup>4</sup> § 3. What may be called a constructive breach is an act of the promisor which disables him from performance, or a refusal to perform before the time of performance arrives; as if A. contracts to convey land to B. at a future time, and, before the time arrives, conveys it to C. B. may at once sue A. for breach of his contract.<sup>5</sup>  
Of contract, &c.  
Constructive breach.

§ 4. Breach of promise of marriage gives rise to a right of action for damages, unless the breach was justifiable, *e. g.* if the man, after making the promise, discovers that the woman is unchaste.<sup>6</sup> The parties to such an action are competent to give evidence in it, but the plaintiff’s testimony must be corroborated by some other material evidence.<sup>7</sup>  
Promise of marriage.

§ 5. By 8 & 9 Will. 3, c. 11, in an action on a bond for non-performance of any covenant or condition, the plaintiff may assign (that is, specify) as many breaches as he pleases, and the jury shall assess the damages on such breaches as shall be proved at the trial, or if he obtains an interlocutory judgment (see *Judgment*), he suggests as many breaches as he likes, and a writ of inquiry issues to assess the damages. (See *Writ of Inquiry*.) The judgment will be entered up for the whole  
Assignment of breaches.

<sup>1</sup> Bl. Comm. iv. 146.

<sup>2</sup> Steph. Crim. Dig. 102; and see stat. 52 Geo. 3, c. 155, s. 12.

<sup>3</sup> Bl. Comm. iii. 209; Steph. Comm. iii. 399.

<sup>4</sup> Leake on Contracts, 460.

<sup>5</sup> *Main’s case*, 5 Rep. 21 a; Leake, 460.

<sup>6</sup> *Macqueen, Husb. and Wife*, 229.

<sup>7</sup> Stat. 32 & 33 Vict. c. 68; Best on Evidence, 255, 773.

penalty, but is only allowed to be executed to the extent of the damages assessed; it stands as a security for further breaches, and if there shall afterwards be any further breaches, upon a *scire facias* by the plaintiff on the judgment, suggesting the breaches, then the damages will be assessed.<sup>1</sup>

**BREACH OF THE PEACE.**—Breaches of the peace are offences against public order. They are commonly divided into actual, constructive and apprehended.

Actual. I. § 2. Actual breaches of the peace include riotous and unlawful assemblies, riots, affrays, forcible entry and detainer, &c.<sup>2</sup> (See those titles.)

Constructive. II. § 3. Constructive breaches of the peace include the offences of sending challenges and provoking to fight, going armed in public without lawful occasion in such a manner as to alarm the public, &c. These are misdemeanors, punishable with imprisonment and other penalties.<sup>3</sup>

Apprehended. III. § 4. An apprehended breach of the peace is where one man threatens another with bodily injury, or with injury to his wife or children, or where a man goes about with unusual weapons or attendance, to the terror of the people, or publishes an aggravated libel of another. In such a case the offender may be summoned before a justice of the peace, and bound over to keep the peace for a limited time by entering into a recognizance with sureties, and, in default, committed to prison for not more than a year.<sup>4</sup> This may also be done where a person has been convicted of a misdemeanor or felony.<sup>5</sup>

**BREACH OF TRUST** is where a trustee does an act which is unauthorized or forbidden by the terms of his trust, or where he omits to do an act which the trust required him to do. Thus, in general, a trustee commits a breach of trust when he employs trust funds in his own business, or when he fails to call in and convert into money such parts of the trust property as are of a fluctuating or deteriorating kind.<sup>6</sup>

Remedy for. § 2. A breach of trust is in the nature of a tort, and entitles the cestui que trust who has been injured to compel the trustee to make good the loss caused by it. There is even something penal in the relief given in some cases of breach of trust: thus where a trustee has employed trust funds in his own business, and has thereby made a profit, the cestui que trust is entitled to it, although the trust estate has not been injured.<sup>7</sup> As to accounts with rests directed against trustees, see *Account*, § 11.

Injunction. § 3. A cestui que trust is also entitled to an injunction to restrain his trustee from committing a threatened breach of trust.<sup>8</sup>

<sup>1</sup> Archbold's Pr. 817; Davids. Conv. v. (2) 273; Wms. Saund. i. 67.

<sup>2</sup> Bl. Comm. iv. 142; Steph. Comm. iv. 248; Steph. Crim. Dig. 40 *et seq.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Stone's Justice, 368 *et seq.*; Bl. iv. 251; Steph. Comm. iv. 293, where a distinction is drawn between recognizances for the peace (as in the cases mentioned above), and recognizances for good behaviour, said

to be applicable in the case of drunkards, vagabonds, &c.

<sup>5</sup> Stat. 24 & 25 Vict. cc. 96, 97, 98, 99, 100.

<sup>6</sup> Lewin on Trusts, 738 *et seq.*; Watson's Comp. Eq. 903; Urlin's Office of Trustee, 114.

<sup>7</sup> Lewin, 742; Watson, 885.

<sup>8</sup> Lewin, 697.

§ 4. Where a breach of trust amounts to a fraudulent misappropriation or disposition of the trust property, it is a criminal offence, punishable with seven years' penal servitude (maximum); the fiat of the Attorney-General is required before the prosecution can be instituted.<sup>1</sup> Criminal.

**BRIBE—BRIBERY.**—§ 1. A bribe is a gift or payment made to a judicial officer in order to influence or reward him in respect of or in relation to any business having been, being, or about to be transacted before him, in his office. Bribery is the misdemeanor committed by a person who gives or offers a bribe, and by a public officer who accepts one.<sup>2</sup> Judicial officer.

§ 2. Bribery at parliamentary and municipal elections is the offence of giving, offering or promising any money or other valuable consideration in order to induce any voter to vote or refrain from voting, or as a reward for his having voted or refrained from voting; the voter who receives or contracts for any such bribe is also guilty of bribery. It is a misdemeanor, and makes the election void.<sup>3</sup> At elections.

**BRIDGES.**—§ 1. At common law, the expense of maintaining a public bridge falls on the county, borough, city, &c. in which it is situate, except where a parish is bound by prescription to repair a bridge; in such a case the parish and county may enter into a contract for the repair of the bridge by the county. As to private bridges, see *Toll*. In the case of bridges built since the Highway Act, 1835, the repair of the road passing over or adjoining to a bridge is done by the parish or other authority or persons bound to the general repair of the highway of which it forms a portion. Any parish, county, or other body or person neglecting the duty of repairing a bridge is liable to an indictment.<sup>4</sup> § 2. Numerous bridges have been built under statutory powers, *e.g.* under Turnpike Acts.<sup>5</sup>

§ 3. Causing malicious injuries to bridges, so as to destroy them or make them dangerous or impassable, is a felony, punishable with penal servitude for life (maximum).<sup>6</sup> Injuries to bridges.

**BRIEF.**—A brief is a document containing the materials or instructions furnished by a solicitor to a barrister to enable him to represent the client on the trial of an action, or on the hearing of a petition, motion, summons or other application. Strictly speaking, the "brief" includes all the documents supplied to counsel, such as copies of pleadings, affidavits, correspondence, &c.; but in a more technical sense the "brief" is that document which is drawn up by the solicitor in the form of a narrative or explanatory comment on the case. At the trial of an action where the

<sup>1</sup> Stat. 24 & 25 Vict. c. 96, ss. 80 *et seq.*; Lewin, 735.

<sup>2</sup> Stephen's Dig. Crim. 77; Russell on Crimes, i. 318.

<sup>3</sup> Stat. 17 & 18 Vict. c. 102; 30 & 31 Vict. c. 102; 35 & 36 Vict. c. 60; Russell, 319, 333; Stephen, 78.

<sup>4</sup> Steph. Comm. iii. 129.

<sup>5</sup> On the determination of a turnpike trust, the bridges vest in the county: stat. 33 & 34 Vict. c. 73, s. 12.

<sup>6</sup> Stat. 24 & 25 Vict. c. 97, ss. 33 *et seq.*

evidence is given *vivâ voce*, this is the most important part of the documents supplied to counsel, consisting as it does of an expanded version of the pleadings, with the important documents set out and commented on, and the proofs of the witnesses. (See *Proof*, § 4.) On the trial of an action where the evidence is given by affidavit, and on the hearing of a petition, motion, &c., the brief in this sense is less important, as the counsel have the facts of the case stated in the other documents. In Chancery practice the brief in this sense is frequently called "observations," being merely annexed to the petition or other documents in the case.<sup>1</sup>

Hand-briefs.

§ 2. Formerly, certain orders were obtainable as a matter of course on production of a brief purporting to contain instructions to counsel to apply to the Court for the order required, and indorsed with counsel's hand, *i. e.* signature, although the matter was never mentioned to the Court at all; these were hence called hand-briefs: they appear to be quite obsolete.

ETYMOLOGY.]—Brief in Norman French meant a writ,<sup>2</sup> and a writ was so called, "quia breviter et paucis verbis intentionem proferentis exponit."<sup>3</sup> It is possible that a brief to counsel originally consisted merely of the writ with the Norman French name for it on the back. In early times the pleadings were oral.

**BRISSENIUS.**—Barnabé Brisson was born in Poitou in 1531, became avocat-général in the parlement in 1575, président à mortier in 1583, and died on the 15th Nov. 1591. His principal works are *De Verborum Significatione* and *De Formulis et Solennibus Verbis*.<sup>4</sup>

**BRITTON** is the name given to a work on English law written in the reign of Edward I. by an author whose identity has not been clearly established. The work is in Norman-French, and claims to be promulgated with the authority of the king. It is founded to a great extent on Fleta, and to a less extent on Bracton; the arrangement, however, is quite different from that of either of those treatises, being based on the remedies appropriate to the various rights rather than on the rights themselves. Britton has the advantage over other early treatises in having been admirably edited.<sup>5</sup>

**BROKER.**—§ 1. A broker is an agent for the purchase and sale of goods, being employed by an intending vendor to find a purchaser, or by an intending purchaser to find a vendor. His remuneration consists of a commission or payment (called brokerage) proportionate to the price of the goods sold. A broker differs from a factor (*q. v.*) in the following respects:—He generally contracts in the name of his principal, while a factor may buy and sell either in his own name or in that of his principal; he is merely a negotiator between the parties, and is therefore not entrusted with the possession or control of the goods, while a factor is.<sup>6</sup> Stockbrokers are an exception to these rules.

<sup>1</sup> As to briefs generally, see Archbold, Pr. 345; Daniell, Ch. Pr. 841, n. (2).

<sup>2</sup> Co. Litt. 73b.

<sup>3</sup> Bract. 413.

<sup>4</sup> Holtz. Encycl.

<sup>5</sup> Britton, edited (for the Clarendon Press), by Mr. Francis Morgan Nichols: 1865.

<sup>6</sup> Russell on Merc. Agency, 3; Chitty on Contracts, 189.



§ 2. In criminal law, a broker who fraudulently misappropriates money or property belonging to his employer is guilty of a 'misdemeanor.'<sup>1</sup> Frauds by brokers.

§ 3. Brokers in the city of London, before exercising their callings, are required to be admitted by the mayor and aldermen, and to pay a yearly fee of 40s. to the city (stat. 6 Anne, c. 68), increased to 5*l.* per annum by stat. 57 Geo. 3, c. lx. (local and personal). Formerly, the mayor and aldermen exercised control over brokers in other respects, but this was abolished by the stat. 33 & 34 Vict. c. 60. London brokers.

(See *Agent*; *Lien*; *Bought and Sold Notes*.)

**BUILDING SOCIETIES.**—§ 1. A building society is one established for the purpose of raising, by the subscriptions of some of its members, a stock or fund for making advances to others of its members upon security of freehold, copyhold or leasehold estate, by way of mortgage.<sup>2</sup> The advances are generally, but not necessarily, made to enable the members to acquire the property which they mortgage to the society.<sup>3</sup> Theoretically, therefore, the members are of two classes: the borrowing members being those who have obtained advances from the society, and the investing members those who have not,<sup>4</sup> and who therefore simply participate in the profits arising from the interest paid by the borrowers. Provision is generally made by the rules of the society for determining, in case of competition, the members to whom the available funds of the society are to be advanced from time to time. In many cases, however, so-called building societies are little more than investment or savings banks, all the available funds being lent to strangers.<sup>5</sup>

§ 2. A building society is formed either under the act 6 & 7 Will. 4, c. 32, or under the Act of 1874, and is regulated by rules registered with the registrar.<sup>6</sup> A society formed or re-registered under the Act of 1874 is a corporation.<sup>7</sup>

Building societies are of two principal kinds :

§ 3. A terminating society is one which by its rules is to terminate at a fixed date, or when a given result has been attained.<sup>8</sup> "The general plan of these societies may be thus briefly described:—A certain number of persons form themselves into a society, of which they become members by subscribing for a certain number of shares. Upon each share a certain periodical subscription of uniform amount is payable throughout the whole duration of the society, the object being to continue the society until the members' subscriptions, being invested, shall amount to a fund large enough to give every member a sum fixed by the rules at the commencement. Thus it may be proposed to close the society when there Terminating societies.

<sup>1</sup> Stat. 24 & 25 Vict. c. 96, ss. 75 *et seq.*

<sup>2</sup> See Building Societies Act, 1874, s. 13; Davis on Building Societies, 53; Stone on Building Societies, *passim*.

<sup>3</sup> See *Grimes v. Harrison*, 26 Beav. 435, cited Davis, 70; also the preamble to the act 6 & 7 Will. 4, c. 32, which recites that "certain societies commonly called building societies have been established in different parts of the kingdom, principally among the industrious classes, for

the purpose of raising, by small periodical subscriptions, a fund to assist the members thereof in obtaining a small freehold or leasehold property."

<sup>4</sup> Scratchley on Building Societies, 2.

<sup>5</sup> See Second Report of the Friendly Societies Commissioners, 1872, p. 13.

<sup>6</sup> Act of 1874, ss. 16, 17.

<sup>7</sup> Act of 1874, s. 9; Act of 1875.

<sup>8</sup> Building Societies Act, 1874, s. 5.

are funds sufficient to give to the members seventy pounds in respect of each share held by them, and the monthly subscription will be 7s. 6d. . . . When by means of these subscriptions the society has in hand a sum of (say) seventy pounds, it will be advanced to one of the members upon mortgage of land or house property, and the member will thenceforth pay an increased subscription (perhaps 13s. 6d.) so long as the society lasts.”<sup>1</sup> There are two varieties of the terminating society, called Bowkett and Starr-Bowkett Societies, from the names of their originators: the principle on which they are based is too complicated to be described here.<sup>2</sup>

Bowkett and  
Starr-Bowkett  
Societies.

Permanent  
societies.

§ 4. A permanent society, as its name implies, may last for ever. In a society of this kind, shares are issued upon which the various members make payments, either in one sum, when the share is said to be “paid up,” or by periodical or other sums; the interest is either allowed to accumulate until the share has reached the full value prescribed by the rules, or else paid out yearly to the member, as he may prefer. Advances are made to borrowing members or strangers, repayable by small periodical instalments, extending over a fixed term of years.<sup>3</sup>

Co-operative  
building  
society.

§ 5. A society may be formed under the Industrial and Provident Societies Act, 1876 (repealing the Acts of 1862 and 1871) for the purpose of buying and selling land, with power to mortgage, lease or build upon land bought or taken on lease by it. Such societies are sometimes called co-operative building societies.<sup>4</sup>

Freehold land  
societies.

§ 6. Freehold land societies are only in form within the scope of the Building Societies Acts. In a society of this kind “subscriptions are received from the members in the way generally adopted by building societies, and, with the funds thus acquired, an estate is purchased in some eligible situation. The property is then laid out in lots of a size suited to the wants of the members; roads are made, and other improvements effected, the cost of which, and of the conveyance to the society, is added to the amount of the purchase-money. The total sum thus expended upon the whole estate is then equitably apportioned amongst the several lots, and determines their price. . . . The members are thus enabled to obtain a small quantity of land at wholesale price.”<sup>5</sup> As a building society formed under the Building Societies Acts cannot legally hold land, except as security for advances, such an arrangement as the one above described is in reality *ultra vires*, and has to be effected through the medium of trustees, on whose honour the members must rely. This kind of society was invented principally to give the working classes votes in the days when the franchise was higher than it is now.<sup>6</sup>

#### BURDEN OF PROOF. See *Proof*.

**BURGAGE.**—Tenure in burgage is where the king or some other person is lord of an ancient borough, and the tenements in the borough

<sup>1</sup> Davis on Building Societies, 55.

<sup>2</sup> See Davis, 56 *et seq.*; Second Rep. of Comm. 14.

<sup>3</sup> Davis, 60. Building societies are popular among the working classes, who are attracted by the apparent mutuality of

the system; their real advantage is, that they encourage saving habits.

<sup>4</sup> Davis on Building Societies, 278 *et seq.*

<sup>5</sup> Davis, 63.

<sup>6</sup> Second Rep. of Comm. 16; Davis, 63.

are held of him by a yearly rent or other certain service. "And such tenure is but tenure in socage,"<sup>1</sup> being a kind of town socage, as distinguished from common socage, which is usually of a rural nature. (See *Socage*.) Many tenements held by burgage tenure are subject to a great variety of customs, of which the most remarkable is that called borough-English<sup>2</sup> (*q. v.*).

**BURGESS.**—A member of a borough (*q. v.*).

**BURGLARY**, by the common law, is where a person breaks and enters any dwelling-house by night, with intent to commit a felony therein, whether such felonious intent be executed or not.<sup>3</sup> § 2. The "breaking" is either actual (as where the person makes a hole in a door or opens a window), or in law (as where he obtains an entrance by threats or fraud, or by collusion with someone in the house.<sup>4</sup> § 3. Night is the interval between 9 p.m. and 6 a.m.<sup>5</sup>

§ 4. A person who breaks out of a dwelling-house by night is guilty of burglary if he entered it by day with intent to commit a felony, or if he committed a felony therein before breaking out.<sup>6</sup>

§ 5. Burglary is punishable with penal servitude for life as a maximum punishment.<sup>7</sup>

**ETYMOLOGY.**—"This word *burglar* is derived of these two words, *viz. burgh*, signifying an house, and *laron*, signifying a thief, as it were an house-thief."<sup>8</sup> (See *Housebreaking*.)

**BURIAL.**—§ 1. At common law, every person may be buried in the churchyard of the parish where he dies, unless he was within certain ecclesiastical prohibitions (*e. g.* not having been baptized), and provided that the rites of the Church of England are observed.<sup>9</sup> But no person is entitled to be buried in the church itself without the consent of the incumbent, unless such a right exists by prescription, as belonging to a manor-house or other messuage. The right of burial may be enforced by mandamus or information,<sup>10</sup> or by the ecclesiastical punishment of suspension.<sup>11</sup> The common law rule, that every burial in a parochial churchyard must be celebrated according to the rites of the Church of England, has been abolished by the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), which provides that a deceased person may be buried within the churchyard or graveyard of a parish or ecclesiastical district or place, without the Church of England service for the burial of the dead, provided proper notice of the intended burial is given to the incumbent; the burial may take place either without any religious service, or with any Christian and orderly religious service. The act only extends to burial grounds in which the parishioners or inhabitants of the parish or ecclesiastical district have rights of burial, and it expressly enacts, that it

Right of.

Burials Act,  
1880.

<sup>1</sup> Litt. § 162; Co. Litt. 108 b.

<sup>2</sup> Bl. Comm. ii. 82.

<sup>3</sup> Stephen's Crim. Dig. 231; Russell on Crimes, ii. 2.

<sup>4</sup> *Ibid.*

<sup>5</sup> Stat. 24 & 25 Vict. c. 96, s. 1; Russell, 36.

<sup>6</sup> Sect. 51; Russell, 7.

<sup>7</sup> Sect. 52.

<sup>8</sup> 8 Inst. 63.

<sup>9</sup> Stat. 4 Geo. 4, c. 52, provides for the burial of suicides in churchyards without Christian rites.

<sup>10</sup> Phill. Eccl. Law, 839 *et seq.*

<sup>11</sup> *Ibid.* 857.

shall not authorize the burial of any person in any place where such person would have had no right of interment if the act had not passed; nor authorize the burial of any person in a burial ground vested in trustees, without the performance of any express condition on which, by the terms of the trust deed, the right of interment may have been granted.

**Fees.**

§ 2. Fees on burial are due only by custom in each place, and not by the general law.<sup>1</sup>

**Cemeteries  
Clauses Act,  
1847.**

§ 3. The principal statutes relating to burials are the stat. 10 & 11 Vict. c. 65, regulating the making and management of cemeteries by companies incorporated for that purpose; stat. 15 & 16 Vict. c. 85, making provision for closing burial grounds in the metropolis for the protection of the public health; stat. 16 & 17 Vict. c. 134, extending those provisions to other cities and towns; and stat. 20 & 21 Vict. c. 81, as to burial grounds for the paupers.

**Burial boards,  
under the  
Burial Acts,  
1852—1871.**

§ 4. The stats. 15 & 16 Vict. c. 85, and 16 & 17 Vict. c. 134 (as amended by stat. 18 & 19 Vict. c. 128), also contain enactments for providing a new burial ground in any parish where the existing burial ground is insufficient or dangerous to health: in such case a burial board is appointed by the vestry, with power to purchase land for a burial ground, and to borrow money for that purpose, the expenses being charged on the poor rate.<sup>2</sup>

**Public Health  
Act, 1879.**

§ 5. The Public Health (Interments) Act, 1879, empowers local authorities to acquire, construct and maintain cemeteries, subject to the provisions of the Cemeteries Clauses Act, 1847, and the Public Health Act, 1875. (See *Mortuary*.)

**Grants of  
land for burial  
grounds.**

§ 6. Stats. 30 & 31 Vict. c. 133; 31 & 32 Vict. c. 47; and 36 & 37 Vict. c. 50, contain provisions for voluntary grants and sales of land for the purposes of burial grounds, including gifts of land by limited owners, such as tenants for life.<sup>3</sup>

As to the registration of burials, see *Registration*.

**BUTLERAGE.** See *Prisage*.

**BYE-LAWS** are rules made by some authority (subordinate to the legislature) for the regulation, administration or management of a certain district, property, undertaking, &c., and binding on all persons who come within their scope.<sup>4</sup> Thus every act of parliament incorporating a railway company gives it power to make bye-laws for the regulation of its line, subject to the sanction of the Board of Trade.<sup>5</sup> Municipal corporations have a similar power.<sup>6</sup> § 2. The homage of the customary Court in some manors has, by custom, the right of making bye-laws for the regulation of the common, *e. g.* the draining and fencing of the land, stinting the number of cattle, &c.<sup>7</sup>

**ETYMOLOGY.**—Apparently from Danish *by-love*, Swedish *by-lag*, = *leges urbanae*, laws of particular towns.<sup>8</sup>

<sup>1</sup> Steph. Comm. ii. 740.

<sup>2</sup> See also the Burial Act, 1871, and the acts mentioned in the schedule to that act; and sect. 343 of the Public Health Act, 1875, re-enacting the enactments set out in Schedule 5, Part 3.

<sup>3</sup> Phill. 853.

<sup>4</sup> Termes de la Ley; Lumley on By-

Laws, 2.

<sup>5</sup> Hodges on Railways, 426, 548.

<sup>6</sup> Stat. 5 & 6 Will. 4, c. 76, s. 90; Grant on Corporations, 76; Companies Clauses Act, 1845, &c.; Lumley, 15.

<sup>7</sup> Elton on Copyh. 244; *Fox v. Amhurst*, L. R., 20 Eq. p. 404.

<sup>8</sup> Müller, Etym. Wörtl. s. v.

**Railway  
companies.****Municipal.  
Manorial.**

## C.

**CA. SA.**—*Capias ad satisfaciendum*. See that title.

**CAIRNS'S ACT** (so called from the Solicitor-General by whom it was introduced) is the act. 21 & 22 Vict. c. 27, enabling the Court of Chancery to award damages in addition to or in substitution for an injunction or decree for specific performance, *e. g.* in a suit to restrain interference with ancient lights. The jurisdiction given by the act ought not to be exercised in such a way as to enable one person to buy the property of another without his consent.<sup>1</sup>

**CALENDAR**, in criminal procedure, is a list of prisoners to be tried at the assizes or Central Criminal Court, and of the offences with which they are charged. At the end of the assizes, the clerk of assize makes out a calendar, showing the verdicts and sentences passed on the prisoners, with a blank column to be filled up by the judge in cases where any prisoner is reprieved, respited, or the like. A copy of this calendar is given to the sheriff as his warrant or authority for executing the judgment against each prisoner.<sup>2</sup>

**CALL** is a demand for money required for the purpose of a company. There are two kinds of calls—(i) those made in respect of the unpaid-up portions of the capital of a company, in order to raise money for carrying on its business (directors' calls); and (ii) those made to pay the debts of a company when its business is suspended by liquidation (liquidators' calls). In the case of a limited company, these latter calls cannot be made beyond the amount (if any) remaining unpaid on each share; in the case of an unlimited company, the calls depend on the amount of debts and the number of the solvent shareholders.<sup>3</sup>

§ 2. In the case of companies under the Companies Acts, 1862—1880, calls due from members are specialty debts.<sup>4</sup> (See *Company*.)

**CALLING THE PLAINTIFF** is the old-fashioned term for a non-suit (*q. v.*).<sup>5</sup>

As to calling upon a prisoner, see *Allocutus*.

**CALVIN'S CASE** is the case of *Calvin v. Smith*, reported in 7 Coke's Reports, p. 1. It decided that persons born in Scotland after the accession of James I. to the English crown were natural-born subjects of England: it is hence sometimes called the case of the post-nati. (See *Allegiance*.)

<sup>1</sup> Per Jessel, M. R., in *Krehl v. Burrell*,  
7 Ch. D. 551.

<sup>2</sup> Steph. Comm. iv. 478.

<sup>3</sup> Lindley on Partn. 643.

<sup>4</sup> Act of 1862, ss. 16, 75.

<sup>5</sup> Bl. Comm. iii. 376.

**CAMERA.** See *In Camerâ*.

**CAMPBELL'S ACT** is the popular name for the act 9 & 10 Vict. c. 93, by which (as amended by stat. 27 & 28 Vict. c. 115) an action for damages is given for the benefit of the wife, husband, parent, grandparent, stepparent, child, grandchild and stepchild of a person whose death has been caused by a wrongful act, neglect or default for which he himself could, if death had not ensued, have recovered damages from the wrongdoer.<sup>1</sup> (See *Tort*; *Actio personalis moritur cum personâ*.)

**CANALS.**—The principal acts relating to canals are 8 & 9 Vict. cc. 28 and 42; 10 & 11 Vict. c. 94; 17 & 18 Vict. c. 31; 36 & 37 Vict. c. 48, relating to the traffic and management of canals; 24 & 25 Vict. c. 96, ss. 63 *et seq.*, relating to thefts from canals; 24 & 25 Vict. c. 97, ss. 31 *et seq.*, relating to malicious injuries to canals; and 40 & 41 Vict. c. 60, regulating the use and registration of canal boats as dwellings.

**CANCEL—CANCELLATION.**—§ 1. Literally, to cancel an instrument is to draw lines across it, or across some part of it, such as the signatures of the parties, with the intention of indicating that it is no longer in force; thus bankers commonly cancel cheques when they have been paid. A deed is usually cancelled by striking out the signatures and tearing off the seal.<sup>2</sup> (See *Alteration*.) Cancellation of a will, even by the testator, does not revoke it, unless it is accompanied by a declaration executed by the testator in the manner in which wills are required to be executed.<sup>3</sup>

Action for  
cancellation  
of instrument.

§ 2. Cancellation is sometimes directed by a Court. Thus, when a person has entered into a contract for the sale of land, and the purchaser refuses to pay the money, the vendor may bring an action against him to deprive him of his right under the contract; time is given by the Court for payment of the money, and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the Court, and the vendor becomes again the owner of the estate.<sup>4</sup> This is technically called a decree or judgment for cancellation of the contract.

§ 3. The Chancery Division also frequently cancels instruments which have answered the end for which they were created, or instruments which are void or voidable, in order to prevent them from being vexatiously used against the person apparently bound by them.<sup>5</sup>

**ETYMOLOGY.**—Latin: *cancelli*, lines drawn in the form of lattice-work.

**CANON** in ecclesiastical law means either (i) any rule of the jus canonicum contained in the *Decretum Gratiani*; or (ii) a rule of eccle-

<sup>1</sup> Underhill on Torts, 143; Campbell on Negligence, 20.

<sup>2</sup> See Shepp. Touch, 69 *et seq.*

<sup>3</sup> Shelford, R. P. Stat. 517.

<sup>4</sup> *Lysaght v. Edwards*, 2 Ch. D. at p. 506.

<sup>5</sup> Snell's Eq. 498. As to the cancellation of shares in companies, see Lindley on Companies, 1446; *Bath's Case*, 8 Ch. D. 334.

siastical conduct promulgated by the Convocation of the Church of England, whether it has legal force or not. Thus the canons of 1603 have no legal force.<sup>1</sup> (See *Canon Law*; *Convocation*.)

§ 2. The word is also sometimes used to denote a rule of civil law, as in the expression "the canons of descent." (See *Descent*.)

**CANON LAW** is a body of Roman ecclesiastical law, compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the Holy See. About the middle of the 12th century the confusion and obscurity of the ecclesiastical law induced a monk of Bologna, called Gratianus, to codify the existing materials down to the year 1139; his work was known as the *Concordantia Discordantium Canonum*, afterwards as the *Decretum Gratiani*, and included not only the decrees, epistles, &c. themselves, but also a commentary of his own, known as the *Dicta Gratiani*. The subsequent decrees (*Decretales extravagantes*<sup>2</sup>) were collected from time to time, especially in the five *Compilationes antiquæ*, until the inconvenience of these collections led Gregorius IX. to have a new collection prepared, hence known as the *Decretales Gregorii IX.*, in five books. A sixth book (*Liber Sextus*) was added by Boniface VIII. in 1298, and another by Clement V. in 1313. The two later collections, namely, the *Extravagantes Joannis XXII.* and the *Extravagantes communes* (which were added by Joannes Chappuis to his edition of the canon law published in 1500), were not official like the preceding collections. The *Decretum Gratiani*, and the five subsequent collections, together form the *Corpus Juris Canonici*.<sup>3</sup>

Decretum  
Gratiani.

Corpus Juris  
Canonici.

§ 2. Besides these pontifical collections, which, during the times of popery, were received as authentic in this island, as well as in other parts of Christendom, there is also a kind of national canon law, composed of legatine and provincial constitutions, and adapted only to the exigencies of this church and kingdom. The legatine constitutions were ecclesiastical laws, enacted in national synods, held under legates from the popes in the reign of King Henry III., about 1220 and 1268. The provincial constitutions are principally the decrees of provincial synods of Canterbury, from the reign of Henry III. to that of Henry V., and adopted by the province of York in the reign of Henry VI. At the dawn of the Reformation, it was enacted by stat. 25 Hen. 8, c. 19, that a review should be had of the canon law, and that, till such review should be made, all canons, constitutions, ordinances and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And, as no such review has yet been made, upon this enactment now depends the authority of the canon law in England, while all canons made since its date have no legal force, so far as the laity are concerned.<sup>4</sup> (See *Ecclesiastical Law*.)

English canon  
law.

Legatine con-  
stitutions.

Provincial  
constitutions.

<sup>1</sup> Bl. Comm. i. 83.

<sup>2</sup> So called because they did not form part of Gratian's collection (*Decretales quæ extra Decretum vagabantur*).

<sup>3</sup> Holtz. Encycl. i. 122 *et seq.*

<sup>4</sup> Bl. Comm. i. 82, *et seq.*; Steph. Comm. i. 65 *et seq.*

**CAPACITY.**—A person is said to have legal capacity when he can alter his rights and duties by the exercise of his own will. Hence idiots and lunatics are said to have no legal capacity, and infants and married women have a restricted capacity: in other words, they are under disability (*q. v.*).

**CAPIAS** ("that you take") is the generic name for several writs directing the person to whom they are addressed to arrest the person therein named. They are usually directed to the sheriff, and are of the following kinds:—

**CAPIAS AD AUDIENDUM JUDICIUM.**—In some cases it is necessary that the defendant in a criminal prosecution should be present in Court when judgment is pronounced against him, and, therefore, if he is at large when the verdict of guilty has been given, a writ of *capias* may be issued for the purpose of bringing him up to receive judgment: this writ appears to be called a *capias ad audiendum judicium*.<sup>1</sup>

**CAPIAS AD RESPONDENDUM** is a writ which may be issued for the arrest of a person against whom an indictment for a misdemeanor has been found, in order that he may be arraigned (*q. v.*).<sup>2</sup> In practice, however, a justice's warrant is always used (see *Warrant*), except where it is desired to make the defendant an outlaw (*q. v.*). § 2. Under the old practice in common law actions, before 1832, the *capias ad respondendum* was the writ by which an ordinary action was commenced; the defendant was not actually arrested on it, but was merely required to appear and put in common bail, unless the cause of action amounted to a certain sum, in which case he might be arrested or compelled to put in special bail.<sup>3</sup> (See *Bail*, § 8 *et seq.*; *Venire facias*; *Distringas*.)

**CAPIAS AD SATISFACIENDUM**, or *ca. sa.*, is a writ for the arrest of the defendant in a civil action when judgment has been recovered against him for a sum of money and has not been satisfied. The sheriff generally returns to this writ: *cepi corpus et paratum habeo*—*i. e.* that he has taken the body of the debtor, and has it ready; or that the debtor is so ill that he cannot remove him without danger to his life; or he may return *non est inventus*—*i. e.* that the debtor is not found within his bailiwick.<sup>4</sup> Imprisonment for debt having been abolished by the Debtors Act, 1869, in all except a few cases, the writ of *ca. sa.* is now rare. (See *Committal*.)

**CAPIAS EXTENDI FACIAS** is a writ of execution issuable against a debtor to the crown, and commands the sheriff to "take" or arrest the body, and "cause to be extended" the lands and goods of the debtor.<sup>5</sup> It seems to be practically obsolete. (See *Extent*.)

<sup>1</sup> Archb. Crim. Pl. 178; Bl. Comm. iv. 375.

<sup>2</sup> Bl. Comm. iv. 318; Archbold, Crim. Pl. 82.

<sup>3</sup> Bl. Comm. iii. 287.

<sup>4</sup> Smith's Action, ii. 282; Arch. Pr. 602.

<sup>5</sup> Manning's Exchequer, 5.



**CAPIAS IN WITHERNAM** was a writ formerly used in cases where the defendant in an action of replevin had obtained judgment for the re-delivery of the goods, and the sheriff has returned *elongata* (*q. v.*). The *capias in withernam* commanded the sheriff to take other goods of the plaintiff to the value of the goods replevied, and deliver them to the defendant to be kept by him until the latter goods were returned. The practice is now obsolete.<sup>1</sup>

ETYMOLOGY.]—Anglo-Saxon: *withernam*, a taking again;<sup>2</sup> the accent is on the first syllable.

**CAPIAS UTLAGATUM** is a writ for the arrest of an outlaw. As outlawry has been abolished in civil cases, this writ is now only available in criminal proceedings, and even in those it is rare.<sup>3</sup> (See *Outlawry*.) A general *ca. utl.* is against the person only, and commands the sheriff to arrest the defendant and produce him in Court on a certain day; a special *ca. utl.* is against the person, lands and goods, and commands the sheriff not only to arrest the defendant, but also to hold an inquisition as to his goods and lands, and to take possession of them on behalf of the Queen.<sup>4</sup> In criminal cases this is also called a *capias utlagatum cum breve de inquirendo*.<sup>5</sup>

**CAPITA—CAPITE.** See *Per Capita*; *In Capite*.

**CAPTION**, in procedure, is the history of a judicial proceeding.<sup>6</sup> Thus, in a prosecution by indictment, the record begins by a caption giving the title of the Court, and stating that the jurors on their oaths presented the facts alleged in the indictment, which immediately follows the caption.<sup>7</sup> The title of a deposition taken before a magistrate is also called the caption.<sup>8</sup>

**CAPTURE** is, in some cases, a mode of acquiring property. Thus, every one may, as a general rule, on his own land, or on the sea, capture any wild animal, and acquire a qualified ownership in it by confining it, or absolute ownership by killing it.<sup>9</sup> (See *Animals Fere Naturæ*.)

§ 2. In international law, the strict rule is, that when two nations are at war with one another, the movable property of the individual subjects of each nation is liable to capture by the other. In modern times, however, this rule has generally been subject to two qualifications. First, that the capture must be effected by persons holding a commission or authority from their government; and, secondly, that the property of those subjects of the enemy who are within the dominions of the other state at the time of the declaration of war is exempt from capture, except by way of

Prize and  
booty of war.

<sup>1</sup> Woodfall, L. & T. 481.

<sup>2</sup> See Schmid, Ges. gl. s. v. *Nam*.

<sup>3</sup> See Archbold, Crim. Pl. 87.

<sup>4</sup> Chitty, Pr. (12th edit.) 1312.

<sup>5</sup> Grady & Scotl. 321.

<sup>6</sup> *Taylor v. Clemson*, 2 A. & E., N. S. at p. 1010.

<sup>7</sup> Archbold, Crim. Pl. 38, 124; Pritchard, Q. S. 25.

<sup>8</sup> Roscoe, Crim. Ev. 71. As to captions under the old practice in Chancery, see Daniell, Ch. Pr. 654.

<sup>9</sup> Steph. Comm. ii. 19.

reprisals.<sup>1</sup> It follows from the first qualification that persons seizing an enemy's property on the high seas without a commission are guilty of piracy.

**Booty.** § 3. Capture is either by land or by sea. Property captured by an army on land is called "booty of war," and belongs to the crown; but it has long been usual to grant it to the captors as a reward for their services. Questions of booty (*e. g.* as to the persons among whom it should be distributed) are commonly referred by the crown to the High Court of Justice in its admiralty jurisdiction, pursuant to the statute 3 & 4 Vict. c. 65, s. 22.<sup>2</sup>

**Prize.** § 4. Property captured at sea (called "prize") belongs to the crown if captured by one of the Queen's ships, and to the capturing vessel if captured by a privateer. The practice of privateering having been abolished as between the principal European nations by the Treaty of Paris, questions of prize can seldom arise except in cases of capture by the Queen's ships. At the outbreak of a war requiring the services of the navy, it has been customary for the crown to issue a proclamation bestowing the proceeds of maritime capture upon the takers—that is, upon the officers and crews who have made or assisted in the capture (*infra*, § 5). But whether the prize has been taken by a privateer, or by one of the Queen's ships, the rule equally applies that the property in the prize does not pass to the captors until it has been condemned by a competent Prize Court.<sup>3</sup> The High Court of Justice, in its admiralty jurisdiction, is the Court for deciding questions of prize in this country. (See further on this point, the titles *Condemnation*; *Prize Court*.)

**Actual captors.** § 5. Captors, whether of booty or of prize, are of two classes, actual and constructive, or joint. "When a prize is taken at sea there is usually no doubt as to who is the actual captor, namely, the ship to which the prize strikes its flag. But it is important to observe, that even so, the phrase 'actual captors' includes many others besides those who actually have taken part in the capture. The whole of the ship's crew may not be on board the ship at the time of the capture; or the prize may have been taken out of sight of the ship, and at a great distance from it, by the ship's tender, or by a boat's crew detached from the ship. But in all these cases it is the ship, and not a part of the ship, that is held to take the prize. The whole of the ship's crew share."<sup>4</sup> In the case of booty, a similar principle is applied by drawing the line between division and division, treating the division of an army as analogous (for this purpose) to a ship of war, so that when booty has been captured by any portion of a division, that division is, in the first instance, to be regarded as the actual captor.<sup>5</sup> § 6. Joint or constructive captors are those who have assisted, or are taken to have assisted, the actual captors. But it is not every kind

**Joint or constructive captors.**

<sup>1</sup> Manning's Law of Nations, 166. *et seq.* The latter qualification is considered by some not to be a matter of strict right; it is provided for by treaties between the principal states of the world. Manning, 172.

<sup>2</sup> *Banda and Kirwee Booty*, L. R., 1 Ad. & Ecc. at p. 129; 4 A. & E. 436.

<sup>3</sup> Manning, 476.

<sup>4</sup> *Banda and Kirwee Booty*, 1 A. & E. at p. 135.

<sup>5</sup> *Ibid.* 180.

of assistance which constitutes a joint capture; for the leaning of the Courts is against claims by joint captors except in the two cases of association and co-operation; association takes place when two or more ships or divisions of an army are associated under the same immediate commander; co-operation is where the joint captors have assisted the actual captors by conveying encouragement to them or intimidation to the enemy. In the case of naval prize, the joint captor must be in sight both of the prize and the actual captor to substantiate her claim; but in cases of booty, a wider application is allowed to the term co-operation, owing to the difference between the nature of naval and military operations, and between the surface of the sea and that of the land; hence the rule of sight is inapplicable to capture on land, and each case must be judged on its own grounds, subject to the rule that services, to base a claim of joint capture, must have a direct and immediate effect in influencing the capture.<sup>1</sup>

Association.

Co-operation.

§ 7. Where a capture is effected by her Majesty's naval or military forces in conjunction with an ally, the capture is said to be conjunct, and is divided between the allied forces.<sup>2</sup> (See *Postliminium*.)

Conjunct capture.

**CARRIER.**—§ 1. A carrier is a person who has received goods for the purpose of carrying them from one place to another for hire, either under a special contract or in the course of his business of a common carrier. A carrier who receives goods under a special contract is a bailee, and, in accordance with the general rules governing contracts of bailment, he is bound to use ordinary and average care in conveying the goods entrusted to him.<sup>3</sup> (See *Bailment*.)

Special contract.

§ 2. A common carrier is one who, by profession to the public, undertakes for hire to transport from place to place, either by land or water, the goods of such persons as may choose to employ him. Instances of common carriers are: the proprietor of a common stage coach or waggon, and the owner or master of a general ship. A railway company is not a common carrier of passengers, and is only a common carrier of those goods which it is bound by statute to carry, or which it professes to carry without express stipulations limiting its liability.<sup>4</sup> § 3. The peculiarity of a common carrier of goods is, that he is bound to convey the goods of any person who offers to pay his hire,<sup>5</sup> and that he is an insurer of goods entrusted to him, that is, he is liable for their loss or injury, in the absence of a special agreement or statutory exemption, and unless the loss or injury was caused by the act of God or the Queen's enemies.<sup>6</sup> In this respect a common carrier is an exception to the general rule, that bailees for reward are only liable for ordinary negligence. (See *Bailment*; *Carriers Act*.)

Common carrier.

<sup>1</sup> *Ibid.* 136, 181.

<sup>2</sup> Naval Prize Act, 1864, s. 35.

<sup>3</sup> See *Skaife v. Farrant*, L. R., 10 Ex.

358.

<sup>4</sup> Chitty on Contracts, 439; Hodges on

Railways, 576; Smith, L. C. i. 223.

<sup>5</sup> Smith, L. C. i. 223.

<sup>6</sup> *Nugent v. Smith*, 1 C. P. D. 423; Chitty, 442. As to common carriers of passengers, see *ibid.* 463.

**CARRIERS ACT** is the act 11 Geo. 4 & 1 Will. 4, c. 68 (amended by the stat. 28 & 29 Vict. c. 94. Its object was to modify the common law rule, that a common carrier was liable for goods lost or injured in his custody, unless he could prove a special contract to the contrary.<sup>1</sup> Its principal provisions are—(1) that no carrier by land is to be liable for loss of or injury to certain valuable descriptions of property (coin, jewellery, pictures, &c.) beyond the value of 10*l.*, unless their value was declared at the time of delivery;<sup>2</sup> (2) that any carrier may require an increased rate of charge for such articles over the value of 10*l.* by a notice affixed in his receiving house, and all persons delivering such articles are bound by the notice, without proof of its having come to their knowledge.<sup>3</sup> The Railway and Canal Traffic Act, 1854, s. 7, contains further provisions limiting the liability of railway companies for loss or injury to horses, cattle, &c.<sup>4</sup>

**CARTELS** are agreements between states as to the exchange and ransom of prisoners during war.<sup>5</sup>

**CASE** is (i) an abbreviation for “trespass on the case,” as to which see *Trespass*. It also signifies (ii) a written statement of facts for the opinion of counsel; (iii) in House of Lords and Privy Council practice, a statement prepared and printed by each party to an appeal, showing the facts on which he relies, and containing references to the evidence contained in the appendix (*q. v.*); the cases, therefore, correspond to some extent to the pleadings in an ordinary action, but differ from them in being prepared independently, for neither party sees his opponent’s case until his own has been lodged; (iv) a written statement by an inferior Court or judge, raising a question of law for the opinion of a superior Court; the principal instances of this kind are the Crown Cases Reserved (*q. v.*), and cases stated by justices (*q. v.*; and see *Appeal*; *Special Case*). § 2. By stat. 22 & 23 Vict. c. 63, any Court in her Majesty’s dominions may remit a case to one of the superior Courts in any other part of her Majesty’s dominions, desiring it to pronounce its opinion on a question as to the law administered by it; and by stat. 24 Vict. c. 11, the superior Courts in her Majesty’s dominions may remit a case to a Court of any foreign state with which her Majesty may have made a convention for that purpose, to ascertain the law of such state.<sup>7</sup>

**CASE FOR MOTION.**—In divorce and probate practice, when a party desires to make a motion, he must file, among other papers, a case for motion, containing an abstract of the proceedings in the suit or action, a statement of the circumstances on which the motion is founded, and the prayer or nature of the decree or order desired.<sup>8</sup>

<sup>1</sup> Chitty on Contracts, 455; Hodges on Railways, 599.

<sup>2</sup> Sect. 1.

<sup>3</sup> Sect. 2. As to the general effect of the act, see Chitty, 457.

<sup>4</sup> Hodges on Railways, 592.

<sup>5</sup> Manning’s Law of Nations, 218.

<sup>6</sup> House of Lords Standing Orders in Appeals; Macpherson, Privy C. Pr. 84.

<sup>7</sup> Archbold, Pr. 1462.

<sup>8</sup> Browne on Divorce, 251; Divorce Rules (1866), 147; Browne’s Probate Pr. 295.

**CASE STATED BY JUSTICES.**—By the stat. 20 & 21 Vict. c. 43, after the hearing and determination by a justice or justices of the peace (including metropolitan police and stipendiary magistrates) of any information or complaint under their summary jurisdiction, either party to the proceedings, if dissatisfied with the determination as being erroneous in point of law, is entitled to require the justices or magistrate to state and sign a case, setting forth the facts and the grounds of the determination, for the opinion of a divisional Court of the High Court of Justice.<sup>1</sup>

**CASSETUR BILLA** is an entry made on the record in a proceeding in the Mayor's Court when the plaintiff withdraws his action before the defendant demands the declaration or bill.<sup>2</sup> It is so called from being a prayer by the plaintiff that the bill may be quashed. The proceeding was also used in actions in the superior Courts commenced by bill, when the plaintiff found that his action was misconceived, and wished to commence a fresh one.<sup>3</sup> (See *Cassetur Breve*.)

**CASSETUR BREVE** (= Let the writ be quashed). In the old common law practice, when the defendant in an action pleaded a sufficient plea in abatement, and the plaintiff could not deny it or demur, and did not wish to amend his declaration, he might enter on the roll a judgment that the writ be quashed, in order that he might be enabled to commence a new action. In practice, the prayer of judgment that the writ be quashed, and award that it be so, were copied on paper, and delivered to the defendant's attorney or agent, the same as a pleading, and very often no entry was made on the roll or judgment signed.<sup>4</sup> Under the present practice the plaintiff in such a case would give notice of discontinuance (*q. v.*).

**CASTLE-YARD**, or **CASTLEWARD**, was a form of tenure by knight-service, the duty of persons holding land by such a tenure being "to ward a tower of the castle of their lord, or a doore or some other place of the castle, upon reasonable warning, when their lords heare that the enemies will come, or are come in England."<sup>5</sup> (See *Knight's Service; Tenure*.)

**CASUAL EJECTOR.** See *Ejectment*.

**CATCHING BARGAIN** is a bargain for a loan or payment of money made on oppressive, extortionate, or unconscionable terms, between a person having money and another person having little or no property immediately available, but having property in reversion or expectancy. Relief against the unreasonable part of such a bargain is generally granted to the borrower.<sup>6</sup> (See *Expectant Heir*.) Formerly, the rule was, that mere inadequacy of price was a sufficient ground for rescinding a sale or other dealing with a reversion, but this rule has been abolished, and it is now a question in each case, whether there has been fraud or unfair dealing.<sup>7</sup>

<sup>1</sup> Stone's Justice of the Peace, 225.

<sup>2</sup> Brandon, For. Attach. 109.

<sup>3</sup> Tidd, Pr. 683.

<sup>4</sup> Chitty's Pr. 1487.

<sup>5</sup> Litt. § 111; Co. Litt. 82 b.

<sup>6</sup> *Earl of Chesterfield v. Janssen*, 2 Ves. sen. 125; *White & Tudor*, L. C. i. 483; *Earl of Aylesford v. Morris*, L. R., 8 Ch. 484; Pollock on Contract, 529.

<sup>7</sup> Stat. 31 & 32 Vict. c. 4.

**CATTLE INSURANCE SOCIETIES** are societies established and registered under the Friendly Societies Act, 1875, for insurance against loss of neat cattle, sheep, lambs, swine and horses by death from disease or otherwise.<sup>1</sup> In their constitution and management such societies resemble friendly societies (*q. v.*). They were introduced during the panic caused by the cattle plague of 1866.<sup>2</sup>

**CAUSE.**—§ 1. Before the Judicature Act, 1873, “cause” was the generic term for ordinary civil proceedings, whether at law or in equity, and therefore included actions and suits, but not statutory proceedings in equity commenced by petition, motion, summons, &c., which were and are known as “matters” (*q. v.*). Since the Judicature Acts came into operation, the word “cause” has practically been superseded by “action” (*q. v.*).

Ecclesiastical: § 2. In the Ecclesiastical Courts, causes are divided into plenary and  
 plenary; summary. “Plenary causes are those in which the order and solemnity of the law is exactly to be observed, so that if there be the least infringement or omission of that order, the whole proceedings are annulled; and in these there must be a contestation of suit, a term to propound all things, and a term to conclude. Summary [causes] are those in which such order is dispensed with.”<sup>3</sup> (See *Litis Contestatio*.)

**CAUSE-BOOKS** are books kept in the Central Office of the Supreme Court, in which are entered all writs of summons issued in the office.<sup>4</sup>

**CAUSE OF ACTION** means (I.) the fact or combination of facts which gives rise to a right of action. Thus in the case of a simple tort (*e. g.* an assault or trespass), the cause of action is the wrongful act; in the case of a breach of contract, the cause of action consists of two things, the making of the contract and breach of it, and each of these may be more or less complicated.<sup>5</sup> § 2. The phrase is of importance chiefly with reference to the Statutes of Limitation and the jurisdiction of certain Courts. Thus, if A. incurs a debt while he is abroad, the cause of action is not complete, and therefore the Statute of Limitations does not begin to run, until he brings himself within the jurisdiction of the English Courts.<sup>6</sup> Again, the jurisdiction of a Court is frequently limited to cases where the “cause of action” arises within a certain district or county. Here the phrase may mean either the cause of action in the proper sense of the word (called for distinction the “whole cause of action”), or the act on the part of the defendant which completes the cause of action, *e. g.* the breach of a contract.<sup>7</sup>

<sup>1</sup> Friendly Soc. Act, 1875, c. 8, s. 2.

<sup>2</sup> Fourth Report of Friendly Soc. Comm. cxlix; Davis on Friendly Soc. 57.

<sup>3</sup> Rogers, Eccl. Law, 716; *Martin v. Mackonochie*, 3 Q. B. D. 755; 4 Q. B. D. 697.

<sup>4</sup> Rules of Court, v. 8.

<sup>5</sup> Dicey on Parties, 6.

<sup>6</sup> *Douglas v. Forrest*, 4 Bing. 686.

<sup>7</sup> See the long conflict of decisions on the 18th section of the Common Law Proc. Act, 1852, set at rest by *Vaughan v. Weldon*, L. R., 10 C. P. 47, and now of no importance so far as the High Court is

II. § 2. "Cause of action" sometimes means a person having a right of action. Thus, where a legacy is left to a married woman, and she and her husband bring an action to recover it, she is called in the old books the "meritorious cause of action."<sup>1</sup>

**CAUSE-LIST** is an official list of actions, demurrers, petitions, appeals, &c., set down for trial or argument in open Court.

**CAUTION—CAUTIONER.**—§ 1. By the Land Transfer Act, 1875, regulating the registration of land, any person interested under any unregistered instrument, or interested as a judgment creditor, or otherwise howsoever, in any land or charge registered in the name of any other person, may lodge a caution with the registrar to the effect that no dealing with such land or charge be had until notice has been served on the cautioner or person who has lodged the caution.<sup>2</sup> § 2. And by sect. 60 of the same act, any person claiming such an interest in any land not already registered, as entitles him to object to any disposition thereof being made without his consent, may lodge a caution with the registrar to the effect that the cautioner is entitled to notice of any application for the registration of the land.

After registration.

Before registration.

§ 3. A caution on land is like a *distringas* (*q. v.*) on stock; it gives the cautioner no interest in the land,<sup>3</sup> but merely entitles him to a notice, so as to enable him to take proceedings (*e. g.* obtain an injunction or issue execution) before any dealing with the land, by which his right might be barred, can take place. Cautions, like *distringases*, will probably be used chiefly by *cestui que trusts*, to prevent unauthorized dealings with the land by their trustees.

(See *Caveat*; *Distringas*; *Restriction*; *Inhibition*.)

§ 4. In ecclesiastical law, a caution is a security for the performance of a duty, and is said to be of three sorts: (1) *cautio fidejussoria*, as where the person binds himself with sureties to do something; (2) *c. pignoratitia* or *realis*, as where he engages goods or mortgages land for the performance; and (3) *c. juratoria*, where he takes a corporal oath to perform the duty.<sup>4</sup>

Ecclesiastical law.

**CAVEAT—CAVEATOR.**—§ 1. A caveat is an entry made in the books of the offices of a registry or Court to prevent a certain step being taken without previous notice to the person entering the caveat (sometimes called the caveator). Thus, where a person wishes to prevent the granting of letters-patent for an invention, he enters a caveat at the Patent Office.<sup>5</sup>

Patent.

§ 2. In probate practice, a caveat is entered in the caveat books by a person who wishes to oppose the issue of a grant of probate or letters of

Probate.

concerned (Rules of Court, xi.). As to the Mayor's Court and other Inferior Courts, see Candy's Mayor's Court Pr. 39 *et seq.*

<sup>1</sup> *Rose v. Bowler*, 1 H. Bl. 108.

<sup>2</sup> Sect. 54.

<sup>3</sup> Sect. 64.

<sup>4</sup> Phillimore, Eccl. Law, 1414; Gibson's Codex, 1063.

<sup>5</sup> Stat. 15 & 16 Vict. c. 83, s. 20; *Re Somerset and Walker*, 13 Ch. D. 397.

administration, and has a sufficient interest to entitle him to do so. (See *Interest*.)<sup>1</sup> It is a notice to the officers of the registry requiring them to let nothing be done in the goods of the deceased, that is, to let no grant be issued, unknown to the caveator; it remains in force for six months only, unless renewed, and its effect is to stop all proceedings for the purpose of obtaining a grant of probate or administration in respect of the goods of the deceased until the caveat expires or a writ of summons is issued.<sup>2</sup> (See *Warning*.)

Caveat against arrest.

§ 3. In admiralty practice, where the owner of a ship, or cargo, &c., knows that an action is about to be instituted, and wishes to avoid the inconvenience of his property being arrested, he may enter a caveat against the issue of a writ of summons, on filing an undertaking to enter an appearance and give bail in any action which may be instituted against the property; if, notwithstanding the caveat, a person causes the property to be arrested, without good reason, he is liable to be condemned in costs and damages.<sup>3</sup>

Caveat against release.

§ 4. The Admiralty Court Rules, 1859, provide, that where a solicitor desires to prevent the release of any property under arrest, he shall file in the registry a præcipe, and thereupon a caveat against the release of the property shall be entered in the Caveat Release Book, so as to prevent the release of the property without notice to him. A person entering a caveat without sufficient reason is liable for costs and damages.<sup>4</sup>

Ecclesiastical practice.

§ 5. In ecclesiastical practice, a caveat is entered in a spiritual Court, to prevent a licence, dispensation, faculty, institution, or the like, from being granted without the knowledge of the party who enters it.<sup>5</sup>

**CAVEAT EMPTOR** ("Let the buyer beware") is a maxim employed in the law of sales of chattels to signify that when a buyer of goods has required no warranty, he takes the risk of quality upon himself, and has no remedy if he chose to rely on the bare representation of the vendor, unless he can show that representation to be fraudulent.<sup>6</sup> To this rule there are many exceptions. Thus, if a chattel is made or supplied to the order of the purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or for the special purpose intended by the buyer, if that purpose was communicated to the vendor.<sup>7</sup> It has not yet been decided whether on a sale of an ascertained specific chattel by an innocent vendor, he thereby warrants the title to it, though it is clear that if he knows he has no title, and conceals that fact from the buyer, he is liable for fraud.<sup>8</sup> (See *Warranty*.)

**CEMETERIES.** See *Burial*, § 3.

<sup>1</sup> Probate Rules, 1862, Non-C. 59 *et seq.*; C. B. 7 *et seq.*; Browne's Probate Pr. 263; Coote's Probate Pr. 208.

<sup>2</sup> Browne, 265.

<sup>3</sup> Williams and Bruce, 197.

<sup>4</sup> Williams and Bruce, 196; Roscoe, Adm. Pr. 117. It is to be remarked, that the Rules of Court under the Judicature

Act contained some provisions on this subject (v. 12), which were afterwards repealed by the Rules of December, 1875.

<sup>5</sup> Phillimore, Eccl. Law, 1279.

<sup>6</sup> Benjamin on Sales, 498.

<sup>7</sup> *Ibid.* 525.

<sup>8</sup> *Ibid.* 511.



**CENSURE**, in ecclesiastical law, is a spiritual punishment and consists in withdrawing from a baptized person (whether belonging to the clergy or the laity) a privilege which the Church gives him, or in wholly expelling him from the Christian communion.<sup>1</sup> The principal varieties of censures are admonition, penance, suspension, excommunication, sequestration, deprivation, degradation; see those titles.

**CENTRAL CRIMINAL COURT** is a Court having jurisdiction to try all offences committed within the city of London, the county of Middlesex, and certain suburban parts of Essex, Kent and Surrey. The judges or commissioners are the Lord Mayor of London, the Lord Chancellor, the judges of the High Court, the Dean of Arches, the aldermen of London, the Recorder and Common Serjeant of London, the judge of the City of London Court, and other persons appointed by the crown. Commissioners of oyer and terminer and gaol delivery (*q. v.*) are issued to the Court, under which any two or more of the judges hold sessions in the city of London, or its suburbs, at least twelve times a year, to "inquire of, hear, determine and adjudge" all treasons, felonies and misdemeanors committed within the district of the Court.<sup>2</sup> By stat. 19 & 20 Vict. c. 16, the Queen's Bench Division may order any indictment or inquisition for an offence committed out of the jurisdiction of the Central Criminal Court to be tried in that Court. The Court also has jurisdiction in respect of offences committed on the high seas, formerly within the jurisdiction of the High Court of Admiralty.<sup>3</sup> By the Winter Assizes Act, 1876, the jurisdiction of the Court may be extended by order in council to any neighbouring county, or part of a county, in the months of November, December and January.

**CENTRAL OFFICE** of the Supreme Court of Judicature is the office established in pursuance of the recommendation of the Legal Departments Commission,<sup>4</sup> in order to consolidate the offices of the masters and associates of the Common Law Divisions, the Crown Office of the Queen's Bench Division, the Record and Writ Clerks', Report, and Enrolment offices of the Chancery Division, and a few others.<sup>5</sup> The Central Office is divided into the following departments, and the business and staff of the office are distributed accordingly:—(1) Writ, Appearance and Judgment; (2) Summons and Order (for the Common Law Divisions only); (3) Filing and Record (including the old Chancery Report Office); (4) Taxing (for the Common Law Divisions only); (5) Enrolment; (6) Judgments (for the registry of judgments, executions, &c.); (7) Bills of Sale; (8) Married Women's Acknowledgments; (9) Queen's Remembrancer; (10) Crown Office; and (11) Associates. See the titles of the various officials and title *Master*.

<sup>1</sup> Phillimore, *Eccl. Law*, 1367.

<sup>2</sup> Stat 4 & 5 Will. 4, c. 36; *Steph. Comm. iv.* 315.

<sup>3</sup> Sect. 22; *Steph.* 312; *Reg. v. Keyn*, 2 Ex. D. 63. (See *Territorial*.)

<sup>4</sup> Second Rep. 23, 47.

<sup>5</sup> Judicature (Officers) Act, 1879, ss. 4 *et seq.*

<sup>6</sup> Rules of Court, Dec. 1879: April, 1880.

**CEPI CORPUS.**—When the sheriff has arrested a person under a writ of *capias* or attachment (*q. v.*) he endorses on the writ a return to that effect, which is technically called a return of *cepi corpus*.<sup>1</sup> (See *Return*.)

**CEPIT IN ALIO LOCO** was the name given to that plea in an action of replevin under the old practice, by which the defendant pleaded that he *took* the goods *in another place* than that mentioned in the declaration. It was a plea in bar, not a plea in abatement.<sup>2</sup>

**CERTAINTY.** See *Intent*.

**CERTIFICATE.**—§ 1. A certificate is a statement (generally in writing<sup>3</sup>) by a person having a public or official status, concerning some matter within his knowledge or authority. The principal varieties of certificates relating to legal matters are the following :—

**ASSOCIATE.**—§ 2. Where at the trial of an action at *nisi prius*, or at the assizes, the judge directs judgment to be entered, the associate gives a certificate to that effect, which is produced to the officer in charge of the judgment book when judgment is entered.<sup>4</sup> (See *Postea*.)

**CHARGE.**—§ 3. When the proprietor of land registered under the Land Transfer Act, 1875, creates a charge on it, the proprietor of the charge is entitled to a certificate of charge under the seal of the office; if he transfers the charge, the transferee is entitled to a fresh certificate. It is *prima facie* evidence of its contents.<sup>5</sup> (See *Charge*.)

**CHIEF CLERK.**—§ 4. When a question in an action or suit in the Chancery Division is referred to chambers (as where accounts or inquiries are directed, or a receiver is ordered to be appointed, or a conveyance or other instrument is directed to be settled in chambers), the result of the proceedings is stated in the chief clerk's certificate, which is in the nature of a report to the Court of the matters referred to him.<sup>6</sup> In administration actions, certificates may be either general or separate. A general certificate embraces the result of all the proceedings taken at chambers under the judgment or order; a separate certificate comprises the result of only some one or more of them. Separate certificates are made in cases where it is not desirable to wait till the whole proceedings are completed. Thus, in an action for the administration of the estate of a deceased person, where there are debts remaining unpaid, a certificate of their amount is taken at the earliest possible moment, in order that they may be paid.<sup>7</sup> When a party interested thinks the certificate wrong, he may apply to the judge, within a certain time, to vary or discharge it.<sup>8</sup>

General.

Separate.

Certificate of  
debts.

<sup>1</sup> Archbold, Pr. 611; Daniell, Ch. Pr. 395.

<sup>2</sup> *Bullythorpe v. Turner*, Willes, 475.

<sup>3</sup> Probably the only verbal certificate of practical interest is that given by the Recorder of the City of London, on a question of foreign attachment; see that title, and *Trial*.

<sup>4</sup> Rules of Court, xxxvi. 23 *et seq.*; xli.

5; Archbold, Pr. 382.

<sup>5</sup> Land Transfer Act, 1875, ss. 22, 40, 80.

<sup>6</sup> For a specimen of a chief clerk's certificate, see *Hunter's Suit*, 294.

<sup>7</sup> Daniell, Ch. Pr. 1215 *et seq.*

<sup>8</sup> *Ibid.* 1222. As to certificates in the winding-up of companies, see also *Lindley on Partnership*, 1364.

**COSTS.**—§ 5. By the County Courts Act, 1867, if the plaintiff in an action in the High Court recover a sum not exceeding 20*l.* for breach of contract, or 10*l.* for a tort, he is not entitled to costs, unless the judge before whom the action was tried certifies that there was sufficient reason for bringing the action in the superior Court.<sup>1</sup> Some statutes give the plaintiff, in certain actions, double or treble costs, if the judge before whom the action was tried certifies that he is entitled to them.<sup>2</sup> (See *Costs.*)

**COUNSEL.**—§ 6. In common law practice, when a summons at chambers is argued by counsel, it is necessary to obtain the certificate of the judge or master that it was a case requiring the services of counsel: otherwise the successful party will not be allowed the costs of counsel's attendance.

**DISCHARGE.**—§ 7. In proceedings by liquidation, when the creditors have granted the debtor his discharge, the registrar gives a certificate to that effect, which has the same effect as an order of discharge in the case of a bankrupt.<sup>3</sup> (See *Discharge.*)

**DISMISSAL.**—§ 8. Where a person is charged before justices of the peace with a common or aggravated assault or battery, and they consider the offence not proved, or find the act to have been justified, or so trifling as not to merit punishment, and they accordingly dismiss the complaint, they are bound to give the defendant a certificate of dismissal, which operates to release him from all other proceedings, civil or criminal, for the same cause.<sup>4</sup>

**INCORPORATION.**—§ 9. When a company is registered under the Companies Acts, the registrar is bound to give a certificate stating that the company is incorporated, and (if the fact be so) that it is limited. It is conclusive evidence that all the requisitions of the act in respect of registration have been complied with.<sup>5</sup>

**LAND.**—§ 10. A land certificate is a certificate under the seal of the Land Registry, containing a copy of the registered description of a certain piece of land on the register, the name and address of the registered proprietor, and other particulars.<sup>6</sup> It is *prima facie* evidence of the matters contained in it.<sup>7</sup>

**MORTGAGE.**—§ 11. Under the Merchant Shipping Act, 1854, the owner of a registered ship may obtain a certificate of mortgage, enabling the person named in it to raise money by mortgage of the ship to a limited amount. The form and object of certificates of mortgage are similar to those of certificates of sale (*infra*, § 17).<sup>8</sup>

**PAYMASTER-GENERAL.**—§ 12. Upon the completion of every operation

<sup>1</sup> Archbold, Pr. 421. It seems that the concluding words of s. 67 of the Judicature Act, 1873, have the effect of limiting the operation of the County Courts Act to those actions which may be brought in the County Courts. See *Garnett v. Bradley*, 3 App. Ca. at p. 971.

<sup>2</sup> Archbold, 430.

<sup>3</sup> Bankruptcy Act, 1869, s. 125, §§ 9, 10.

<sup>4</sup> Stat. 24 & 25 Vict. c. 100, ss. 44, 45.

<sup>5</sup> Companies Act, 1862, s. 18.

<sup>6</sup> Land Transfer Act, 1875, ss. 10, 19; General Rules, 33.

<sup>7</sup> Sect. 80.

<sup>8</sup> Sect. 76 *et. seq.*; Maude and Pollock, 39.

Voluntary.

Negative.

by the paymaster-general, except that of paying money out of Court, he files a certificate of the fact in the Central Office (formerly in the Chancery Report Office), and any person interested may obtain an office copy of it. § 13. Another kind of certificate is what is called a voluntary certificate, which is issued by the paymaster-general to show the state of an account in his books at the request of a person interested in it; it merely gives the balance or result of the operations on the account up to that time. (See *Account*, § 14.) No order dealing with a fund in Court is made without the production of one of these certificates. § 14. A negative certificate is one certifying that a particular sum of cash or stock has not been paid or transferred into Court; such a certificate is required to prove that the order requiring the payment or transfer has not been complied with.<sup>1</sup>

REFEREE.—§ 15. When a question in an action is referred to an officer of the Court (*e. g.* a master) under the Common Law Procedure Act, 1854, s. 3, or the Judicature Act, 1873, s. 57, on the ground that it is a question of account or the like, the award of the officer is called a certificate. (See *Arbitration*, § 4.)

REGISTRATION OR REGISTRY.—§ 16. When an act of parliament requires any document or fact to be registered, it generally provides for the delivery by the registrar of a certificate stating that the registration has been effected. Such a certificate is usually *prima facie* evidence of the facts stated in it. To this class belong the certificates of charge and incorporation and land certificates mentioned in this article.

SALE.—§ 17. By the Merchant Shipping Act, 1854, the registered owner of a ship may apply to the registrar for a certificate of sale, which contains a description of the ship, a list of registered mortgages, &c., and an appointment by the owner of a person to sell the ship on his behalf, with any limitations as to the price, place and time at which the sale is to be made, which the owner may desire to impose.<sup>2</sup> The object of obtaining a certificate of sale is to enable the owner to sell his ship out of the country where its port of registry is situate.<sup>3</sup> (See *supra*, § 11.)

SALE AND TRANSFER.—§ 18. In chancery practice, when an order directs the sale or transfer of stock in Court, it is necessary to obtain a direction by one of the registrars, addressed to the paymaster-general, to the effect that the stock is to be sold or transferred, as the case may be. The order and the registrar's direction are then left at the paymaster-general's office to be acted on. The direction is commonly called a certificate of sale (or transfer), or simply a registrar's certificate.<sup>4</sup>

SHERIFF.—§ 19. When a writ of inquiry (*q. v.*) has been executed, but the sheriff thinks that the defendant ought to have an opportunity to set the execution aside, he may endorse on the writ a certificate to that effect,

<sup>1</sup> Chancery Funds Comm. Rep. App. 38; Daniell, Ch. Pr. 1635.

<sup>2</sup> Sect. 76 *et seq.*

<sup>3</sup> Maude and Pollock, Merch. Shipping, 28.

<sup>4</sup> Daniell, Ch. Pr. 1666; Forms, 1898.

which will prevent the plaintiff from signing final judgment until the defendant has had time to move.<sup>1</sup>

**SPECIAL JURY.**—§ 20. Where an action is tried by a special jury, the party at whose instance it is so tried has to bear all the expenses caused by that mode of trial, and is not allowed, upon taxation of costs, any more or other costs than he would have been entitled to if the cause had been tried by a common jury, unless the judge, within a reasonable time after the verdict, certifies that it was a proper cause to be tried by a special jury.<sup>2</sup>

**CERTIFIED COPY** is a copy of a document, signed and certified as a true copy by the officer to whose custody the original is entrusted. By stat. 14 & 15 Vict. c. 99, s. 14, it is enacted, that whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, any copy thereof or extract therefrom shall be admissible in evidence in any Court of justice, &c., provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted.<sup>3</sup> (See *Copy*.)

**CERTIORARI** (in ordinary cases) is a writ directed to an inferior Court of Record, commanding it to *certify* to the Queen in the High Court of Justice some matter of a judicial character. Its principal use is to remove civil causes from inferior Courts of Record into the High Court (*e.g.* from a County Court or the Mayor's Court),<sup>4</sup> where it is desirable that they should be tried in the superior Court, or to remove an indictment from an inferior criminal Court (*e.g.* quarter sessions) into the Central Criminal Court or the Queen's Bench Division, or from the Central Criminal Court into the Queen's Bench Division, in order the better to consider and determine the validity of the indictment and the proceedings thereon, and to prevent a partial (*i.e.* biased) and insufficient trial.<sup>5</sup> The inferior Court obeys the writ by transmitting the record of the proceedings (or, in some cases, a transcript of it) to the superior Court. § 2. A certiorari is also sometimes used where the record of a proceeding in an inferior Court is required to be produced in the High Court on an issue of nul tiel record (*q. v.*).<sup>6</sup>

For removal of cause.

To produce record.

II. § 3. Where a peer or peeress is indicted of treason or felony, the indictment is removed into the House of Lords, or (if it is not sitting) into the Court of the Lord High Steward, by writ of certiorari.<sup>7</sup>

Trial of peer.

**CESSAVIT** was an action which lay where a man who held lands by rent or other services, neglected or *ceased* to perform his services for two years together. The action

<sup>1</sup> Stat. 1 Will. 4, c. 7, s. 1; Archbold, Pr. 815.

<sup>2</sup> Stat. 6 Geo. 4, c. 50, s. 34; Archbold, Pr. 456.

<sup>3</sup> Best on Evidence, 620.

<sup>4</sup> Archbold's Pr. 1404 *et seq.*; Daniell's Ch. Pr. 1430; Pollock's C. C. Pr. 230;

Candy's Mayor's Court Pr. 104; Judicature Act, 1873, s. 90; *Reg. v. Sheward*, 5 Q. B. D. 179.

<sup>5</sup> Archbold, Cr. Pl. 98; Pritchard, Q. S. 357; Stat. 19 & 20 Vict. c. 16.

<sup>6</sup> Archbold's Pr. 753.

<sup>7</sup> Hom. Cox, Inst. 472.

enabled the plaintiff to recover the land itself, unless the tenant tendered the arrears of rent (if any), and damages before judgment, and gave security for the future performance of the services. The action was abolished by stat. 3 & 4 Will. 4, c. 27, s. 36.<sup>1</sup>

**CESSE.**—A tenant of land was said to cesse when he neglected or *ceased* to perform the services due to the lord.<sup>2</sup> (See *Cessavit*.)

Proviso for  
cesser.

Stat. 8 & 9  
Vict. c. 112.

**CESSER.**—The cesser of a term, annuity, or the like, takes place when it determines or comes to an end. The expression is chiefly used with reference to long terms of a thousand years or some similar period, created by a settlement for the purpose of securing the income, portions, &c., given to the objects of the settlement. (As to these, see *Settlement*.) When the trusts of a term of this kind are satisfied (as where it was created to secure an annuity, and the annuitant has died), it is desirable that the term should be put an end to, and with this object it was formerly usual to provide in the settlement itself that as soon as the trusts of the term had been satisfied, it should cease and determine; this was called a proviso for cesser. Now, however, by the operation of the stat. 8 & 9 Vict. c. 112, every term of years ceases and determines ipso facto as soon as its trusts are satisfied.<sup>3</sup> (See *Term*.)

**CESSIO BONORUM**, in Roman law, was where a debtor surrendered his property to his creditors in lieu of execution against his body. It did not release the debtor from his debts if he afterwards acquired property from which he could pay them without leaving himself in want.<sup>4</sup> The principle of cessio bonorum has been adopted in many continental countries as a mode of giving relief to insolvent debtors,<sup>5</sup> and was formerly a mode of effecting arrangements with creditors in English law (see *Arrangements with Creditors*). A cessio bonorum is now an act of bankruptcy<sup>6</sup> (*q. v.*).

**CESSION**, in jurisprudence, signifies transfer or alienation, but it is not a term of English law in this sense. § 2. In ecclesiastical law, cession is where a person loses a benefice by accepting a new benefice or preferment, contrary to the acts against pluralities<sup>7</sup> (*q. v.*).

**CESTUI QUE TRUST** is a person for whom another is trustee. (See *Trust*; *Beneficiary*.)

**CESTUI QUE USE**, in the old law of real property, was a person to whose use (that is, for whose benefit) lands or other hereditaments were held by another person. The modern equivalent is the cestui que trust. (See *Use*.)

“Cestui que use” is a corruption of *cestui à que use* = “he to whose use.” (See *Cestui que vie*.)

<sup>1</sup> Bl. Comm. iii. 232; Termes de la Ley; Hargrave's note to Co. Litt. 142 a.

<sup>2</sup> Co. Litt. 373 a, 380 b.

<sup>3</sup> Williams on Settlements, 253 *et seq.*

<sup>4</sup> Hunter's Roman Law, 879; Holtz. Encycl. s. v.

<sup>5</sup> Holtz. *ubi supra*; Banco de Portugal v. Waddell, 5 App. Ca. 161.

<sup>6</sup> Tomkins v. Saffery, 3 App. Ca. 213.

<sup>7</sup> Stats. 1 & 2 Vict. c. 106; 13 & 14 Vict. c. 98; Steph. Comm. ii. 691.

**CESTUI QUE VIE.**—Where a person is entitled to an estate or interest in property during the life of another, the latter is called the cestui que vic. As to the production of a cestui que vie in cases where it is suspected that he is dead, see *Production*.

“Cestui que vie” is a corruption of *cestui à que vie* = “he for whose life:” Compare the phrase “que estate” in the title *Prescription*.

**CHALLENGE** is an objection to persons returned to be jurors in a civil or criminal proceeding. It is of two kinds,—to the array, or to the polls.

§ 2. A challenge to the array is an exception to the whole jury<sup>1</sup> in respect of some partiality or default of the sheriff or other officer. Some principal; causes of challenge to the array are called principal challenges, because if they are true they must be allowed, while others are called challenges for favour, because they show some grounds that imply a probability of favour or partiality, but are left to the discretion of the triors (*q. v.*). To the array : principal ; for favour.

§ 3. Challenges to the polls (that is, to particular jurors) are of five kinds: (1) A peremptory challenge is where the objecting party may challenge without showing any cause; this is only allowed in trials for treason or felony, *in favorem vitæ*, and is restricted to thirty-five jurors in the former, and twenty in the latter.<sup>2</sup> To the polls : peremptory ;

§ 4. The following kinds of challenges are called by way of distinction “challenges for cause”: (2) *Propter honoris respectum*, as where a lord of parliament is empannelled on a jury; (3) *propter defectum*, for some want or default in the individual juror, *e.g.* persons not having qualification, idiots, aliens neither domiciled nor naturalized,<sup>3</sup> women, &c.; (4) *propter affectum*, for suspicion of partiality, which is either (a) a principal challenge, as where the juror is of kin to either party, or has an interest in the cause, &c.; or (b) a challenge to the favour, where there is merely a probability of bias;<sup>4</sup> (5) *propter delictum*, for some crime or misdemeanor.<sup>5</sup> for cause.

§ 5. Challenges Triors. are tried and determined by triors appointed by the Court, or, in some cases, by the Court itself, or by persons who have been already sworn on the jury.<sup>6</sup> (See *Elisors*.)

**CHALLENGE TO FIGHT.**—It is a misdemeanor, punishable with fine and imprisonment, to challenge any person to fight a duel, or to endeavour to provoke him to send a challenge.<sup>7</sup>

**CHAMBERS.**—Attached to the various Divisions of the High Court are rooms called chambers, in which the judges and their deputies, the

<sup>1</sup> “And herein you shall understand that the jurors’ names are ranked in the pannel one under another; which order or ranking the jurie is called the array.” Co. Litt. 156 a.

<sup>2</sup> 6 Geo. 4, c. 50; 7 & 8 Geo. 4, c. 28; Archbold, Crim. Pl. 157.

<sup>3</sup> See Juries Act, 1870, s. 8; for other defects now obsolete, see Co. Litt. 156 b.

<sup>4</sup> Co. Litt. 157 a, b; Steph. Comm. iv. 525.

<sup>5</sup> *Ibid.*

<sup>6</sup> Steph. 522, 526; Chitty, Pr. 433; Co. Litt. 158 a.

<sup>7</sup> Steph. Crim. Dig. 40.

masters and chief clerks, sit to transact business which does not require to be done in Court, or can be more conveniently disposed of in chambers.<sup>1</sup> The proceedings in chambers are private, only the parties or their solicitors and counsel being admitted. The principal business is hearing summonses (*q. v.*); but, in the chambers of the common law Divisions, the masters also conduct references and examine witnesses about to proceed abroad, &c., while in the chambers of the Master of the Rolls and the Vice-Chancellors, the judges examine wards of Court, and the chief clerks investigate accounts, conduct inquiries, settle deeds, &c. Sometimes also the hearing or further consideration of a cause in the Chancery Division is taken in chambers, to save expense; and some administrative proceedings are conducted entirely in chambers.<sup>2</sup> (See *Appeal*; *Summons*.)

**CHAMPARTY** or **CHAMPERTY** is the act of assisting the plaintiff in a legal proceeding in which the person giving the assistance has no valuable interest, on an agreement that if the proceeding is successful, the proceeds shall be divided between the plaintiff and the assisting person. It is a misdemeanor (*q. v.*).<sup>3</sup> (See *Maintenance*.)

ETYMOLOGY.]—Norman French: *champart*; <sup>4</sup> Latin, *campi pars* = "part of the field;" originally the right of a feudal lord to take part of the produce of land cultivated by his tenants.<sup>5</sup>

**CHANCE-MEDLEY** is where a man is assaulted in the course of a sudden brawl or quarrel, and, after he has declined any further combat, kills his adversary in self-defence. It is a variety of excusable homicide.<sup>6</sup> (See *Homicide*.) Coke paraphrases "chance-medley" as "homicide *per infortunium*,"<sup>7</sup> but it is said that the term is a corruption of *chaude meslée*, a hot fight.<sup>8</sup>

**CHANCEL** is that part of a church which was originally set apart for the clergy to perform their religious offices; it answers to the choir in a cathedral or collegiate church. The rector or lay impropriator is bound to repair the chancel, and in return he is entitled as of common right to the chief seat in it, unless some other parishioner has it by prescription.<sup>9</sup> Chancel is derived from *cancelli*, a lattice-work partition between it and the body of the church.<sup>10</sup>

Lord Chancellor.

**CHANCELLOR.**—§ 1. A chancellor is a judicial officer of a king, a bishop, or other high dignitary.

§ 2. The Lord High Chancellor of Great Britain is "created by the

<sup>1</sup> Judicature Act, 1873, s. 39; Rules of Court, liv.

<sup>2</sup> See as to the business to be conducted in the chambers of the equity judges, 15 & 16 Vict. c. 80; 18 & 19 Vict. c. 134; Order xxxv. 1; Daniell, Ch. Pr. 1040.

<sup>3</sup> Steph. Comm. iv. 237; Pollock on Contract, 270; Steph. Crim. Dig. 86. See *Ram Coomar Coondoo v. Chunder Canto*

*Mookenjee*, 2 App. Ca. 186.

<sup>4</sup> Britton, 37 b.

<sup>5</sup> Littré, s. v.

<sup>6</sup> Russell on Crimes, i. 845.

<sup>7</sup> Co. Litt. 287 b.

<sup>8</sup> See Bl. Comm. iv. 184; Loysel, Inst. Cout. gl.; Littré, s. v. *Meslée*.

<sup>9</sup> Phill. Eccl. Law, 1785, 1807.

<sup>10</sup> *Ibid.* 1776.



mere delivery of the king's great seal into his custody, whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedency to every temporal lord. He is a privy councillor by his office, and, according to Lord Chancellor Ellesmere, prolocutor (or speaker) of the House of Lords by prescription. To him (under the crown) belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic (for none else were then capable of an office so conversant in writings), and presiding over the royal chapel, he became keeper of the king's conscience, visitor (in right of the king) of all hospitals and colleges of the king's foundation, and patron of all the king's livings under the value of twenty marks per annum in the king's books.<sup>1</sup> He is the general guardian of all infants, idiots and lunatics, and has the general superintendence of all charitable uses in the kingdom."<sup>2</sup> He was formerly the principal judge of the Court of Chancery, and is now president of the Court of Appeal, of the High Court of Justice, and of the Chancery Division of the High Court, and acts as president of the House of Lords when sitting as a Court of Appeal. He is, therefore, of course a barrister, and, as a rule, has previously either been Attorney- or Solicitor-General, or held some judicial office. He is also a cabinet minister, and has charge in the House of Lords of all legal measures brought forward by the government. (See *Chancery*; *Presentations Office*; *Vice-Chancellor*.)

II. § 3. The Chancellor of the Duchy and County Palatine of Lancaster is an official of the crown as owner of the duchy of Lancaster. His duties appear now to be chiefly ministerial, although he is nominally the judge of the Chancery Court of the County Palatine, and of the Duchy Chamber Court (see those titles). The judicial duties of the former Court are performed by the Vice-Chancellor, and the latter Court seems rarely to sit.<sup>3</sup>

Chancellor of  
Duchy of  
Lancaster.

III. § 4. The chancellor of a bishop or diocese is a judicial officer who acts as the delegate of the bishop in hearing ecclesiastical causes, &c. The office generally includes in it two other offices—that of official principal, and that of vicar-general<sup>4</sup> (*q. v.* and see *Court of Arches*).

Chancellor of  
diocese.

IV. § 5. The Chancellor of the Exchequer was an officer originally appointed to act as a check on the Lord Treasurer, and was a judge of the Court of Exchequer sitting as a Court of Equity. The office, however, has long ceased to belong to the Exchequer in the modern sense of the word, and has formed part of the Treasury.<sup>5</sup> The judicial functions of the Chancellor of the Exchequer were formally abolished by the Judicature Act, having long been practically obsolete.

Chancellor of  
the Exche-  
quer.

ETYMOLOGY.]—Latin: *cancellarius*, a clerk, said to be so called from his sitting *ad cancellos*, at the railing which separated the judges from the public.<sup>6</sup> Compare *Bar*.

<sup>1</sup> Twelve canonries and 650 livings are now in the gift of the Lord Chancellor: Second Rep. of Legal Deputy Comm. 34.

<sup>2</sup> Bl. Comm. iii. 47. See Butler's note to Co. Litt. 290 b.

<sup>3</sup> Bl. Comm. iii. 78.

<sup>4</sup> Phillimore, Eccl. Law, 1208.

<sup>5</sup> Hom. Cox, Inst. 683; Bl. Comm. iii. 44.

<sup>6</sup> See Dirksen, Man. Lat. s. v.; Littré, Dict. s. v. *Chancelier*.

High Court of  
Chancery.

Chancery  
Division.

Common law  
side and offices  
of the  
Chancery.

Lancaster  
Chancery  
Court.

**CHANCERY.**—I. § 1. Before the Judicature Acts came into operation the Chancery consisted of two Courts, and a number of offices. § 2. The court of equity, or the equity side of the Court of Chancery, which is generally meant by the expression "Court of Chancery," was the principal Court in which that part of the law of England known as "equity" (*q. v.*) was enforced. It consisted of four judges of first instance, namely, the Master of the Rolls (*q. v.*), and three vice-chancellors (*q. v.*), and a Court of Appeal, consisting of the Lord Chancellor and two Lords Justices (*q. v.*). Not only did the law administered in the Court of Chancery differ from that recognized in the Courts of Common Law, but it had also a different procedure. (See *Suit; Bill of Complaint; Petition; Matter.*)

§ 3. By the Judicature Acts the Court of Chancery has been merged in the Supreme Court of Judicature, and its practice altered (see *Action*); but its judges of first instance form a separate Division of the High Court, namely, the Chancery Division, which retains most of the business which was formerly within the exclusive jurisdiction of the Court of Chancery; and in many of its details the practice in Chancery proceedings remains the same as before. The Chancery Division also retains many of the various offices and officers attached to the Court of Chancery, while other have been abolished. (See *Account*, §§ 5 *et seq.*; *Certificate*, § 4; *Chief Clerk; Equity; Inquiry; Master; Record and Writ Clerk; Registrar.*)

§ 4. The common law court and offices of the Chancery are much more ancient than the equity court,<sup>1</sup> the jurisdiction of the latter having been originally an encroachment, and hence in old books the equitable jurisdiction of the Court is called its extraordinary jurisdiction. The most important part of the common law side of the Court of Chancery was its offices, especially the Petty Bag Office, the Hanaper Office and the Enrolment Office, the two former of which were concerned in issuing or sealing original writs, writs of error, parliamentary writs, letters-patent, commissions to inquire as to lunatics, charities, &c., while in the Enrolment Office, as its name implies, deeds, &c. were enrolled or entered on record. The Court on this side of the Chancery had jurisdiction in matters relating to the business of the offices—*e.g.* in proceedings by scire facias to repeal letters-patent, to enforce recognizances, in traverses of offices, and inquisitions, &c. (See *Petty Bag Office; Scire Facias; Enrolment; Hanaper.*)<sup>2</sup>

§ 5. By the Judicature Act, 1873, the Court of Chancery, as a common law court, and its offices, were transferred to the Supreme Court of Judicature.<sup>3</sup> By the Judicature (Officers) Act, 1879, the Enrolment Office was consolidated (with others) into the Central Office of the Supreme Court, and the Petty Bag Office is to be abolished on the next vacancy.

II. § 6. The Court of Chancery of the County Palatine of Lancaster is a Court having a local jurisdiction in equity. It consists of a vice-chancellor, with a registrar and other officers, forming a Court of first

<sup>1</sup> 3 Bl. 48.

<sup>2</sup> 3 Bl. 48 *et seq.*; Gilbert's Chancery, 9; Chitty's Pr. 1757; Daniell's Ch. Pr. ii.

1608; Wms. Saund. ii. 15.

<sup>3</sup> Jud. Act, 1873, ss. 16, 77.

instance, from which an appeal formerly lay to the "Court of Appeal in Chancery of the County Palatine of Lancaster," consisting of the Chancellor of the Duchy and the Lords Justices of the Court of Appeal in Chancery;<sup>1</sup> but by the Judicature Acts, 1873, 1875, this appellate jurisdiction has been transferred to the Court of Appeal of the Supreme Court.<sup>2</sup>

§ 7. The Chancery Court of York is the ecclesiastical Court of Appeal for cases decided in the diocesan Courts within the province of York.<sup>3</sup> The judge is called the official principal of the Court; he is also official principal of the Court of Arches (*q. v.*)<sup>4</sup>

Chancery  
Court of  
York.

ETYMOLOGY AND HISTORY.]—Norman French: *chauncelerie*,<sup>5</sup> low Latin *cancellaria*,<sup>6</sup> from *cancellarius*, a chancellor.

The Chancery was originally an office for the issue of writs,<sup>6</sup> including the original writs by which all common law actions were commenced in ancient times. It was the business of the clerks in the Chancery to "hear and examine the petitions and complaints of suitors, and give them a remedy by the king's writ fitted to their case."<sup>7</sup> The Chancellor being keeper of the king's seal also had the sealing of all charters, letters patent, and other public instruments;<sup>8</sup> hence when any question arose on a charter, patent, commission, &c., proceedings were taken before the Chancellor;<sup>9</sup> this was the origin of its common law jurisdiction. As to its equitable or extraordinary jurisdiction, see *Equity*; *Subpœna*; *Attachment*; *Commission of Rebellion*.<sup>10</sup>

**CHAPELS** belonging to the Church of England are of the following kinds. § 1. A chapel of ease is one which is used only for the ease of the

Chapel of  
ease.

parishioners in prayers and preaching, while the sacraments and burial are received and performed at the mother church; the curate of such a chapel is generally removable at the pleasure of the parochial minister.

§ 2. A parochial chapel is one which has the privilege of administering the sacraments (especially baptism), and the office of burial. § 3. A free-

Parochial.  
Free.

chapel is one which is exempt from the jurisdiction of the bishop of the diocese, having been erected either by the crown, or by the crown's licence, with that exemption. § 4. Private chapels are such as noblemen and other persons have, at their own private charge, built in and near their own houses, for them and their families to perform religious duties in. The minister is called a chaplain, and is nominated by the owner of the chapel.<sup>11</sup> § 5. There are also chapels built or endowed under acts of parliament, especially under the Church Building and Church Extension

Private.

Acts; the principal of these are (i) district chapelries or chapels to which districts have been assigned by the Ecclesiastical Commissioners; such chapels have perpetual curates, with tithes, and exclusive cure of souls, and differ from churches in little more than name;<sup>12</sup> (ii) consolidated chapelries, which differ from district chapelries chiefly in being formed

District  
chapelries.

Consolidated  
chapelries.

<sup>1</sup> Stat. 13 & 14 Vict. c. 43; 17 & 18 Vict. c. 82. As to the jurisdiction of the Court, see *In re Alison's Trusts*, 8 Ch. D. 1; *In re Longden, &c. Co.*, *ibid.* 150.

<sup>2</sup> Jud. Act, 1873, s. 18. New rules for the procedure of the Court were issued at the end of 1876. Since the above article was written, a treatise on the Practice of the Court, by Messrs. Snow and Winstanley, has appeared.

<sup>3</sup> Phillimore, Eccl. Laws, 1207.

<sup>4</sup> Public Worship Regulation Act, 1874.

<sup>5</sup> Britton, 37 b, 122 b.

<sup>6</sup> "Officium quod dicitur cancellaria," Fleta, 75.

<sup>7</sup> Reeves, ii. 251.

<sup>8</sup> See Reeves, Eng. Law, i. 60; ii. 250.

<sup>9</sup> Gilbert's Chancery, 12.

<sup>10</sup> Bl. Comm. ii. 50 *et seq.*; 4 Inst. 78.

<sup>11</sup> Phill. Eccl. Law, 1821.

<sup>12</sup> *Ibid.* 2171.

Chapels with- out districts. out of portions of many parishes;<sup>1</sup> (iii) chapels to which an endowment, without a district, has been granted by the Commissioners.<sup>2</sup>

**CHAPTER.** See *Dean and Chapter*.

Of party.

**CHARACTER.**—§ 1. Evidence as to the character of a party to a judicial proceeding is not, in general, admissible, unless the nature of the proceeding is such as to put his character in issue. Such evidence is, therefore, admissible on an indictment for keeping a common gaming-house, or for being a common barretor, if it bears on the charge; and so, in an action for seduction, or in a prosecution for rape, evidence may be given as to the character of the woman for chastity.<sup>3</sup> A prisoner may call witnesses to speak to his character in reference to the charge against him, and the prosecutor may then adduce evidence of his general bad character, but he cannot go into particular instances of misconduct, except in the case of a prisoner charged with felony not punishable with death, for if he calls witnesses as to character, the prosecutor may, in answer thereto, give evidence of his conviction for a previous felony.<sup>4</sup>

Of witness.

§ 2. Evidence is also admissible to show that a witness is unworthy of credit by reason of his general bad character; and if he is asked whether he has been convicted of felony or misdemeanor, and denies or refuses to answer, the opposite party may prove the conviction.<sup>5</sup>

**CHARGE.**—I. § 1. In its general sense, a charge is an obligation or liability. Thus we speak of a district being chargeable to maintain its own highways, and of a pauper being chargeable to the parish.

On property.

§ 2. More frequently, however, charge is applied to property, and signifies that it is security for the payment of a debt or performance of an obligation. It is a general term, and therefore includes mortgages, liens, writs of execution, &c., but is also applied in a restricted sense to cases where the security has no special name, and where there is not necessarily a personal debt. Thus, if the owner of land agrees that it shall be security for a debt or obligation by himself or another person, that will charge the land;<sup>6</sup> the principal effect of such a charge is to entitle the grantee to take proceedings to obtain a sale of the property charged.<sup>7</sup> (See *Hypothecation*.)

Charge of debts or legacies.

§ 3. Where a person by his will charges his real estate with the payment of any debts or legacies, the executors or trustees may raise such debts or legacies by sale or mortgage of the lands, unless he has devised them to any person for his own benefit subject to the charge, in which case the devisee (if he accepts the devise) must satisfy the debts or legacies;<sup>8</sup> for this purpose he may sell or mortgage the land.

<sup>1</sup> Phill. 2172.

<sup>2</sup> *Ibid.* 2168.

<sup>3</sup> Best on Evidence, 358.

<sup>4</sup> Stat. 6 & 7 Will. 4, c. 111.

<sup>5</sup> Stats. 17 & 18 Vict. c. 125, s. 25; 28 Vict. c. 18.

<sup>6</sup> Fisher on Mortgage, 78.

<sup>7</sup> See Fisher, 8, 77.

<sup>8</sup> Williams, R. P. 219; stat. 22 & 23 Vict. c. 35, ss. 14 *et seq.*; Shelford, R. P. Stat. 484.

§ 4. "Charge" is also applied to equitable assignments by way of security. (See *Assignment*, §§ 3, 5.) Thus, if A., being entitled to a payment in futuro of 500*l.* from B., and being indebted to C. for 200*l.*, gives C. an order on B. to pay him 200*l.* out of the 500*l.*, this is an equitable assignment, and would be called a "charge" on the 500*l.* in B.'s hands, because its operation is to secure the payment of C.'s debt.<sup>1</sup>

Equitable assignment.

§ 5. By the stat. 23 & 24 Vict. c. 127, s. 28, where a solicitor is employed to prosecute or defend any proceeding in a Court, the Court may make a declaration that the solicitor is entitled to a charge upon the property recovered or preserved by the proceeding, and the charge is effectual against all persons, except bonâ fide purchasers of the property for value without notice.<sup>2</sup>

Declaration of charge.

§ 6. Under the Land Transfer Act, 1875, the registered proprietor of freehold or leasehold land may charge it with the payment of money, with or without a power of sale, by executing an instrument of charge in the statutory form, and by having the charge entered on the register.<sup>3</sup> It has most of the incidents of an ordinary mortgage.<sup>4</sup> The proprietor of the charge is entitled to a certificate of charge.<sup>5</sup>

Registered charge.

§ 7. Under the Agricultural Holdings Act, 1875, when a landlord pays to his tenant compensation in respect of improvements effected by the latter on the land, he may obtain from the County Court of the district a charge of the amount on the land, the effect of which is to make the land liable for the repayment of the amount by instalments to the landlord, his executors, administrators and assigns, so that where he is merely a limited owner (*e.g.* a tenant for life) the amount will be repaid to him or his personal representatives if his estate comes to an end before the time when the improvement in respect of which the compensation was paid is taken to be exhausted. This time varies with the nature of the improvement.<sup>6</sup> (See *Agricultural Holdings Act*.)

Charge on holding.

§ 8. In an action for an account in the Chancery Division, a person is said to be charged with sums which he admits, or is proved to have received. When he brings in an account showing receipts and payments by him, he is said to charge himself with the receipts, and to discharge himself by the payments.<sup>7</sup> (See *Discharge*; *Surcharge*.)

In action for account.

II. § 9. In criminal law a charge is an accusation, made by a summons, warrant, information, indictment or the like. (See those titles.)

Criminal law.

III. § 10. Under the old chancery practice, charges were allegations in a bill of complaint intended either to substantiate the general statement of the plaintiff's case, or to avoid a defence which he anticipated that the defendant would set up. (See *Bill of Complaint*, § 6.)

**CHARGÉ D'AFFAIRES** is a diplomatic agent, differing from an ambassador or minister in being accredited to the minister, not the

<sup>1</sup> See *In re Lewer, Ex parte Wilkes*, 4 Ch. D. 101.

<sup>2</sup> Daniell, Ch. Pr. 1721. See *Pilcher v. Arden*, 7 Ch. D. 318.

<sup>3</sup> Sect. 22; General Rules, 20, Form 20.

<sup>4</sup> Sects. 23—27.

<sup>5</sup> Sect. 22.

<sup>6</sup> 38 & 39 Vict. c. 92, s. 42.

<sup>7</sup> As to the old practice of bringing in charges and discharges in the master's office, see Daniell, Ch. Pr. 1122, n. (n).

sovereign, of the foreign state where he resides, and in representing a minister and not the sovereign of his own state.<sup>1</sup>

**CHARGING ORDER.**—§ 1. By 1 & 2 Vict. c. 110, ss. 14—16, and 3 & 4 Vict. c. 82, when judgment has been recovered in an action a judge at chambers may make an order that any government stock, funds or annuities, or any stock or shares in a public company in England, standing in the name of the judgment debtor in his own right, or in the name of any person as trustee for him, shall stand charged with the payment of the judgment debt.<sup>2</sup> The effect is to prevent the transfer of the stock, and to give the judgment creditor all the remedies which he would have been entitled to if the charge had been made in his favour by the judgment debtor, but he cannot enforce it until six months from the date of the order.<sup>3</sup>

§ 2. As to so-called charging orders under stat. 23 & 24 Vict. c. 127, see *Charge*, § 5.

(See *Distringas*; *Stop Order*.)

**CHARITABLE TRUSTS ACTS** (stats. 16 & 17 Vict. c. 137; 18 & 19 Vict. c. 124; 23 & 24 Vict. c. 136; 25 & 26 Vict. c. 112; and 32 & 33 Vict. c. 110)<sup>4</sup> were passed to constitute a board of commissioners called the Charity Commissioners, with powers for inquiring into the nature, objects, condition and management of charities, and for giving advice and directions, and making orders for the administration of charity property, and for authorizing leases, sales, and exchanges of charity lands. A mode of applying to the Chancery Division in matters relating to charities, by petition or summons, in a summary way, is also provided. The acts do not apply to unendowed charities.<sup>5</sup> (See *Charity*, § 3; *Scheme*; *Official Trustees of Charitable Funds and Charity Lands*.)

**CHARITABLE USES ACT** is the act 9 Geo. 2, c. 36, which prohibits gifts to charities of land, or moneys arising from or to be laid out in land, unless made in accordance with the provisions of the act. It is commonly, but inaccurately, known as the Mortmain Act,<sup>6</sup> (See *Mortmain*.)

**CHARITY.**—§ 1. When a person gives money or property for the benefit of the public, or a section of the public, this constitutes a charitable gift, and the donor is called the founder of the charity. In practice, however, the term is usually applied to institutions of a permanent character, such as hospitals, schools, &c. The object must be *public*, and therefore gifts for the erection or repair of private tombs or monuments (so-called private charities) are not charities in the proper sense of the word.<sup>7</sup> Instances of proper charities (sometimes called

“Private”  
charities.

<sup>1</sup> Manning's Law of Nations, 106.

<sup>2</sup> Smith's Action, 211; Rules of Court, xlv. 1.

<sup>3</sup> 1 & 2 Vict. c. 110, s. 14; Fisher on Mortgage, 113 *et seq.*

<sup>4</sup> See also Sir Samuel Romilly's Act, 52 Geo. 3, c. 101.

<sup>5</sup> Tudor's Charitable Trusts, 189; Steph. Comm. iii. 74; Daniell's Ch. Pr. 1766; Hunter's Suit, 246.

<sup>6</sup> See *Luckraft v. Pridham*, 6 Ch. D. 205.

<sup>7</sup> Watson's Comp. Eq. 42.

public charities) are gifts for the relief of aged, poor and sick persons, for the relief of the donor's poor relations, for education, for the repair of bridges, towards payment of the national debt, &c.<sup>1</sup> § 2. When a charity has to be administered with reference to the tenets of a particular religion (*e.g.* where its purpose is education in those tenets, or where its objects must be persons holding those tenets), the charity is said to be ecclesiastical, as opposed to a lay or 'eleemosynary charity, which is not restricted with reference to any particular religion.<sup>2</sup> § 3. An endowed charity is one which possesses property from which it derives income, and which was originally given to it for the purpose of being kept as a source of income; a charity, therefore, which is supported wholly or partially by voluntary subscriptions is (wholly or partially) an unendowed charity; and neither money arising from voluntary subscriptions, nor property given to a charity in such a way that it might legally be applied as income, is converted into an endowment merely by being set apart or invested for the purpose of being applied to some defined and specific object connected with the charity.<sup>3</sup>

Ecclesiastical,  
eleemosynary.

Endowed  
charities.

(See *Charitable Trusts Acts*; *Mortmain*; *Information*; *Scheme*; *Cypres*; *Visitor*.)

**CHARTER** formerly meant any deed relating to hereditaments, especially deeds of feoffment,<sup>4</sup> but it is now always used in the sense of a royal charter, which is a grant by the crown, in the form of letters patent under the great seal, to persons therein designated, of jura regalia or other franchises, liberties, property, rights, powers, privileges or immunities.<sup>5</sup> At the present day the most usual instances of charters are those creating universities and other corporations. (Old French: *chartre*, Latin *charta*.)

(See *Letters Patent*; *Corporation*; *Surrender*.)

**CHARTER-PARTY** is a written agreement by which a shipowner lets an entire ship, or a part of it, to a merchant for the conveyance of goods, binding himself to transport them to a particular place for a sum of money which the merchant undertakes to pay as freight for their carriage.<sup>6</sup> The principal stipulations in an ordinary charter-party refer to the places of loading and delivery, the mode and time of paying the freight, the number of laying days (that is, the time allowed the freighter for loading and unloading), and the rate of demurrage (*q. v.*)<sup>7</sup>

**ETYMOLOGY.**—*Carta partita*, an instrument or deed cut in two; apparently the ship-

<sup>1</sup> See the quaint enumeration in stat. 43 Eliz. c. 4, from which the legal idea of a charity is taken, and cases cited, Watson, 40 *et seq.*; Daniell's Ch. Pr. 1760; Tudor's Char. Trusts Act, 4.

<sup>2</sup> *Att.-Gen. v. St. John's Hospital*, 2 Ch. D. 554; Tudor's Char. Trusts, and the cases cited.

<sup>3</sup> See sects. 62 and 66 of the Charitable Trusts Act, 1853; and as to their construction (which is not free from difficulty),

*The Governors of the Charity for Widows, &c. of Clergymen v. Sutton*, 27 Beav. 651; *In re Sir R. Peel's School*, L. R., 3 Ch. 543.

<sup>4</sup> Co. Litt. 7 a, 9 b.

<sup>5</sup> Grant on Corporations, 9; Lindley on Partn. 154.

<sup>6</sup> Maude and Pollock, Merch. Shipp. 227.

<sup>7</sup> See the form, *ibid.* 228.

owner's copy and the merchant's copy were originally written on the same sheet of paper or parchment, which was then cut in two, in the same manner as an indenture (*q. v.*).

(See *Affreightment*.)

Royal.  
Free.

**CHASE** is a district of land privileged for wild beasts of chase, with the exclusive right of hunting therein. It resembles a forest (*q. v.*), except that it has no peculiar laws or courts. § 2. A chase belonging to the crown is called a chase royal; a chase in the hands of a subject (whether by royal grant or by prescription) is sometimes called a free (or frank) chase; it is a franchise (*q. v.*), and may belong either to the owner of the land over which the right of chase exists, or to another person.<sup>1</sup>

ETYMOLOGY.]—Norman French: *chace*,<sup>2</sup> from *chacier*; Italian *cacciare*, to hunt, most probably from a Romanic form, *captiare*, of the Latin *captare*, to pursue, hunt.<sup>3</sup>

Chattels real.

**CHATTELS** is a term used to denote any kind of property which, having regard either to the subject-matter or the quantity of interest therein, is not freehold. Any estate in lands and tenements which does not amount to freehold is consequently a chattel, but inasmuch as it concerns or "savours" of the realty, it is called a chattel real, to distinguish it from things which have no concern with land, *viz.* mere moveables and rights connected with them, all of which are called chattels personal. Chattels real include estates for years, at will, by sufferance, wardships, and various interests of uncertain duration.<sup>4</sup> (See *Estate; Interest*.)

Chattels personal.

§ 2. The term "chattels personal" is generally applied to tangible things, such as furniture, jewels, animals and the like. Choses in action (*q. v.*) and incorporeal personal property, such as copyrights, patent rights, and the like, are not generally included in the term chattels.<sup>5</sup> (See *Personal Property*.)

**CHAUD-MEDLEY.** See *Chance-Medley*.

**CHAUNTRY** was a church or chapel endowed with lands or other yearly revenues for the maintenance of one or more priests, to sing mass daily for the souls of the donors and such others as they appointed.<sup>6</sup> Chauntries were abolished by the acts 37 Hen. 8, c. 4, and 1 Edw. 6, c. 14, and their lands given to the crown.<sup>7</sup>

**CHEAT** in criminal law is a generic term for the act of fraudulently obtaining the property of another by any deceitful practice not amounting to felony, but of such a nature that it directly affects or may directly affect the public at large. Thus, selling by a false weight or measure,

<sup>1</sup> Co. Litt. 233 a; Manwood, Forest, 6 b; Comyns, Dig. *Chase*, B.

<sup>2</sup> Britton, 138 b.

<sup>3</sup> Diez, Wörtl. i. 97.

<sup>4</sup> Steph. Comm. i. 280; Co. Litt. 118 b.

<sup>5</sup> See Litt. §§ 281, 282, where he treats of debts and duties as distinct from chattels

personal, such as a horse. Coke, however, talks of chattels in possession and chattels in right, which latter appear to be the same as choses in action. Co. Litt. 182 a.

<sup>6</sup> Termes de la Ley; Litt. § 530.

<sup>7</sup> Co. Litt. 301 b.



even to a single person, is a cheat, while selling short measure or weight (no false weights or measures being used) is not, because it only affects the person actually defrauded. So, maiming oneself in order to have a pretext for begging is a cheat.

Every cheat is a misdemeanor (*q. v.*)<sup>1</sup>

(See *False Pretences.*)

**CHEQUE.**—§ 1. A cheque is an order addressed by a person to his banker, requiring him to pay a certain sum to a person therein indicated on demand. The person making the cheque is called the drawer, and the person to whom it is payable the payee.

§ 2. A cheque resembles a bill of exchange in many respects: thus, it is a negotiable instrument, unless its negotiability is qualified or restrained; it may be made payable to order or bearer; and the liability of the drawer resembles that of the drawer of a bill.<sup>2</sup> But there are several special rules and usages applying to cheques and not to bills, and it is, therefore, not strictly accurate to say (as is sometimes done),<sup>3</sup> that a cheque is an inland bill of exchange; thus, the drawer of a cheque is not discharged by the holder's failure to present in due time, unless he has sustained actual prejudice from the delay, as by the failure of the banker; again, a banker who pays a cheque to order on a forged indorsement of the payee's name, is not liable to his customer for the amount;<sup>4</sup> and the negotiability of a cheque may be restrained by means not applicable to bills of exchange.

§ 3. The negotiability of a cheque may be restrained by crossing it. When the cheque bears across its face two parallel lines (with or without the words "and Company," or an abbreviation thereof), it is said to be crossed generally. When it bears across its face the name of a banker, it is said to be crossed specially, and to be crossed to that banker. To a crossing, whether general or special, may be added the words "not negotiable."

Crossed cheques.

§ 4. When a cheque is crossed generally, the banker on whom it is drawn must not pay it across the counter, but can only pay it to another banker; in other words, the holder of such a cheque cannot obtain payment of it unless he has an account with some banker.

General crossing.

When a cheque is crossed specially, the banker on whom it is drawn can only pay it to the banker to whom it is crossed; in other words, the holder of that cheque cannot obtain payment of it unless he has an account with the banker to whom it is crossed. § 5. When a cheque bears the words "not negotiable," in addition to the crossing, the holder of it cannot give a transferee a better title than he has himself.<sup>5</sup>

Special crossing.

"Not negotiable."

**ETYMOLOGY.**—To check is to control or verify, especially applied to that kind of

<sup>1</sup> Stephen's Crim. Dig. 254; Russell on Crimes, ii. 511 *et seq.*

<sup>2</sup> *Keene v. Beard*, 8 C. B., N. S. 372; *Eyre v. Waller*, 5 H. & N. 460; 29 L. J., Ex. 246.

<sup>3</sup> Byles on Bills, 13; *Hopkinson v. Forster*, L. R., 19 Eq. 74.

<sup>4</sup> Byles, 19; Stat. 16 & 17 Vict. c. 59, s. 19. The Crossed Cheques Act, 1876 (s. 12), also

protects a banker who collects an ordinary crossed cheque for his customer, although there may be some defect in the latter's title (*Matthiessen v. London and County Bank*, 5 C. P. D. 7); but this would not be so if the cheque were crossed "not negotiable."

<sup>5</sup> Crossed Cheques Act, 1876, repealing 19 & 20 Vict. c. 25, and 21 & 22 Vict. c. 79.

regulation or supervision which is exercised by one department of an office over another. The original meaning of the word was to stop, derived from the expression check-mate (Persian *sháh-mát*, "the king is dead," used in the game of chess). Hence check or cheque was applied to slips of paper of which a piece was torn off to serve as a counterfoil or tally. For a sketch of the history of cheques, see Cohn "Zur Geschichte der Checks," *Zeitschrift für vergl. Rechtsw. i.* 117; and for an account of the functions which cheques fill in the money market, see Jevons on Money, 240 *et seq.*

**CHEYAGE** is a sum of money formerly paid by villeins to their lords in acknowledgment of their bondage. It seems also to have signified a sum of money paid to a man of power and might for his protection.<sup>1</sup> It comes from the Norman French, *chief*, *chef*, a head or superior.<sup>2</sup>

**CHIEF.** See *Examination*; *Evidence*; *In capite*; *Lord Chief Baron*; *Lord Chief Justice*; *Rent*.

**CHIEF CLERKS** of the Master of the Rolls and Vice-Chancellors are officers who transact the principal judicial business in the chambers of the Chancery Division of the High Court. There are three to each judge. They act as the deputies of the judges in making orders relating to the ordinary conduct of an action, such as orders for time, amendment, discovery, &c., and in questions of administrative detail, such as those relating to the maintenance, guardianship, &c. of infants, and the management of settled estates and companies in liquidation (*e. g.* orders for calls and the adjudication and payment of claims by creditors). They also answer inquiries and take accounts referred to them by the judges; the result is embodied in what is called the chief clerk's certificate (see *Certificate*, § 4), and they settle conveyances and other documents requiring the sanction of the judge, with or without the assistance of the conveyancing counsel (*q. v.*). The chief clerks and their subordinates are merely deputies of the judge; consequently all orders, &c. are drawn up in the name of the judge, not of the chief clerk, and every party to the proceeding is entitled as a matter of right to bring the question before the judge in person.<sup>3</sup> The chief clerks are assisted by junior clerks, who prepare the draft certificates, minutes of orders, &c., vouch accounts, and hear summonses and applications relating to matters of routine, such as summonses for time and affidavits of documents; there are also additional and assistant clerks.<sup>4</sup> (See *Master*.)

**CHIEF JUDGE** is the judge of the London Bankruptcy Court, The Bankruptcy Act, 1869, provides for the appointment of one of the commissioners of the old London Bankruptcy Court as the first chief judge of the present Court, and for the appointment of subsequent judges.<sup>5</sup> He may delegate his powers to the registrars of the Court.<sup>6</sup> (See *Bankruptcy Courts*.)

<sup>1</sup> Co. Litt. 140 a; Termes de la Ley, s. v.

<sup>2</sup> Loysel, Inst. Cout. Gloss.

<sup>3</sup> Daniell, 1045.

<sup>4</sup> Second Rep. of Leg. Dep. Comm. (1874), 58; Daniell, Ch. Pr. 1042; stat.

15 & 16 Vict. c. 80.

<sup>5</sup> Sects. 61, 128.

<sup>6</sup> Sect. 67.

**CHILD--CHILDREN.**—§ 1. As to the status of children in civil law, see *Infants* and *Minors*. The criminal law contains various provisions for the protection of children (see *Abduction*; *Abandonment*, § 3); also stats. 24 & 25 Vict. c. 100, and 27 & 28 Vict. c. 47 (as to the kidnapping, stealing and abusing of children); stat. 35 & 36 Vict. c. 38 (regulating houses for the nursing and maintenance of children apart from their parents); the Poor Law Amendment Act, 1868, s. 37 (making parents who neglect their children liable to imprisonment); the Factory Acts, 1833 to 1871; the Workshop Acts, 1867 to 1871, and other acts regulating the employment of children in occupations likely to be injurious to health; and the Education Acts (*q. v.*). (See also *Affiliation*; *Guardian*; *Maintenance*; *Necessaries*; *Parent and Child*.)

§ 2. As a technical term, in legal instruments, "child" is always construed to mean a legitimate, as opposed to an illegitimate, child (see *Bastard*). Hence, where a testator, having married a woman by whom he had had illegitimate children, but no legitimate children, left his property to "my children by her," it was held that the illegitimate children could not take.<sup>1</sup> If the testator had used words sufficient to identify the children as *personæ designatæ*, the gift would have been effectual in their favour.

**CHIROGRAPH--CHIROGRAPHER** anciently signified a deed of two parts which were written on the same paper or parchment, with the word *chirographum* in capital letters between the two parts: the paper or parchment was then cut through the middle of the letters, and a part given to each party. If the cutting was indented, the deed was an indenture.<sup>2</sup> § 2. When fines of land were in use, the last step in the process of levying a fine was the chirograph, which was an engrossment of the substance of the whole matter, beginning *Hæc est finalis concordia*, and was retained by the purchaser as one of his title deeds. It was conclusive evidence of the fine. The officer who made the engrossment was called the chirographer.<sup>3</sup> (See *Fine*.)

**CHIVALRY.** See *Guardian*; *Knight-service*.

**CHOSE.**—§ 1. A chose is a chattel personal<sup>4</sup> (see *Chattel*); and is either in possession or in action.

§ 2. Choses in possession are moveable chattels,—such as furniture, horses, and generally all goods and merchandise.

§ 3. A chose in action is a right of proceeding in a Court of law to procure the payment of a sum of money (*e. g.* a bill of exchange, a policy of insurance,<sup>5</sup> an annuity,<sup>6</sup> or a debt), or to recover pecuniary damages for the

<sup>1</sup> *Dorin v. Dorin*, L. R., 7 H. L. 568.

<sup>2</sup> *Madox*, Form. Ang. ii. 29; Co. Litt. 143 b, and note.

<sup>3</sup> *Ley's Case*, 5 Rep. 39 a; *Williams on Seisin*, 107; *Madox*, 217.

<sup>4</sup> *Williams*, P. P. 4.

<sup>5</sup> *Ex parte Ibbetson*, 8 Ch. D. 519.

<sup>6</sup> See Bro. Abr. s. v.; *Hargrave's note* to Co. Litt. 144 b; *Dacey on Parties*, 67; Bl. Comm. ii. 389. A right of presentation to a benefice when the church is vacant is called in the old books a chose in action (Cro. El. 174, 788); but this use of the word is obsolete. It is not impossible

- Legal, infliction of a wrong or the non-performance of a contract.<sup>1</sup> Originally the term was only applied to a right of action in the strict sense, that is, the right to bring an action at law, but subsequently it was extended to equitable.
- equitable. the right of taking proceedings in equity; thus the right to take proceedings to recover a legacy, or to recover a trust fund which has been misapplied by the trustee, is an equitable chose in action.<sup>2</sup> The distinction is still of importance, as the provisions of the Judicature Act relating to assignment of choses in action are limited to legal choses in action
- Assignment. (*infra*, § 4).<sup>3</sup> § 4. Formerly choses in action were of two classes, namely, those which were assignable at law, and those which were only assignable in equity. Originally the only choses in action assignable at law were bills of exchange and similar negotiable instruments. Most other choses in action were only assignable by the device of allowing the assignee to sue in the name of the assignor.<sup>4</sup> Debts and equitable choses in action were assignable in equity; but it was necessary for the assignee to give notice of the assignment to the debtor or trustee in order to preserve his priority. (See *Assignment*, § 5). By the Judicature Act, 1873,<sup>5</sup> any absolute assignment of a legal chose in action, followed by express notice in writing to the debtor, trustee or other person from whom the chose in action is due, operates to pass the legal right to the chose in action to the assignee from the date of the notice, subject to any equities affecting it.<sup>6</sup> Every assignment not falling within the words of this enactment remains subject to the former rules; therefore, an absolute assignment of an equitable chose in action, or an assignment of a legal or equitable chose in action by way of charge, is effectual only in equity. As, however, the High Court is bound to give relief in all cases in which it would, before the Judicature Act came into operation, have been given by a Court of Equity,<sup>7</sup> the distinction between the two kinds of choses in action is not of practical importance, except, perhaps, with reference to the division of the Court in which relief should be sought.
- Reversionary. § 5. Choses in action are of two classes, those which are immediately reducible into possession (see *Reduction into Possession*), and those which are reversionary, such as a reversionary interest in consols. The latter class were formerly of importance, from the fact that a reversionary chose in action belonging to a married woman could not be disposed of by her or the husband, or both together. Now, however, a married woman can dispose of any reversionary interest in personalty (with certain exceptions) by deed acknowledged.<sup>8</sup>

that "chose in action" originally denoted a right of doing something, and had no necessary connection with legal proceedings. (See *Chattel*, note (8).)

<sup>1</sup> Williams, P. P. 4; Watson's Comp. Eq. 328.

<sup>2</sup> Williams, 6; *Piggott v. Stewart*, W. N. (1875), 69.

<sup>3</sup> Judicature Act, 1873, ss. 24, 25.

<sup>4</sup> As to policies of life insurance, see stat. 30 & 31 Vict. c. 144.

<sup>5</sup> Sect. 25, § 6. As to the reason for

the old prohibition against assigning choses in action, see Spence's Eq. ii. 850; Mr. F. Pollock on "The Personal Character of Obligations in English Law," Law Mag. 1874.

<sup>6</sup> Sect. 25, § 6. How a legal chose in action can be received or claimed from a trustee is not easy to understand. The word legal is probably a mistake.

<sup>7</sup> Sect. 24.

<sup>8</sup> 20 & 21 Vict. c. 57; Watson's Comp. Eq. 334; Williams, P. P. 379.

§ 6. Patents, copyrights, trade marks and similar rights, are generally classed as incorporeal personal property. (See *Personal Property*.)

**CHURCH** is a building consecrated for divine service according to the rites of the Church of England, and having an incumbent for the cure of souls within the parish in which the church is situated. Churches are divisible into—(a) what are commonly called parish churches, or churches belonging to original parishes; and (b) churches belonging to new parishes, formed by the separation or sub-division of original parishes under the provisions of the early Church Building Acts,<sup>1</sup> and the acts relating to the Ecclesiastical Commissioners.<sup>2</sup> (See *Parish*; also *Chancel*; *Chapel*.)

**CHURCH DISCIPLINE ACT** is the stat. 3 & 4 Vict. c. 86, containing regulations for trying clerks in holy orders charged with offences against ecclesiastical law, and for enforcing sentences pronounced in such cases.<sup>3</sup> (See *Public Worship Regulation Act*.)

**CHURCH-RATE** is a rate levied by the churchwardens of a parish for the repair of the church. Formerly such rates appear to have been recoverable in the ecclesiastical Courts; but now the payment of them is voluntary, except where they are levied under local acts of parliament, either (a) in lieu of tithes or for other good consideration; or (b) to pay off money borrowed on the security of church-rates.<sup>4</sup>

**CHURCHWARDENS** “are parochial officers for several purposes, and are to inspect the morals and behaviour of the parishioners, as well as to take care of the goods and repairs of the church.”<sup>5</sup> They are a corporation for the purpose of the custody of the ornaments of the church,<sup>6</sup> and levy the church-rate (*q. v.*).<sup>7</sup> (See *Corporation*, § 6.)

**CHURCHYARD**.—By the common law, the rector of a church has the freehold in the churchyard, subject to the rights of the parishioners.<sup>8</sup> (See *Burial*.)

**CINQUE PORTS** are the five harbours of Hastings, Romney, Hythe, Dover and Sandwich. “On these ports extensive privileges were conferred by our early sovereigns, particularly by William the Conqueror and King John; and two other towns, Winchelsea and Rye, were subsequently added to their number. From their position, lying more immediately exposed to attacks from the French coast, they were supposed to be among the most important places in the kingdom, and were placed

<sup>1</sup> Stat. 58 Geo. 4, c. 45; 59 Geo. 3, c. 134; 3 Geo. 4, c. 72.

<sup>2</sup> Phill. Eccl. Law, 1755 *et seq.*, 2167.

<sup>3</sup> Phill. Eccl. Law, 1314; *Reg. v. Bishop of Oxford*, 4 Q. B. D. 245, 525.

<sup>4</sup> Stat. 31 & 32 Vict. c. 109; Phill. Eccl. Law, 1816; Steph. Comm. ii. 698.

<sup>5</sup> Phill. Eccl. Law, 1837 *et seq.*

<sup>6</sup> *Ibid.* 1839.

<sup>7</sup> Bl. Comm. i. 394.

<sup>8</sup> Phill. Eccl. Law, 1779.

under the especial custody of a Lord Warden. . . . Until recently the Lord Warden of the Cinque Ports and the constable of Dover Castle had a local jurisdiction in relation to civil suits and proceedings; but this was taken away by 18 & 19 Vict. c. 48 (amended by 20 & 21 Vict. c. 1, and 32 & 33 Vict. c. 53)."<sup>1</sup>

Commission-  
ers.

§ 2. The Commissioners within the Cinque Ports are persons nominated by the lord warden to determine certain questions as to salvage and claims for services to ships by pilots or others within the jurisdiction of the Cinque Ports.<sup>2</sup>

Admiralty  
Court.

§ 3. The Admiralty Court of the Cinque Ports seems to have as extensive a jurisdiction in Admiralty matters within its local limits as the High Court of Justice. It also hears appeals from the commissioners (*supra*, § 2) and the County Courts within the Cinque Ports.<sup>3</sup>

**CIRCUITS** are divisions of the country for judicial business. For the purpose of holding assizes (*q. v.*), the country is divided into seven circuits, namely, the Northern, North-eastern, Midland, South-eastern, Oxford, Western, and North and South Wales, the last being divided into two divisions. The county of Surrey forms a kind of circuit by itself.<sup>4</sup> § 2. County Court circuits were created by stat. 8 & 9 Vict. c. 95; as its name implies, a County Court circuit is a district having several Courts in which the judge of the district holds sittings in rotation.

**CIRCUITY OF ACTION** is where two or more proceedings are taken to effect the same result, as might be effected by one. Thus, where A. sues B. for a debt, and B. brings another action against A. on a contract, instead of B. setting off his claim against A. in the first action; so, where A. sues B. on a liability against which B. has a guarantee or indemnity by C., and B. brings an action against C. on his guarantee or indemnity, instead of C. defending the original action against B. Formerly circuity of action was the rule and not the exception, but now the provisions of the Judicature Acts relating to counter-claim, citation, and other proceedings may be said to have abolished circuity of action as far as is practically possible.<sup>5</sup> (See *Discharge*.)

**CIRCULAR NOTES.** See *Letter of Credit*.

**CIRCUMSPECTE AGATIS** is the title usually given to the stat. 13 Edw. 1, defining the respective jurisdictions of the temporal and ecclesiastical Courts in certain matters.<sup>6</sup>

**CIRCUMSTANTIAL.** See *Evidence*.

**CIRCUMSTANTIBUS, TALES DE.** See *Tales*.

<sup>1</sup> Steph. Comm. ii. 499, n. (z); Bl. Comm. iii. 79.

<sup>2</sup> Roscoe's Admiralty, 81; stat. 1 & 2 Geo. 4, c. 76.

<sup>3</sup> Roscoe, 99.

<sup>4</sup> Order in Council, 5 February, 1876, made under Judicature Act, 1875, s. 23.

<sup>5</sup> See the concluding words of s. 24 of the Judicature Act, 1873.

<sup>6</sup> Steph. Comm. iii. 310.

**CITATION** is the operation of calling upon a person who is not a party to an action or proceeding to appear before the Court in that action or proceeding.

§ 2. In an action in the High Court, where a defendant claims to be entitled to relief (*e.g.* contribution or indemnity) against any person not a party to the action he may, by leave, issue a notice to that effect, stating the nature of the claim, and requiring him to enter an appearance in the action; the notice is filed, and a sealed copy of it is served on the person, together with a copy of the statement of claim in the action.<sup>1</sup> This is called citation or notice by defendant to third party.<sup>2</sup> If the third party fails to appear, he cannot dispute the validity of any judgment obtained against the defendant citing him.<sup>3</sup> If he appears, it is the duty of the party citing him to apply to the Court for directions as to the mode of having the question in the action determined. (*See Third Party.*)

In ordinary action.

§ 3. In divorce practice, a citation corresponds in some respects with the writ of summons in ordinary actions; it is a document directed to the respondent or co-respondent, and commanding him to appear within a certain time after service. It cannot be extracted or issued until the petition has been filed, and after being served it is filed in the registry.<sup>4</sup>

Divorce practice.

§ 4. In probate actions, citation is employed in order to give notice of the proceedings to persons whose interests are or may be affected by them, so as to give them an opportunity of appearing and taking part in the proceedings if they wish to do so. This is called citation to see proceedings.<sup>5</sup> The person issuing a citation is called the party citant, and the person to whom it is addressed the citee.

Citation to see proceedings (probate).

§ 5. Formerly citation was also a mode of commencing a suit in the Probate Court: such citations were of various kinds, the principal being citations by an executor to the next of kin, &c., to see a will proved in solemn form: by a legatee to an executor to prove the will, or to bring in a probate to be revoked, &c.<sup>6</sup> Under the new practice such suits or actions are now commenced by writ of summons.<sup>7</sup>

Probate (old practice).

§ 6. Under the old admiralty practice, where a ship, cargo, &c., was already under arrest in a cause and a second cause was instituted against it, the plaintiff in the latter issued instead of a warrant a citation in rem, commanding the marshal to cite all persons interested to enter an appearance; it was served in the same way as a warrant.<sup>8</sup> Under the new practice a writ of summons in rem is issued.<sup>9</sup> (*See Caveat*, § 4.) In an admiralty action in personam the defendant was cited to appear by a citation in personam;<sup>10</sup> this is now done by a writ of summons in the ordinary form.<sup>11</sup>

Citation in rem.

Citation in personam.

§ 7. In the ecclesiastical courts generally, the issue of a citation is the Citation.

<sup>1</sup> Rules of Court, xvi. 18.

<sup>2</sup> *Swansea, &c. Co. v. Duncan*, 1 Q. B. D. 644.

<sup>3</sup> Rules of Court, xvi. 20. *See Yorkshire Waggon Co. v. Newport Coal Co.*, 5 Q. B. D. 268.

<sup>4</sup> *Browne on Divorce*, 207, 217.

<sup>5</sup> Probate Rules, 1862, C. B. 16; Forms, No. 4; *Kennaway v. K.*, 1 P. D. 148.

<sup>6</sup> *Browne*, 269.

<sup>7</sup> Rules of December, 1875.

<sup>8</sup> *Williams & Bruce*, 196.

<sup>9</sup> Rules of Court, ii. 1, 7.

<sup>10</sup> *Williams & Bruce*, 241.

<sup>11</sup> Rules of Court, ii. 3.

usual mode of commencing a suit. It is a judicial act by which the defendant is commanded to appear in the suit.<sup>1</sup>

(See *Decree*; *Viis et Modis*.)

**CITY** is a borough "which hath or hath had a bishop."<sup>2</sup> (See *Borough*.)

**CITY OF LONDON COURT** is a Court having a local jurisdiction within the city of London. It is to all intents and purposes a County Court, having the same jurisdiction and procedure.<sup>3</sup> It has exclusive jurisdiction in admiralty matters within the city.<sup>4</sup> (See *Mayor's Court of London*.)

**CIVIL** is opposed (i) to ecclesiastical; (ii) to criminal. As to civil death, see *Death*.

§ 2. The "civil law" is an old-fashioned term for the Roman law, derived from the title *Corpus Juris Civilis*.

**CIVIL LIST** is the revenue settled on the crown, and so-called from having been originally intended to defray the ordinary expenses of the government, as opposed to the military or extraordinary expenses. Afterwards the crown surrendered its hereditary revenues (the profits of crown lands, &c.), and the civil list is now fixed at 385,000*l.* per annum, out of which are defrayed the personal expenses of the crown and royal household, special and secret services. Pensions to the amount of 1,200*l.* may also be granted by the crown to persons deserving of the public bounty.<sup>5</sup> The other public expenses formerly charged on the civil list are now charged on the Consolidated Fund (*q. v.*).

**CLAIM**, generally, is the assertion of a right. (See *Continual Claim*; *Statement of Claim*.)

Claims in  
Chancery.

§ 2. In administration actions, windings-up, and similar proceedings in the Chancery Division, persons who consider themselves to have rights against the assets in course of administration, have to send in claims in the shape of formal notices to the executor, liquidator, &c. (See *Adjudication*, § 2.)<sup>6</sup>

In bank-  
ruptcy.

§ 3. In bankruptcy, a creditor of the bankrupt is not allowed to receive a dividend from the estate until he has proved his debt (see *Proof*); but where a creditor, though he has a just demand against the estate, is not able to perfect his proof before a dividend is declared, he is allowed to enter a claim, and the dividends in respect of it will be reserved for a reasonable time until he can prove his debt.<sup>7</sup>

<sup>1</sup> Phill. Eccl. Law, 1253, 1280; Rogers's Eccl. Law, 743.

<sup>2</sup> Co. Litt. 109 b, and note (2).

<sup>3</sup> Stat. 30 & 31 Vict. c. 142, s. 35.

<sup>4</sup> Roscoe's Admiralty, 75; stat. 31 & 32 Vict. c. 71.

<sup>5</sup> Homersham Cox, Inst. 606; Steph. Comm. ii. 516; stat. 1 & 2 Vict. c. 2.

<sup>6</sup> Daniell's Ch. Pr. 1091 *et seq.* As to the old practice in suits instituted by claim without bill, see Hunter's Suit, 208; Braith. Pr. 92.

<sup>7</sup> Robson's Bankr. 327.



**CLAIMANT** is a person who makes a claim in an administrative proceeding. (See *Claim*, § 2.)

§ 2. The plaintiff in the old action of ejectment was called the claimant.

**CLASS.**—Gifts by will to classes of persons, *e.g.* to the children, nephews, brothers, &c. of the testator or of another person, frequently give rise to the question, at what time the members of the class who are to share in the gift are to be ascertained, and at what time their interests are to be treated as vested. Rules of construction have been adopted by the Court, but they are too complicated to be stated here.<sup>1</sup> (See *Inquiry*.)

**CLASSIFICATION.**—In the practice of the Chancery Division, where there are several parties to an administration action, including those who have been served with notice of the decree or judgment (see *Notice of Decree*), and it appears to the judge (or chief clerk) that any of them form a class having the same interest (*e.g.* residuary legatees), he may require them to be represented by one solicitor, in order to prevent the expense of each of them attending by separate solicitors. This is termed “classifying the interests of the parties attending,” or, shortly, “classifying” or “classification.” In practice the term is also applied to the directions given by the chief clerk as to which of the parties are to attend on each of the accounts and inquiries directed by the judgment.<sup>2</sup>

**CLAYTON'S CASE**<sup>3</sup> is the leading authority on appropriation of payments in a current account, *e.g.* that of a banker. In that case Devaynes, the partner in a banking firm, died on the 29th November, 1809, leaving a considerable estate, and the surviving partners carried on the business on their own account until July, 1810, when they became bankrupt. At the death of Devaynes, Clayton had a balance of 1,713*l.* on his cash account with the firm. Between the death of Devaynes and the bankruptcy, the payments made to Clayton by the surviving partners largely exceeded the 1,713*l.*, and the payments so made amounted to 1,260*l.* within a few days after Devaynes' death, and before they had received any money whatever from Clayton. But their subsequent receipts largely exceeded the payments, and at the date of the bankruptcy the balance due on the account exceeded the amount of the balance due at Devaynes' death. Under these circumstances, Clayton claimed against the estate of Devaynes the 1,713*l.*, after deducting the dividends received by him in the bankruptcy of the surviving partners. But it was held that in an account of this kind, in the absence of an express appropriation by the creditor, the first sum paid in is the first one drawn out; in other words, that the first payment by the banker must be set against the first

<sup>1</sup> See Watson's Comp. Eq. 1281 *et seq.*

<sup>2</sup> Consol. Orders, XXX. 20; Daniell, Ch. Pr. 1088. See also Rules of Court, xvi. 12 b (April, 1880). Special regulations

on this head are in force in the Master of the Rolls's Chambers,

<sup>3</sup> 1 Mer. 529.

receipt, and so on: consequently, no part of the 1,713*l.* remained due by the estate of Devaynes, because it had been drawn out by Clayton.

§ 2. The rule in *Clayton's Case* does not apply where a person in a fiduciary position, *e. g.* a trustee, has paid money held by him in that character to his general account, and mixed it with his own money; for in such a case, when he withdraws money from the account for his own purposes, he is deemed to withdraw it from that part of the fund which belonged to him, so as to leave the trust money intact.<sup>1</sup>

**CLERKS OF ARRAIGNS** are officers attached to the Central Criminal Court and to each circuit (*q. v.*). The clerk of arraigns "has to discharge for the judge sitting on the crown side (*i. e.* in criminal cases) the duties which are discharged for him by a master on the civil side: taxation of costs, allowances to witnesses, the business connected with jurors, their excuses and fines, the custody of documents, the duty of recording verdicts and making out warrants after sentence, are, in addition to advising the Court upon points of criminal procedure, among the duties of the clerk of arraigns."<sup>2</sup> (See *Arraign*; *Clerk of Assize*; *Clerk of Indictments*.)

**CLERK OF ASSIZE** is the officer who is responsible for the due performance of the administrative duties of the Courts of assize on each circuit. He performs the same duties on circuit which the associates formerly performed, and which the masters now perform, at the sittings at Nisi Prius in London and Middlesex<sup>3</sup> (see *Associate*); and he also acts as clerk to the crown on circuits, by which apparently is meant that he performs similar functions when the Courts of assize are sitting for criminal business.<sup>4</sup> It seems, however, that "on several circuits the Clerk of Assize rarely attends in Court," and that "on five of the great circuits the functions of the Clerk are wholly or partially performed by his deputy," who also acts as Clerk of Arraigns or Clerk of Indictments (*q. v.*) on the same circuit.<sup>5</sup>

**CLERK OF THE CROWN.**—As to the duties performed by the clerk of assize as clerk of the crown see *Clerk of Assize*. There is a Clerk of the Crown for each of the Counties Palatine of Durham and Lancaster,<sup>6</sup> who performs the same duties as are performed in ordinary counties by the Clerk of Assize in his character of clerk of the crown.<sup>7</sup>

**CLERK OF THE CROWN IN CHANCERY.** See *Crown Office in Chancery*.

**CLERK OF ENROLMENTS** was the chief officer of the Enrolment Office (*q. v.*). He now forms part of the staff of the Central Office (*q. v.*); but the office is to be abolished on the next vacancy.<sup>8</sup>

<sup>1</sup> *In re Hallett's Estate*, 13 Ch. D. 696.

<sup>2</sup> Second Report of Legal Dep. Comm. (1874), 22.

<sup>3</sup> Archbold's Practice, 15.

<sup>4</sup> See stat. 18 & 19 Vict. c. 126, s. 20.

<sup>5</sup> Second Report of Legal Dep. Comm.

<sup>22.</sup> As to the qualification of Clerks of Assize, see the Clerks of Assize, &c. Act, 1869.

<sup>6</sup> Second Rep. Legal Dep. Comm. 21.

<sup>7</sup> Stat. 19 & 20 Vict. c. 118.

<sup>8</sup> Judicature (Officers) Act, 1879.

**CLERK OF THE HANAPER.** See *Hanaper*.

**CLERK OF THE HOUSE OF COMMONS** is one of the chief officers of the lower house. He is appointed by the crown as under-clerk of the parliaments to attend upon the Commons. He makes a declaration on entering upon his office to make true entries, remembrances and journals of the things done and passed in the house. He signs all orders of the house, indorses the bills sent or returned to the Lords, and reads whatever is required to be read in the house. He has the custody of all records and other documents.<sup>1</sup>

**CLERKS OF INDICTMENTS** are officers attached to the Central Criminal Court and to each circuit. They prepare and settle indictments against offenders and assist the clerk of arraigns.<sup>2</sup> (*q. v.*).

**CLERK OF THE PARLIAMENTS** is one of the chief officers of the House of Lords. He is appointed by the crown, by letters patent. On entering office he makes a declaration to make true entries and records of the things done and passed in the parliaments, and to keep secret all such matters as shall be treated therein.<sup>3</sup> By stat. 33 Geo. 3, c. 13, the Clerk of the Parliaments is directed to indorse on every act the date on which it receives the royal assent.

**CLERK OF THE PATENTS.**—As to the Clerk of the Patents, see *Patent Office*: as to the Clerk of the Patents to the Attorney- and Solicitor-general, see *Patent Bill Office*.

**CLERK OF THE PEACE** is an officer appointed by the Custos Rotulorum (*q. v.*), to assist the justices of the peace in quarter sessions in drawing indictments, entering judgments, issuing process, &c.<sup>4</sup>

**CLERK OF THE PETTY BAG.** See *Petty Bag*.

**CLERKS OF RECORDS AND WRITS** were officers formerly attached to the Court of Chancery, whose duties consisted principally in sealing bills of complaint and writs of execution, filing affidavits, keeping a record of suits, and certifying office copies of pleadings and affidavits. They were three in number, and the business was distributed among them according to the letters of the alphabet.<sup>5</sup> (See *Reference to Record*.) By the Judicature Acts, 1873, 1875, they were transferred to the Chancery Division of the High Court. Now by the Judicature (Officers) Act, 1879, they have been transferred to the Central Office of the Supreme Court, under the title of Masters of the Supreme Court, and the office of clerk of records and writs has been abolished. (See *Central Office*; *Master*.)

<sup>1</sup> May, Parl. Pr. 289.

<sup>2</sup> Second Rep. Legal Dep. Comm. 23.

<sup>3</sup> May's Parl. Pr. 238.

<sup>4</sup> Pritchard, Q. S. 49.

<sup>5</sup> Second Rep. Legal Dep. Comm. 43.

**CLERKS OF SEATS**, in the Principal Registry of the Probate Division, discharge the duty of preparing and passing the grants of probate and letters of administration, under the supervision of the registrars. There are six seats, the business of which is regulated by an alphabetical arrangement, and each seat has four clerks. They have to take bonds from administrators, and to receive caveats against a grant being made in a case where a will is contested. They also draw the "acts," that is, a short summary of each grant made, containing the name of the deceased, amount of assets and other particulars.<sup>1</sup>

Land.

**CLOSE**.—I. § 1. In the law of real property, close signifies a piece of land, and a trespass on a man's land was formerly described as a breach of his close, or trespass quare clausum fregit. "For every man's land is in the eye of the law enclosed and set apart from his neighbours'; and that either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal, invisible boundary, existing only in the contemplation of the law, as when one man's land adjoins to another's in the same field."<sup>2</sup> (See *Boundaries*; *Trespass*.)

Pleadings,  
evidence,

II. § 2. In procedure, close signifies conclusion. Thus the close of the pleadings is where the pleadings are finished, that is, when issue has been joined.<sup>3</sup> (See *Pleading*; *Issue*.) So, when evidence is taken by affidavit, it is said to be closed when the affidavits in reply have been filed.<sup>4</sup> (See *Affidavit*, § 2.) As to the close of a bankruptcy, see *Bankruptcy*, § 8.

bankruptcy.

**CLOSE ROLLS**. See *Rolls*.

**CLUB** is a voluntary association of persons for social purposes, and sometimes also for purposes of a literary or political nature, or the like. A club is not a partnership.<sup>5</sup> In some clubs the expenses are borne by a contractor, who receives the subscriptions of the members, and makes his profit out of the difference: these are called proprietary clubs.

§ 2. A club is regulated by the rules agreed to by the members, and for the time being in force, and therefore if a member is expelled from a club by a decision which has been arrived at bonâ fide in accordance with the rules and in a judicial manner, without caprice or improper motive, the Court cannot interfere.<sup>6</sup> In a proper case, however, the Court will grant an injunction to prevent a member from being deprived of the benefits of the club.<sup>7</sup>

**COADJUTOR**.—§ 1. The coadjutor of an executor is the same thing as an overseer (*q. v.*). § 2. In the old writers, coadjutor signifies one who disseises a person of land to the use (that is, for the benefit) not of himself, but of another.<sup>8</sup>

<sup>1</sup> Second Rep. Legal Dep. Comm. 79.

<sup>2</sup> Bl. Comm. iii. 209.

<sup>3</sup> Rules of Court, xxv.

<sup>4</sup> *Ibid.* xxxviii. 6.

<sup>5</sup> *Fleming v. Hector*, 2 M. & W. 172.

<sup>6</sup> *Hopkinson v. Marquis of Exeter*, L.R., 5 Eq. 63.

<sup>7</sup> *Fisher v. Deane*, 11 Ch. D. 353.

<sup>8</sup> Litt. § 278.

**CODE—CODIFICATION.**—§ 1. The term code is used in various senses. In the *Corpus Juris Civilis* it is used to signify a consolidation of the statute law, namely, a collection of enactments arranged systematically, with all obsolete and inconsistent enactments omitted. In modern times the term is more commonly used to signify a new enactment containing legislative rules of law relating to a particular subject (e.g. civil law, criminal law, procedure, evidence or the like). Such a code differs from that of Justinian in being expressed in new language, instead of being a mere re-arrangement of existing enactments.

§ 2. A code differs from a digest (*q. v.*) in consisting of abstract rules of law: a digest, in the proper sense of the word, is a collection of concrete cases.<sup>1</sup>

§ 3. Codification is the process of converting the law of a country, or a portion of it, into a code, whether that law consists of statutes, or case-law, or customs, or all three. Codification is in theory a formal process, as opposed to legislation: that is, the codifier takes the law as he finds it, without reference to its expediency, and merely puts it in a more convenient shape; in practice, however, codification is impossible without introducing amendments of the law, in matters of detail at least.

§ 4. The most celebrated modern codes are those of Napoleon. Several codes have been promulgated in India, and a code of the criminal law has long been under discussion in this country.

**CODICIL.**—§ 1. A codicil is an instrument executed by a testator for adding to, altering or explaining a will previously made by him. It is in law part of the will, and the will and codicils (if more than one) make but one testament.<sup>2</sup> A codicil must be executed with the same formalities as a will.<sup>3</sup>

§ 2. Before the Wills Act (1 Vict. c. 26), a testator could make a nuncupative or word of mouth disposition of property undisposed of by his written will, and such a disposition was called a nuncupative codicil.<sup>4</sup> Nuncupative testamentary dispositions have been abolished by the Wills Act in all but a very few cases. (See *Will*.)

**ETYMOLOGY.**—§ 3. Latin: *codicilli*, a little book, especially a note-book, for informal letters.<sup>5</sup> In Roman law *codicilli* meant an informal or “unsolemn” testamentary disposition, as opposed to a *testamentum*, which appointed a *hæres* or executor, and was executed with formalities.<sup>6</sup> It is said by old writers that in English law also “codicil” meant an “unsolemn last will,” not containing the appointment of an executor;<sup>7</sup> but whether this is really so, or whether these writers merely copied the passages on codicils from Justinian, is not clear.

**COGNIZANCE—COGNIZEE—COGNIZOR.** See *Conusance*; *Notice*.

<sup>1</sup> As to Codes generally, see Holland on the Form of the Law, *passim*; Holtz. Encycl. i. 227; Savigny's admirable essay, “Vom Beruf unserer Zeit, &c.” (see *Savigny*), and the works of Austin and Bentham.

<sup>2</sup> Williams on Executors, 8.

<sup>3</sup> 1 Vict. c. 26, ss. 1, 9.

<sup>4</sup> Williams, 117.

<sup>5</sup> Ortolan, Inst. ii. 660.

<sup>6</sup> Just. Inst. ii. 25.

<sup>7</sup> Williams, 7, citing the works of Swinburne and Godolphin.

**COGNOVIT.**—§ 1. Where the defendant in an action in one of the Common Law Divisions of the High Court has no defence, he may give the plaintiff a written confession of the action, upon condition that he shall be allowed a certain time for the payment of the debt or damages, the amount of which is generally agreed upon. This is called a cognovit (*cognovit actionem*). It impliedly authorizes the plaintiff's solicitor to do everything necessary to obtain judgment against the defendant if he fails to comply with the conditions on which time is given. That part of the document which contains the terms on which the defendant is to be allowed to discharge the plaintiff's claim is called the defeazance: it must be written on the same piece of paper as the cognovit. The cognovit must be attested by a solicitor, whose duty it is to inform the defendant of its nature and effect, and it must be filed within twenty-one days after execution, or it will be void.<sup>1</sup> Cognovits are not now of frequent occurrence. (See *Warrant of Attorney*.)

**COIF** is a white silk cap which serjeants-at-law are supposed to wear in Court, as "a badge that they are graduates in law."<sup>2</sup>

ETYMOLOGY.]—Old French, *coif* or *coiffe*; Low Latin, *cofia*, a cap.<sup>3</sup>

**COIN.** See *Counterfeit Coin*; *Utter*.

**COKE.**—Edward Coke was born 1st February, 1551-2, called to the bar in 1578, became recorder of London, 1591-2, solicitor-general, 1592, member and speaker of the House of Commons, 1593, attorney-general, 1594, was knighted on the accession of James I., made chief justice of the Common Pleas, 1606, of the King's Bench, 1613; from which office he was removed in 1616, in consequence of his resistance to the king and Court of Chancery: he was again returned to parliament in 1621, and died on September 3rd, 1633.

His principal works are—(1) the so-called Institutes of the Laws of England, in four parts, consisting of the celebrated Commentary on Littleton's Treatise on Tenures, a commentary on many old acts of parliament, a treatise of Pleas of the Crown, and an account of the various Courts; (2) eleven volumes of reports; and (3) a volume of law tracts, published after his death, including the "Compleat Copyholder."<sup>4</sup>

**COLLATERAL** is, literally, that which is "by the side of" or distinct from a certain thing. Thus, collateral consanguinity is the relationship between persons who are descended from the same ancestor (brothers, cousins, &c.), as opposed to lineal consanguinity, which exists

<sup>1</sup> Archbold's Pr. 755; Debtors Act, 1869, ss. 24 *et seq.* Under the old practice a cognovit given after plea was called a *cognovit actionem relicta verificatione*.

Chitty, Pr. 942.

<sup>2</sup> Fortescue, de Laud, ch. 50.

<sup>3</sup> Skeat, Etym. Dict.

<sup>4</sup> Foss's Biog. Dict.; Bl. Comm. i. 72.

between persons of whom one is descended from the other (father and son, grandfather and grandson, &c.) (See *Consanguinity*; *Descent*.)

§ 2. A collateral security is one which is given in addition to the principal security. Thus, a person who borrows money on mortgage (which is the principal security) may deposit shares with the lender as collateral security. (See *Addenda*.)

§ 3. A collateral assurance, agreement, &c., is one which is independent of, but subordinate to, an assurance or agreement affecting the same subject-matter. Thus, where A. agreed to take a lease of B.'s land, but finding, on examination, that it was overrun with rabbits, declined to sign the lease unless B. would promise to destroy the rabbits, which B. did, but no term to that effect was inserted in the lease, which provided that A. should preserve the game on the land, and reserved the right of sporting to B., it was held that the agreement by B. to destroy the rabbits was collateral to the lease, and could, therefore, be taken advantage of by A., although it had not been inserted in the lease.<sup>1</sup>

§ 4. In the law of evidence, a collateral issue is a question which is not immediately or mediately a matter in dispute in the proceeding. Thus, it is not allowable to adduce evidence as to particular acts of misconduct by a witness with a view of discrediting his testimony, because that would raise a collateral issue.<sup>2</sup> (See *Character*.) § 5. In criminal procedure, when a prisoner has been found guilty, and on being asked why execution should not be awarded against him, pleads in bar of execution that he is not the person who has been found guilty (called a plea of diversity of person or non-identity), a jury is empannelled to try this collateral issue.<sup>3</sup>

§ 6. In the old books, when a bond, recognizance or the like, was entered into to secure the performance of some act, such as to execute a conveyance, build a house, &c., it was called a bond to do a collateral act, as opposed to a bond for the payment of money,<sup>4</sup> apparently because in the latter case the act and the penalty are both of the same nature.

As to collateral warranty, see *Warranty*.

**COLLATION** is the ceremony by which a bishop admits and institutes a clerk to a church or benefice in his (the bishop's) own gift, whether as patron or by lapse: it is equivalent to the two acts of presentation and institution, which are necessary in cases where the patron and the bishop are different persons.<sup>5</sup> When the benefice is in the bishop's own gift, it is sometimes called a collative advowson. (See *Advowson*.)

**COLLIGENDA BONA.** See *Grant*, § 10.

**COLLISION.**—§ 1. Cases of damage caused by the collision of ships form an important part of the Admiralty jurisdiction of the High

<sup>1</sup> *Morgan v. Griffith*, L. R., 6 Exch. 70; *Salaman v. Glover*, L. R., 20 Eq. 444.

<sup>2</sup> Best on Evidence, 803.

<sup>3</sup> Bl. Comm. iv. 396.

<sup>4</sup> 9 Rep. 79 a.

<sup>5</sup> Phill. Eccl. Law, 348, 467; Bl. Comm. i. 390.

Court, and County Courts. These cases are subject to peculiar rules, regulating the liability of the respective vessels and their owners, and the procedure to be adopted. Thus, if the collision is caused by the negligence of both vessels, each party can only recover half his loss, and the liability of each vessel is limited according to its size.<sup>1</sup> The result of the former rule is, that if two vessels, A. and B., come into collision, both being to blame, causing loss or injury to A. to the extent of 500*l.*, and to B. to the extent of 1000*l.*, half the loss of A. would be deducted from half the loss of B., so that A. would pay B. 250*l.* (See *Preliminary Acts ; Limitation of Liability.*)

**COLLOQUIUM**, in the old common law pleading in cases of slander, was that part of the declaration which alleged that the words complained of were spoken of and concerning the plaintiff, or of and concerning the plaintiff in the way of his trade and profession.<sup>2</sup> (*Colloquium* = conversation.)

**COLLUSION** is where two persons, apparently in a hostile position, or having conflicting interests, by arrangement do some act in order to injure a third person or deceive a Court. Thus, where a person brought an action for penalties against a company by arrangement with them, for the purpose of protecting them against other actions by hostile persons for the same penalties, it was held that the judgment was obtained by collusion.<sup>3</sup> The effect of collusion is to vitiate the transaction in which it is employed.

Affidavit of  
no collusion.

§ 2. A person taking interpleader proceedings for his own protection is bound to make an affidavit that there is no collusion between him and either of the adverse claimants.<sup>4</sup>

Divorce.

§ 3. In suits for dissolution of marriage, collusion was formerly used in the sense of connivance and conspiracy to commit the offence complained of; but it now means a conspiracy in presenting or prosecuting the petition in the suit, as where the respondent agrees with the petitioner to assist in obtaining a decree. Collusion is a bar to such a suit.<sup>5</sup> (See *Intervention.*)

**COLOUR.**—I. § 1. Colour primarily signifies any appearance, pretext or pretence: thus, a person is said to have no colour of title when he has not even a *primâ facie* title.<sup>6</sup>

II. § 2. Colour was formerly an important term in the language of pleading, but is now obsolete. "It signifies an apparent or *primâ facie* right, and the meaning of the rule that pleadings in confession and avoidance should give colour is, that they should confess the matter adversely alleged to such an extent at least as to admit some apparent right in the opposite party, which requires to be encountered and avoided (*i. e.* deprived of its effect) by the allegation of new matter."<sup>7</sup> Colour was either implied or express. § 3. Implied colour: "Where to an action of assumpsit the defendant pleads in confession

<sup>1</sup> Williams & Bruce's Admiralty, 70; Judicature Act, 1873, s. 25, § 9; Regulations for Preventing Collisions at Sea; Orders in Council of 9th January, 1863 (Maude & Pollock Mer. Shipp. 451), 14th August, 1879 (4 P. D. 241).

<sup>2</sup> 1 Wms. Saund. 246 b.

<sup>3</sup> *Girdlestone v. Brighton Aquarium Co.*, 3 Ex. D. 137; 4 Ex. D. 107.

<sup>4</sup> *Manby v. Robinson*, 4 Ch. App. 347; stat. 1 & 2 Will. 4, c. 58.

<sup>5</sup> *Browne on Divorce*, 105.

<sup>6</sup> Litt. § 400.

<sup>7</sup> Stephen, Pl. (5th edit.) 233.



and avoidance that he did not promise within six years before the action brought, it is an absolute implied admission of the truth of the adverse allegation, that he had at one time made such promise as alleged, and that there is therefore an apparent right in the plaintiff and this right is avoided by relying on the lapse of time."<sup>1</sup> § 4. Express colour (called in the old books "colour" simply) is "a feigned matter, pleaded by the defendant in an action of trespass, from which the plaintiff seems to have a good cause of action, whereas he has in truth only an appearance or colour of cause."<sup>2</sup> Thus, if the defendant in an action of trespass *quare clausum fregit* wished to defend himself upon the ground that J. S., a third person, being seised in fee of the land in question, demised it to him for a term of years, he was not allowed to plead those facts simply, because they would amount to a denial of any title to possession whatever in the plaintiff, and for such a denial a traverse (*q. v.*) was the proper plea; but as it was frequently advantageous for the defendant to set forth such facts in his plea, the old pleaders devised the expedient of "inserting in the plea a fictitious allegation of some colourable but insufficient title in the plaintiff, which they at the same time avoided by the preferable title of the defendant."<sup>3</sup> Thus, in the example given above, the defendant would plead the demise by J. S. to himself, and proceed to aver that the plaintiff claimed under another demise from J. S., and that it was inoperative; this was called *giving colour*, because it supplied the want of implied colour.

ETYMOLOGY.]—Latin: *color*, a pretext.<sup>4</sup>

**COLOURABLE** is that which is in appearance only and not in substance what it purports to be.

Thus, where a person took a house, for which he paid rates and taxes in a parish, for the purpose of obtaining a qualification for certain privileges given to the parishioners of that parish, it was held that his qualification was good and not colourable; but that if he had not really taken the house, "but only got somebody to put up his name over the door or something of that kind, then it would have been colourable, and it would have been a sham."<sup>5</sup>

Colourable imitation, as applied to trade marks (*q. v.*), is such a close or ingenious imitation as to be calculated to deceive ordinary persons.<sup>6</sup>

**COMITY.**—The comity of nations (*comitas gentium*) is that body of rules which states observe towards one another from courtesy or mutual convenience, although they do not form part of international law.<sup>7</sup>

**COMMANDITE—COMMANDITAIRE.**—A *société en commandite* in French law is a partnership of which some of the members (the *associés commanditaires*) are mere lenders of capital to the firm, and are not responsible for any losses beyond the amount of their capital.<sup>8</sup> The principle has been introduced into English law by the Partnership Act, 1865, and in mercantile language a person who advances money to a partnership under that act is called a commanditaire. An attempt was

<sup>1</sup> Stephen, Pl. 5th edit. 234.

<sup>2</sup> Bac. Abr. *Trespass* (T. 4.)

<sup>3</sup> Stephen, Pl. 241.

<sup>4</sup> Dirksen, Man. Lat. s. v. § 2; Stephen, Pl. Append. n. 40 *et seq.*

<sup>5</sup> *Etherington v. Wilson*, L. R., 1 Ch. D. p. 166. Compare Co. Litt. 245 a.

<sup>6</sup> *Wotherspoon v. Currie*, L. R., 5 H. L. at p. 519; Ludlow and Jenkyns on Trade Marks, 74.

<sup>7</sup> Holtz. Encycl. s. v.; Manning's Law of Nations, 122.

<sup>8</sup> Teulet, Codes, s. v.; Holtz. Encycl. s. v. *Commandit-gesellschaft*.

also made by the Companies Act, 1867, to apply the principle of sociétés en commandite to English companies, but without success. (See *Company*, § 5.)

**COMMENDAM** is a benefice or ecclesiastical living which, being void, or to prevent its becoming void, is committed (*commendatur*) to the charge and care of some sufficient clerk, to be supplied until it may be conveniently provided of a pastor. Thus, formerly when a parson of a parish was made the bishop of a diocese, there was a cession of his benefice; but if the king gave him power to retain his benefice, he continued parson thereof, and was said to hold it in commendam. This was called a commendam *retinere*, as opposed to a commendam *capere*, which was where power was given to take a benefice in addition to one which the incumbent already had. Commendams were also divided with reference to their duration into *semestris* (six months), *perpetua* (for life), and *limitata* (temporary).<sup>1</sup> Commendams were practically abolished by stat. 6 & 7 Will. 4, c. 77, s. 18, and the modern acts against pluralities, except in the rare instances in which pluralities (*q. v.*) are still allowed.<sup>2</sup>

**COMMENDATION**, in feudal law, was where an owner of land placed himself and his land under the protection of a lord, so as to constitute himself his vassal or feudal tenant. Commendation and the grant of beneficia or feuds were the two principal modes by which the feudal system was established.<sup>3</sup>

**COMMISSARY** is an ecclesiastical officer who exercises jurisdiction "in places of the diocese so far from the chief city that the chancellor cannot call the people to the bishop's principal consistory Court without great trouble to them."<sup>4</sup> (See *Diocesan Courts*.)

**COMMISSION** is an order or authority to do some act.

I. § 2. In the law of contracts and agency a commission is an authority to an agent to enter into a contract, especially one for the sale or purchase of goods: such a commission generally includes an engagement by the principal to remunerate the agent, and hence "commission" is sometimes used to denote the remuneration paid to an agent.<sup>5</sup>

Del credere.

§ 3. A del credere commission is an authority to an agent to negotiate sales of goods on behalf of his principal, the latter engaging to pay him a higher remuneration than usual in consideration of his guaranteeing the payment of the price by the persons to whom he may sell them.<sup>6</sup>

II. § 4. Commission also signifies an authority given by the crown, a Court or the like to a person or persons to do some act, especially to inquire into certain facts. When the commission creates a permanent office it is generally known by the description of the commissioners—such as the Ecclesiastical Commissioners, the Charity Commissioners,

<sup>1</sup> Phillimore, Eccl. Law, 503 *et seq.*; Steph. Comm. ii. 692; *Colt and Glover v. Bishop of Coventry*, Hob. 140.

<sup>2</sup> Phillimore, 504.

<sup>3</sup> See Stubbs' Const. Hist. i. 153.

<sup>4</sup> Phillimore, Eccl. Law, 1215.

<sup>5</sup> Chitty on Contracts, 512; Smith's Merc. Law, 122.

<sup>6</sup> Smith, 119.

Railway Commissioners, &c. (See the various titles.) The following commissions are of a temporary nature :—

**APPRAISEMENT AND SALE.**—§ 5. Where property has been arrested in an admiralty action in rem and ordered by the Court to be sold, the order is carried out by a commission of appraisement and sale; in some cases (as where the property is to be released on bail and the value is disputed) a commission of appraisement only is required. The commission of appraisement is directed to the marshal and commands him to reduce into writing an inventory of the property, to choose one or more experienced persons, to swear them to appraise the property according to its true value, and to file a certificate of the value signed by himself and the appraisers.<sup>1</sup> The commission of sale (which is generally added to the commission of appraisement, though it may be separate) commands the marshal to sell the property by public auction for not less than the appraised price and to pay the proceeds into the registry.<sup>2</sup>

**ASSIZE.**—§ 6. Commissions of assize are those issued to judges of the High Court or Court of Appeal, or to serjeants-at-law and queen's counsel, authorizing them to sit at the assizes for the trial of civil actions. (See *Assize*, § 3; *Nisi Prius*.)

**DELEGATES.** See that title.

**EXAMINATION OF WITNESSES.**—§ 7. When a person whose evidence is required in a cause is out of the jurisdiction, a commission is issued authorizing a person or persons therein named to take his evidence on oath either by interrogatories or *vivâ voce*, or by both methods, and the depositions are read at the trial.<sup>3</sup> (See *Examiner*; *Mandamus*.)

**GAOL DELIVERY.** See that title.

**LUNACY.**—§ 8. Commissions in lunacy are issued under the great seal and are of two kinds, special and general. Before the Lunacy Regulation Special Act, 1853, a special separate commission, called a "commission in the nature of a writ de lunatico inquirendo," was issued in each case of alleged lunacy, requiring the person to whom it was directed to inquire concerning the state of mind of the alleged lunatic and to certify the result by inquisition (*q. v.*); but although special commissions may still be issued if the Lord Chancellor thinks fit (sect. 50), it is provided by the above act (sect. 39) that a general commission may be issued, directed to the Masters in Lunacy by name, and authorizing them to inquire in each case of alleged lunacy referred to them by the Lord Chancellor in the same manner as if a commission had issued specially in the case; this has practically superseded special commissions.<sup>4</sup> (See *Masters in Lunacy*.) As to the permanent Commissioners in Lunacy, see that title.

General.

**OYER AND TERMINER.** See that title.

<sup>1</sup> Williams and Bruce's Admiralty, 206, 225, 232.

<sup>2</sup> *Ibid.* 236.

<sup>3</sup> Archbold's Pr. 309; Smith's Action, 95.

<sup>4</sup> Pope on Lunacy, 43.

**PARTITION.**—§ 9. Formerly a partition was effected by issuing a commission to commissioners to divide the property, and on their return coming in the parties were ordered to execute mutual conveyances to carry out the division.<sup>1</sup> (See *Partition*.)

**PEACE.**—§ 10. A commission of the peace is one by which the crown appoints (or technically “assigns”) a number of persons to act as justices of the peace (*q. v.*) within a certain district. The ordinary commission to justices contains two assignments or appointments; by the first, the general power of preserving the peace is given to the justices jointly and severally; by the second, power to hold sessions (*q. v.*) is given to all the justices and to every two or more of them, of whom (in the original Latin *quorum*) one of certain named justices must be one.<sup>2</sup>

§ 11. The commission to the mayors and chief officers in certain corporate towns not mentioned in the Municipal Corporations Act is in the nature of a perpetual commission, the powers of which are exercised by the persons who for the time being fill the offices designated.<sup>3</sup> (See *Recorder*.)

**REBELLION.**—§ 12. A commission of rebellion was the old method of compelling a defendant to a suit in Chancery to appear and answer the bill: it authorized the commissioners to attach, *i. e.* arrest, him. The process was abolished in 1841.<sup>4</sup>

**SEWERS.** See *Sewer*.

**UNLIVERY.**—§ 13. In an action in the Admiralty Division, where it is necessary to have the cargo in a ship unladen in order to have it appraised, a commission of unlivery is issued<sup>5</sup> and executed by the marshal.<sup>6</sup>

**COMMISSION-DAY** is the opening day of the assizes at a particular town. (See *Assize*, § 3.)

**COMMISSIONER** means a person to whom a commission is directed by the crown, or a Court, &c. The most important classes of commissioners, however, are those holding permanent offices, and of these the following are the principal:—

**COMMISSIONERS FOR TAKING ACKNOWLEDGMENTS OF MARRIED WOMEN** are either special, that is, appointed for taking the acknowledgment in a particular case (as where the married woman is abroad), or perpetual.<sup>7</sup> (See *Acknowledgment*, § 2.)

**COMMISSIONERS IN BANKRUPTCY.**—Formerly the jurisdiction over bankrupts' persons and estates was exercised by commissioners appointed by a commission issued by the Lord Chancellor under the great seal in each case; the Lord Chancellor exercising superintendence over the proceedings.<sup>8</sup> By stat. 1 & 2 Will. 4,

<sup>1</sup> Haynes's Eq. 153.

<sup>2</sup> Pritchard's Q. S. 3 *et seq.* At the present day it is usual to include all the justices in the quorum clause, and consequently any two justices may hold a quarter sessions; *ibid.* 12.

<sup>3</sup> Pritchard, 3.

<sup>4</sup> Bl. Comm. iii. 444, and notes.

<sup>5</sup> Williams & Bruce's Admiralty, 233.

<sup>6</sup> *Ibid.* 234, n. (m).

<sup>7</sup> Stats. 3 & 4 Will. 4, c. 74, ss. 81 *et seq.*; 23 & 24 Vict. c. 127, s. 30; Sheldford's R. P. Stat. 384.

<sup>8</sup> Robson's Bankruptcy, 2.

c. 56, a court of bankruptcy consisting of four judges (exercising as a Court of Review the jurisdiction previously exercised by the Lord Chancellor), and six commissioners (who were permanent officials), was constituted; country commissioners were also appointed from time to time. The proceedings in each case were commenced by a fiat, called a London or a country fiat according to circumstances, and issued out of Chancery, instead of by a commission.<sup>1</sup> By stat. 5 & 6 Vict. c. 122, permanent district commissioners, attached to districts courts in the country, were appointed.<sup>2</sup> Commissioners in bankruptcy were abolished by the Bankruptcy Act, 1869.<sup>3</sup> (See *Bankruptcy*; *Bankruptcy Courts*.)

**COMMISSIONERS OF INLAND REVENUE** have for their functions to superintend the collection of the internal taxes (as opposed to the customs or frontier duties), such as the land tax, the income tax, succession and legacy duties, and stamp duties<sup>4</sup> (*q. v.*). Their offices are in Somerset House. The commissioners of inland revenue are the result of the consolidation, in 1849, of the commissioners of stamps and taxes with the commissioners of excise.<sup>5</sup>

**COMMISSIONERS IN LUNACY** are officers appointed under stat. 8 & 9 Vict. c. 100. They have the control of lunatic asylums and of houses licensed for the reception of lunatics, which they are required to visit periodically, but they have no jurisdiction over the property or persons of lunatics, nor have they anything to do with lunatics so found by inquisition, unless confined in an asylum or licensed house.<sup>6</sup> (See *Visitors*; *Masters in Lunacy*; *Commission*, § 8.)

**COMMISSIONERS TO ADMINISTER OATHS** are solicitors appointed to administer oaths to persons making affidavits before them. Formerly they were appointed under various acts of parliament according to the Court in which the affidavit was to be used,<sup>7</sup> but now all such commissioners may administer oaths in all causes and matters pending in the Supreme Court,<sup>8</sup> and in future all commissioners for this purpose will be appointed by the Lord Chancellor under the Judicature Act.<sup>9</sup> Commissioners for taking oaths in the Supreme Court may also take oaths in the ecclesiastical Courts.<sup>10</sup>

§ 2. A commissioner must not administer an oath to a person for whom he is acting as solicitor or agent.<sup>11</sup>

**COMMISSIONERS OF PATENTS** investigate applications for patents, have the letters patent prepared, and issue their warrant for having them sealed with the great seal; they also keep the register of

<sup>1</sup> Robson's Bankruptcy, 4.

<sup>2</sup> *Ibid.* 6.

<sup>3</sup> Sects. 128, 130.

<sup>4</sup> Dowell's Stamp Duties, 4, 5.

<sup>5</sup> *Ibid.* 119.

<sup>6</sup> Second Rep. of Legal Dep. Comm. 60; Pope on Lunacy, 37; stats. 8 & 9 Vict. c. 100; 16 & 17 Vict. cc. 96 and 97; 18 & 19 Vict. c. 105; 25 & 26 Vict. c. 111.

<sup>7</sup> Stats. 29 Chas. 2, c. 5; 16 & 17 Vict. c. 78; Daniell, Ch. Pr. 646; Archbold,

Pr. 15, 1299. As to commissioners in Scotland and Ireland, see 3 & 4 Will. 4, c. 42, s. 42; Isle of Man and Channel Islands, 22 Vict. c. 16.

<sup>8</sup> Jud. Act, 1873, s. 82.

<sup>9</sup> Sect. 84.

<sup>10</sup> Stat. 40 & 41 Vict. c. 25, s. 18.

<sup>11</sup> Archbold, 1299; Daniell, 651, n.; *Duke of Northumberland v. Todd*, 7 Ch. D. 777.

patents and assignments,<sup>1</sup> and have the superintendence of the registry of trade-marks<sup>2</sup> (*q. v.*). The commissioners themselves are high judicial officers, and all the routine work is performed by clerks. (See *Patent Office*.)

**COMMISSIONERS OF WOODS, &c.** The Commissioners of Woods, Forests and Land Revenues, and of Works and Public Buildings, are two boards appointed for the superintendence of the public property indicated by their titles, which includes the royal parks in and near London and the other royal demesnes given up by the crown on the settlement of the civil list.<sup>3</sup> (See *Civil List*; *Demesne*.)

**COMMIT—COMMITMENT—COMMITTAL.**—§ 1. A person is committed to prison when he is sent there by a court or judge, generally for a short period or for a temporary purpose.

Committing  
for trial.

§ 2. In criminal law, when a person is accused of an indictable offence, the magistrate before whom he is examined, after hearing the evidence of witnesses, is bound either to discharge the accused or to commit him to prison to take his trial (commonly called committing him for trial), unless it is a bailable offence, in which case he may be admitted to bail (*q. v.*). This imprisonment is only for safe custody and not for punishment.<sup>4</sup> The next step is the indictment (*q. v.*).

Committal for  
contempt;  
for judgment  
debt.

§ 3. In civil proceedings, the principal instances of committal are those for punishment of contempt of Court<sup>5</sup> (see *Contempt*), and for non-payment of a judgment debt under the Debtors Act, 1869 (*q. v.*). In the latter class of cases the first step (in the practice of the common law divisions of the High Court) is to obtain a committal summons, calling on the judgment debtor to show cause before a judge at chambers why in default of payment he should not be committed to prison, and on default, if the case is one to which the statute applies, the committal order is made, on which the debtor is arrested and imprisoned.<sup>6</sup> (See *Attachment*.)

In lunacy.

**COMMITTEE.**—§ 1. In lunacy practice, a committee is a person to whom the custody of the person or the estate of a lunatic is committed or granted by the Lord Chancellor. The same person may be committee of the person and of the estate, or the two offices may be vested in two different persons, or either office may be vested in two or more persons, called joint committees. The committee represents the lunatic,<sup>7</sup> but acts under the direction of the Master, Lords Justices or Lord Chancellor having jurisdiction in the matter, in much the same manner as the guardians and trustees or executors act in an administration suit, the committee of the

<sup>1</sup> Stat. 15 & 16 Vict. c. 83.

<sup>2</sup> Stat. 38 & 39 Vict. c. 91.

<sup>3</sup> Stats. 14 & 15 Vict. c. 42; 15 & 16 Vict. c. 62; 16 & 17 Vict. c. 56, and numerous other acts down to 36 & 37 Vict. c. 36 (see index to statutes); Steph. Comm. ii. 535.

<sup>4</sup> Steph. Comm. iv. 354.

<sup>5</sup> Rules of Court, xlii. 5.

<sup>6</sup> Smith's Action, ii. 284 *et seq.*, 515; Coe's Pr. 159. In the Chancery Division the application is made by motion. Daniell, Ch. Pr. 928.

<sup>7</sup> Viner, Abr. "Lunatick;" 2 Sch. & Lef. 439.

person being responsible for the comfort and well-being of the lunatic, and the committee of the estate being responsible for its proper management.<sup>1</sup>

§ 2. In parliamentary practice a committee is a sitting of one of the houses of parliament or of a number of its members for considering questions of detail; hence committees are distinguished as "committees of the whole house,"<sup>2</sup> and "select committees," consisting of certain members appointed by the house to inquire into and report on a particular matter for the information of the house,<sup>3</sup> especially such matters as involve the examination of witnesses; *e.g.* a private bill<sup>4</sup> or an inquiry into an alleged public abuse, or the like.

§ 3. The principal function of committees of the whole house is to consider bills which have been read a second time and to amend them where necessary.<sup>5</sup> In the House of Commons two committees of the whole house also sit at intervals throughout the session, one (called the Committee of Supply) for the purpose of considering how much money is required for the public expenditure, the other (called the Committee of Ways and Means) for providing that money by sanctioning the imposition of taxes and the application of public revenues.<sup>6</sup> The recommendations of the latter are carried into effect by the Annual Appropriation Act.<sup>7</sup> (See *Appropriation*, § 6.)

§ 4. There are also committees nominated, for purposes of parliamentary business, *e.g.* the Committee of Selection, appointed by the House of Commons to classify private bills and arrange for their consideration by select committees.<sup>8</sup> A bill is sometimes referred to what is called a hybrid committee, consisting partly of members nominated by the house and partly of members nominated by the Committee of Selection.<sup>9</sup> (See *Bill*, § 2.)

**COMMITTEE OF INSPECTION** is a number of persons, not exceeding five, chosen by the creditors in a bankruptcy or liquidation from among their own body for the purpose of superintending the administration by the trustee of the bankrupt's property,<sup>10</sup> auditing his accounts, &c.<sup>11</sup> There are certain things which the trustee can only do with the sanction of the committee of inspection, such as mortgaging the bankrupt's property to raise money for the payment of his debts.<sup>12</sup>

**COMMODATUM.** See *Bailment*, § 3.

**COMMON.**—I. § 1. In the technical sense of the words, a common (or right of common) is the right of taking some part of any natural product of the land or water belonging to another man in common with

<sup>1</sup> Elmer, Pr. in Lunacy, *passim*; Pope on Lunacy, 92.

<sup>2</sup> May, Parl. Pr. 392.

<sup>3</sup> *Ibid.* 408.

<sup>4</sup> *Ibid.* 414.

<sup>5</sup> *Ibid.* 500 *et seq.*

<sup>6</sup> *Ibid.* 616.

<sup>7</sup> *Ibid.* 637.

<sup>8</sup> *Ibid.* 745.

<sup>9</sup> *Ibid.* 811.

<sup>10</sup> Bankruptcy Act, 1869, ss. 14, 125.

<sup>11</sup> *Ibid.* s. 20.

<sup>12</sup> *Ibid.* s. 27.

him. Therefore, the right to take the whole of the product, or to exclude the owner from taking it, is not a common—though sometimes called a sole common—but an estate in land: “for it is against the nature of this word common; and it was implied in the first grant that the owner of the soyle should take his reasonable profit there.”<sup>1</sup> Hence, also, a right of common cannot be claimed by custom, because, the number of claimants under a custom being indefinite, the subject of the right would be liable to be entirely destroyed.<sup>2</sup> The only exception to this rule occurs in the case of copyholders, who may claim a right of common against their lord by virtue of a custom in the manor. The reason of this is, that copyholders are but tenants at will to their lord, and therefore cannot claim by prescription except in his name; as they could not claim a right in his name against himself, they would not be able to claim at all if they were not allowed to claim under a custom.<sup>3</sup> Most rights of common may be created by grant at the present day, or may be claimed by prescription. (See *Appendant*; *Appurtenant*; *Lost Grant*; *Prescription*.)

§ 2. A common is an incorporeal hereditament, and a species of profit à prendre. (See *Hereditament*; *Profit*.)

§ 3. A person having a right of common is called a commoner. (See *Commonable*.)

Commons are of four principal kinds, viz., common of pasture, of estovers, of turbary, of piscary; the remaining rights are generally classed together as miscellaneous.

*Common of  
pasture.*

A. § 4. Common of pasture is the right of feeding one's beasts upon another's land; the most usual instances of this are: the right of the tenants of a manor to pasture their beasts on the waste, woodlands, &c. of the manor; the right of pasture over royal forests possessed by persons owning land within the forest;<sup>4</sup> and the reciprocal rights of pasture possessed by owners of shack-lands, lammas-lands, lot-meadows, &c.<sup>5</sup> (*infra*, § 7; and *Commonable*, § 2). But any owner of land in fee simple may grant to another person the right of pasturing animals on his land, and the right of common so created may be either appurtenant or in gross.<sup>6</sup>

*Appendant.*

Common of pasture is either appendant, appurtenant, because of vicinage, or in gross.<sup>7</sup> § 5. Common of pasture appendant is the right which every freehold tenant of a manor possesses to feed his cattle used in agriculture (*i.e.* horses, cattle and sheep) upon the lord's waste, provided they are levant and couchant on the tenant's freehold land. It is said to exist “of common right,” because (as it is usually put) on every original feoffment of arable land to be held of the manor in socage, the law, without express words, presumed a grant of sufficient pasture in the waste for the beasts levant and couchant on the land. The more correct view appears to be that the right of common appendant is trace-

<sup>1</sup> Co. Litt. 122 a.

<sup>2</sup> Williams on Commons, 194; Shelford, R. P. Stat. 30.

<sup>3</sup> Williams, 17; Elton, Copyh. 215.

<sup>4</sup> *Commissioners of Sewers v. Glasse*, L.R., 19 Eq. 134; Cooke, Incl. 45.

<sup>5</sup> Cooke, Incl. 42.

<sup>6</sup> Williams, 168, 184.

<sup>7</sup> Co. Litt. 122 a.



able to the village communities or vills which existed in England at the time of the Conquest. The right of common appendant cannot be created since *Quia Emptores*, that statute having prohibited the creation of new manors, and the land to which such a right is appendant must originally have been arable.<sup>1</sup> (See *Appendant*; *Levant and Couchant*.)

§ 6. Common of pasture appurtenant is a right annexed to certain Appurtenant. lands, by virtue of which the owner of those lands feeds cattle on the soil of another person;<sup>2</sup> it differs from the right of common appendant (*supra*, § 5) in all the characteristics which arise from the connection of the latter with the socage tenure of ancient arable land in a manor:<sup>3</sup> it may, therefore, be held by copyholders or strangers to a manor, and may arise by grant or prescription since *Quia Emptores*, and is not necessarily confined to commonable beasts.<sup>4</sup> (See *Commonable*, § 1.)

§ 7. Common of pasture appurtenant may be either simple or reciprocal: Simple. the former occurs where the owner of the waste has no pasture over the tenant's land in return, the latter where neighbours have a mutual Reciprocal. right of turning out cattle to feed on each other's land. The simple right is usually exercised upon the waste of a manor by the tenants, and strangers who can show a grant or prescribe: these may be either individual landowners in the neighbourhood, or a whole body of tenants within an adjoining lordship. The reciprocal right is found in shack fields, and open meadows or common fields, which at certain seasons are open to the cattle of all the proprietors of allotments. Such a right may also be alternate as well as reciprocal,<sup>5</sup> as if one township has common Alternate. in another during one season, and the second has common in the first during the next, and so on.<sup>6</sup>

§ 8. Common because of vicinage (*pur cause de vicinage*, *causâ vicinagii*) is where the tenants of two adjoining manors, the inhabitants of two adjoining townships, or the owners of two contiguous pieces of land,<sup>7</sup> have from time immemorial "intercommoned," *i. e.* allowed each other's cattle to stray and pasture on each other's land, or on a waste or open field lying between their lands. The reason for which this kind of common is allowed in law to exist is to avoid the disputes which would arise on both sides if actions could be brought for trespass, or if distress damage feasant could be made whenever the cattle of one person stray over the undivided land of the other.<sup>8</sup> Consequently, either party may put a stop to it by enclosing his land.<sup>9</sup> The chief difference between this and the other kinds of common is, that a commoner *pur cause de vicinage* may not put his beasts into another's land, but must first put them into his own land, "and then the beasts may well stray and go into the other common without being distrained."<sup>10</sup>

<sup>1</sup> Williams, 31; Williams, R. P. Appendix (C); Elton, Comm. 47.

<sup>2</sup> Cooke, Incl. 19; Williams, 168.

<sup>3</sup> Elton, 62.

<sup>4</sup> Co. Litt. 122 a.

<sup>5</sup> Elton, 65; Williams, 57.

<sup>6</sup> *Anon.*, 1 Dyer, 47 b.

<sup>7</sup> See *Jones v. Robin*, 10 Ad. & El.

N. S. 620.

<sup>8</sup> Elton, 71; *Tyrringham's Case*, 4 Co. 37.

<sup>9</sup> Co. Litt. 122 a.

<sup>10</sup> *Anon.*, 1 Dyer, 47 b. For the other differences, see Elton, Comm. 72; Cooke, Incl. 29; *Commissioners of Sewers v. Glasse*, L. R., 19 Eq. at p. 159.

In gross.

§ 9. Common of pasture in gross differs from the foregoing varieties of common in being unconnected in any way with the tenure or occupation of land. It may be created either (1) by the owner of a common appurtenant for a fixed number of cattle alienating the common without the tenement to which it belongs, or (2) by the owner of land granting to another man and his heirs the right to put beasts on the land of the grantor, with or without restrictions as to number and time of year. It is also said that a common in gross may be claimed by prescription in respect of mere inheritance.<sup>1</sup> (See *Prescription*.)

§ 10. Common appendant, appurtenant, and in gross, are either certain by number, that is, for a certain number of beasts, or certain by levancy and couchancy (*q. v.*), or sans nombre<sup>2</sup> (*q. v.*).

The following rights of common differ from common of pasture in being limited to those parts of the land where the product is found, while common of pasture extends to every place across which the cattle may wander in search of food, although there may be no pasture there.<sup>3</sup>

Common of estovers.

B. § 11. Common of estovers is the right of taking from the woods or waste lands of another person a reasonable portion of his timber or underwood for use in the commoner's tenement. As to the different kinds of estovers, see *Estovers*. Common of estovers is either appurtenant, that is, annexed to land, or in gross, that is, existing independently of land<sup>4</sup> (see *supra*, §§ 6, 9; and *In Gross*; *Appurtenant*).

§ 12. Another species of common, often included under common of estovers, is the right to take for use on the commoner's tenement part of the wild herbage and brushwood (such as heath, furze, broom, fern, rushes, and, in some manors, hay) from the land of another.<sup>5</sup>

Common of turbary.

C. § 13. Common of turbary in its modern sense is the right of taking peat or turf from the waste land of another for fuel in the commoner's house.<sup>6</sup> It appears that formerly a distinction was drawn between peats (*turbæ*) from a peat-moss or boggy ground, and "flags" (French *blèches*, Latin *blestie*) or turves pared from the surface, and that strictly speaking common of turbary does not give a right to take "flags," that being destructive of the pasture.<sup>7</sup> The right is, however, unimportant at the present day; it is analogous to common of estovers, and is therefore either appurtenant or in gross, but not appendant.<sup>8</sup>

Common of piscary.

Common of digging.

D. § 14. As to common of piscary, see *Fishery*.

E. § 15. Common of digging or common in the soil is the right to take for one's own use part of the soil or minerals in another's land; the most usual subjects of the right are sand, gravel, stones and clay. It is of a very similar nature to common of estovers and of turbary<sup>9</sup> (*supra*, §§ 11, 13; and see *Dole*; *Tinbounding*).

Common of fowling.

F. § 16. In some parts of the country a right of taking wild animals

<sup>1</sup> Williams, 184.<sup>2</sup> Co. Litt. 122 a.<sup>3</sup> Elton, 229.<sup>4</sup> Elton, 82, where it is shown that there is no such thing as common of estovers appendant. Cooke, 34.<sup>5</sup> Elton, 117.<sup>6</sup> Bl. Comm. ii. 35; Williams, 187.<sup>7</sup> Elton, 96.<sup>8</sup> *Ibid.* 99.<sup>9</sup> *Ibid.* 109.

(such as conies or wildfowl) from the land of another has been found to exist; in the case of wildfowl it is called a common of fowling.<sup>1</sup>

As to apportionment of commons, see *Apportion*, § 5. See also *Sans Nombre*; *Levancy and Couchancy*; *Surcharge*; *Pawnage*.

II. § 17. Common is sometimes used to denote certain rights which resemble rights of common in the strict sense (*supra*, § 1) in giving a person the right of taking the profits of land in common with others, but nevertheless differ from rights of common in some essential point. Thus the right of the lord of a manor to take profits from the waste of the manor in common with the tenants is not strictly a right of common, because the waste is vested in him, and no one can have common in his own land.<sup>2</sup> (See *Pasture*; *Seignorial*.)

§ 18. So cattle-gates or stints, the rights of pasture of the inhabitants of a parish or other similar class over lammis-lands, &c. are not rights of common, though frequently so called, but shares in the vesture of land, and therefore corporeal hereditaments.<sup>3</sup>

III. § 19. Common also signifies a piece of land subject to rights of common. As to the enclosure and regulation of commons under the Commons Acts, see *Inclosure*.

**COMMON ASSURANCES**, in the language of the old books, are those conveyances "by which commonly the property of things is made or changed."<sup>4</sup> Property here, of course, means ownership. For the various kinds of common assurances, see *Conveyance*; see also *Assurance*.

**COMMON BENCH** is another name for the Court of Common Pleas (*q. v.*)

**COMMON CALAMITY**. See *Commorientes*.

**COMMON CARRIER**. See *Carrier*.

**COMMON EMPLOYMENT**.—§ 1. In the law of master and servant, the common law rule is that a master is not liable to his servant for injuries resulting from the negligence of a fellow servant in the course of their common employment, unless the servant causing the injury was incompetent to discharge his duty, or the servant injured was not at the time acting in his master's employment.<sup>5</sup> § 2. The question whether there is a common employment, that is, whether two servants are fellow servants within this rule, depends on whether they are under the orders and control of the same person, although their wages may be paid by different persons;<sup>6</sup> and they are not the less fellow servants because one is a foreman and the other a subordinate workman,<sup>7</sup> or because the duties

<sup>1</sup> Elton, 118.

<sup>2</sup> Elton, Comm. 8; Cooke, Incl. 56.

<sup>3</sup> Elton, 31, n. (d).

<sup>4</sup> Sheppard's Touchstone of Common Assurances, 1.

<sup>5</sup> Underhill on Torts, 42; *Priestly v.*

*Fowler*, 3 M. & W. 1; *Wiggett v. Fox*, 11 Ex. 832.

<sup>6</sup> *Rourke v. White Moss Colliery Co.*, 1 C. P. D. 556.

<sup>7</sup> *Wilson v. Merry*, L. R., 1 Sc. & D. 326.

of one are dissimilar from those of the other, provided the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which have to be considered in his wages.<sup>1</sup>

Employers'  
Liability Act,  
1880.

§ 3. The common law rule on the subject has been altered by the Employers' Liability Act, 1880, which provides that a workman shall be entitled to compensation for personal injuries caused (a) by reason of the negligence of any person in the exercise of a superintendence entrusted to him by the employer; (b) by reason of the negligence of any person in the service of the employer to whose directions the workman was bound to conform and did conform, whereby the injury was caused; (c) by reason of the act or omission of any person in the service of the employer, in obedience to some improper or defective rule, bye-law, &c. of the employer; or (d) by reason of the negligence of any person in the service of the employer who has the charge or control of any signal points, locomotive or train on a railway. Provision is made by the act, limiting the amount of compensation recoverable, the time for bringing the action, &c. (which must, in the first instance, be brought in a County Court), and other matters.

**COMMON INFORMER.** See *Informer*.

**COMMON INTENDMENT—COMMON INTENT.** See *Intendment*; *Intent*.

**COMMON LAW**, in the widest sense of the word, is that part of the law of England which, before the Judicature Acts, was administered by the common law tribunals, especially the former Courts of Queen's Bench, Common Pleas, and Exchequer, as opposed to Equity (*q. v.*), or that part of the law of England which was administered by the Court of Chancery.

§ 2. The common law consists of (1) what may be called the original common law, or those rules which have been administered by the common law courts from time immemorial; in this sense "common law" is opposed to "statute": (2) those modifications and extensions of the original common law which have been introduced by statute; thus the course in which lands descend by inheritance was formerly regulated entirely by the original common law, but the present law of inheritance (though still part of the common law) consists to a considerable extent of statutory rules: (3) the customary law.<sup>2</sup> (See *Custom*.)

§ 3. With reference to the subjects with which it deals, the common law is divided into civil and criminal; the former includes the two great branches of private rights arising out of contracts and torts (*q. v.*); the latter deals with crimes (*q. v.*). In addition to these subjects, the superior courts of common law had jurisdiction in other matters by means of the writs of habeas corpus, mandamus and prohibition (*q. v.*).

<sup>1</sup> *Morgan v. Vale of Neath R. Co.*,  
L. R., 1 Q. B. 149.

<sup>2</sup> See Bl. Comm. i. 67 *et seq.*; Broom's  
C. C. L. 3 *et seq.*

§ 4. The jurisdiction of the superior courts of common law was by the Judicature Act transferred to the High Court of Justice, but actions which were formerly within the exclusive jurisdiction of any of the old common law courts must still be brought in the corresponding division of the High Court. (See *High Court of Justice*.)

**COMMON PLEAS.**—I. § 1. The Court of Common Pleas (or Common Bench) was originally the only superior Court having jurisdiction in ordinary civil actions between private persons, although subsequently the Courts of King's (or Queen's) Bench and Exchequer (*q. v.*) acquired concurrent jurisdiction in all actions, except real actions, in which the Court of Common Pleas retained exclusive jurisdiction (see *Dower*; *Quare Impedit*; *Action*). It was a superior Court of record, consisting of a lord chief justice and five puisne justices.<sup>1</sup>

By modern acts of parliament exclusive jurisdiction was given to it in appeals from revising barristers, in petitions against parliamentary elections, and in respect of acknowledgments under the Fines and Recoveries Act.

§ 2. By the Judicature Acts, 1873, 1875, the jurisdiction and judges of the Court of Common Pleas were transferred to the High Court of Justice: the judges form a Division of the High Court called the Common Pleas Division, and all actions which were formerly within the exclusive jurisdiction of the Court of Common Pleas must be assigned to that Division; the judges for the trial of election petitions, however, are now selected from all the three common law divisions.<sup>2</sup>

Common  
Pleas  
Division.

II. § 3. The Court of Common Pleas at Lancaster was a Palatine Court having a local common law jurisdiction. By the Judicature Act its jurisdiction was transferred to the High Court of Justice.<sup>3</sup> (See *County Palatine*; *Palatine Courts*.)

Common  
Pleas at  
Lancaster.

**COMMON RECOVERY.** See *Recovery*.

**COMMON SERJEANT** is a judicial officer of the Corporation of the City of London. He is a kind of assistant or deputy to the recorder, and as such is a judge of the Mayor's Court in the absence of the recorder:<sup>4</sup> he is also a judge of the Central Criminal Court (*q. v.*).

**COMMONABLE** in its widest sense is applied to a thing over, by, or in respect of which a right of common may be exercised. Thus commonable land is land subject to a right of common; therefore under a grant of common of pasture, pasture-land only is "commonable," that is, may be used by the commoner.<sup>5</sup> So a "commonable messuage" is a house to which a right of common is attached;<sup>6</sup> and "commonable beasts" (in the primary sense of the phrase) are those animals which a commoner

Commonable  
land (I.).

Commonable  
messuage.  
Commonable  
beasts (I.).

<sup>1</sup> Smith's Action, 4 *et seq.*; Bl. Comm. iii. 37; Co. Litt. 71 b.

<sup>2</sup> Jud. Act, 1873, ss. 16, 31 *et seq.*

<sup>3</sup> *Ibid.* s. 16; Bl. Comm. iii. 79.

<sup>4</sup> Candy's Mayor's Court Pr. 2.

<sup>5</sup> Perkins, § 108.

<sup>6</sup> General Incl. Act, 1845, s. 53.

is entitled to put on the common; thus sheep are commonable beasts under an ordinary right of common of pasture, but not in royal forests.<sup>1</sup> As the only commonable beasts in the case of common appendant are beasts used in agriculture (horses, cattle and sheep), the phrase "commonable beasts" is generally confined to those animals, to the exclusion of hogs, goats, geese, &c.<sup>2</sup> (See *Pawnage*.)

II. § 2. "Commonable" is also used in a special sense as opposed to "common;" thus commonable rights are rights of pasture over lammas-lands, cattle-gates or stints, &c., which are not rights of common in the strict sense (see *Common*, § 18), and "commonable lands" include not only lammas-lands, cattle-gates, &c., but also shack-lands, open fields, &c. which are subject to the rights of common, but differ from "common lands," such as manorial wastes, &c., in being subject to severalty rights. (See *Severalty*; *Common*, § 7.)<sup>3</sup>

**COMMORANCY—COMMORANTS.**—§ 1. Commorants are persons residing within a certain district, and commorancy is the fact of their residence there. Thus all persons commorant within the district of a court leet (*q. v.*) were bound to attend its sittings in ancient times.<sup>4</sup> (See *Resiant*.)

§ 2. Formerly it was supposed that there might be a right of common in the inhabitants of a vill or township by reason of their commorancy, but the contrary was decided in *Gateward's Case*.<sup>5</sup> (See *Common*, § 1; *Custom*; *Easement*.)

**COMMORIENTES** are persons dying together or simultaneously. The term is applied to persons who perish by a common calamity (shipwreck, massacre, &c.), so that it cannot be ascertained which died first. Where they stand in the relation of ancestor and heir or the like, so that the devolution of a right depends upon the order of death, the question becomes of importance, but the English law provides no rules for determining the question in the absence of evidence.<sup>6</sup>

**COMMUTATION** is the conversion of the right to receive a variable or periodical payment into the right to receive a fixed or gross payment. Commutation may be effected by private agreement, but it is usually done under an act of parliament. Thus, under the Tithe Commutation Acts, "a rent-charge, varying with the price of corn, has been substituted all over the kingdom for the inconvenient system of taking tithes in kind."<sup>7</sup> (See *Tithes*.) Under the Copyhold Acts the rents, fines, heriots or other manorial rights of the lord of a manor may be commuted into a rent-

<sup>1</sup> Manwood, 82.

<sup>2</sup> Co. Litt. 122 a; *Smith v. Feverell*, 2 Mod. 7.

<sup>3</sup> Cooke, Incl. 42.

<sup>4</sup> Bl. Comm. iv. 273.

<sup>5</sup> 6 Co. 59; *Elton*, Comm. 5.

<sup>6</sup> Best on Evidence, 525; Coote's Pro-

bate Pr. 182; *Fearne's Post. Works*. The Roman law had a system of presumptions to determine the question (*Digest*, xxxiv. 5, fr. 9; *Savigny*, Syst. ii. 20), some of which have been adopted by the Code Civil.

<sup>7</sup> Wms. R. P. 347.

charge (either fixed or varying with the price of corn), together with a small fixed fine on death or alienation, or in various other manners.<sup>1</sup> Under the Succession Duty Act the commissioners may commute duty presumptively payable for a certain sum to be presently paid;<sup>2</sup> and under the Pensions Commutation Acts the right of an officer or other public servant to receive a pension may be commuted by the payment of a gross sum of money.

Succession  
duty.

Pensions.

**COMPANY.**—§ 1. A company is an association of persons formed for the purpose of some business or undertaking carried on in the name of the association, each member having the right of assigning his share to any other person, subject to the regulations of the company.

§ 2. An incorporated company is a corporation formed for the purpose of carrying on a business for profit. (See *Association*.) Such companies are incorporated either (1) by charter (*q. v.*);<sup>3</sup> (2) by special act of parliament;<sup>4</sup> or (3) by registration under one of the public general acts relating to companies.<sup>5</sup> (See *Companies Acts*.)

Incorporated.

§ 3. Unincorporated companies are associations of individuals not forming a corporation, but carrying on business under a corporate name, and having certain qualities resembling those of incorporated companies. To this class belong (1) companies formed under the act 7 Will. 4 & 1 Vict. c. 73, which enables the crown, without incorporating a company, to confer upon it, by letters-patent, certain privileges, including the power of suing and being sued, by a public officer (*q. v.*) and limited liability;<sup>6</sup> (2) companies formed under private acts of parliament, generally with the power of suing and being sued by a director or other officer;<sup>7</sup> (3) companies formed for banking under the act 7 Geo. 4, c. 46, and having certain privileges, such as that of suing and being sued by a public officer;<sup>8</sup> (4) cost book companies (*q. v.*); (5) companies formed without the authority of a charter or act of parliament, and before 2nd November, 1862 (see Companies Act, 1862, s. 4), consisting of a large number of members, with transferable shares, and a directorate for the management of the business. The question whether such companies are illegal has been much discussed.<sup>9</sup> To this class belong what are sometimes called scrip companies, in which the members simply hold scrip certificates, transferable by delivery.<sup>10</sup> (See *Scrip*.)

Unincorporated.

§ 4. Companies are described as limited or unlimited, according as the liability of their shareholders is or is not limited. In the case of an unlimited company, each shareholder is liable to contribute to the debts of the company to the full extent of his property (see *Calls*), but some

Unlimited.

<sup>1</sup> Elton, Copyh. 292. As to commutation of penance in the ecclesiastical courts, see 4 Bl. 217.

<sup>2</sup> Stat. 16 & 17 Vict. c. 51, s. 41. This power is seldom exercised unless there is some special reason, *e. g.* where the property subject to the duty is being sold, divided, or otherwise dealt with. Hanson, Succ. Duties, 329.

<sup>3</sup> Lindley on Part. 7, 152.

<sup>4</sup> *Ibid.* 156.

<sup>5</sup> For a history of these acts, see Thring on Companies, 14 *et seq.*; Lindley, 8 *et seq.*

<sup>6</sup> Lindley, 154.

<sup>7</sup> *Ibid.* 155.

<sup>8</sup> *Ibid.* 162.

<sup>9</sup> *Ibid.* 11, 81, 189; Thring, 10.

<sup>10</sup> Lindley, 128, 195.

insurance companies, though strictly speaking unlimited, are practically limited by the insertion in each policy of a clause, restricting the claim of the assured to the amount remaining unpaid-up on each share.

Limited by shares ; § 5. A company is limited either by the amount of the share which each member takes in the company, and beyond which he therefore cannot be compelled to contribute to the debts of the company (company limited by shares), or by the amount which each member undertakes by the memorandum of association (*q. v.*) to contribute to the assets of the

by guarantee. company in the event of its being wound up (company limited by guarantee); the latter mode is used in the case of companies supported by annual subscriptions, or formed on the principle of mutual assurance.<sup>1</sup>

Commandite company. There is a hybrid kind of company in which the liability of the shareholders is limited (either by shares or by guarantee), while the liability of the directors or managers, or the managing director, is unlimited.<sup>2</sup> Provision for the creation of such companies seems to have been considered desirable from a mistaken view of the nature of French *sociétés en commandite*; the provision is a dead letter. (See *Commandite*.)

“ Limited and reduced.” § 6. A company formed for profit must, if the liability of its members is limited, have the word “ limited ” as the last word in its name.<sup>3</sup> When a company limited by shares has obtained the leave of the Court to reduce its capital, the words “ and reduced ” must be added and used as the last words of its name for a certain period to be fixed by the Court.<sup>4</sup> (See *Reduction of Capital*.)

Limited company with reserve capital. § 7. Under the Companies Act, 1879, a limited company may create a reserve capital as security for its creditors, by providing that a certain portion of its capital shall not be capable of being called up except in the event of the company being wound up.

Limited banks of issue. § 8. A bank of issue registered as a limited company is not entitled to limited liability in respect of its notes.<sup>5</sup>

Joint stock companies. § 9. Joint stock companies are those having a joint stock or capital which is divided into numerous transferable shares, or consists of transferable stock.<sup>6</sup> (See *Stock*.) The term “ joint stock ” was originally applied to those companies which were formed without the authority of any statute; and afterwards to those formed under various acts from 1825, including the Joint Stock Companies Acts of 1844, 1856 and 1857.<sup>7</sup>

Public and private companies. § 10. Companies are sometimes divided into public and private; “ but in this, as in many other instances, the word public is used with no definite signification; and it is extremely difficult to say exactly what the essential character of a public company really is. It has, however, been decided that banking companies, governed by the 7 Geo. 4, c. 46 (*supra*, § 3), are public companies within the meaning of the statute 1 & 2 Vict. c. 110, s. 14<sup>8</sup> [enabling separate creditors of shareholders in public com-

<sup>1</sup> Thring on Companies, 129.

<sup>2</sup> Companies Act, 1867, ss. 4 *et seq.*

<sup>3</sup> Companies Act, 1862, ss. 8, 9, 41, 42; Companies Act, 1867, s. 23.

<sup>4</sup> Companies Act, 1867, s. 10; Thring on Companies, 214; Companies Act, 1877.

<sup>5</sup> Act of 1879, s. 6.

<sup>6</sup> Lindley, 6. And see Companies Act, 1862, s. 181.

<sup>7</sup> Lindley, 5; Thring, 10.

<sup>8</sup> *McIntyre v. Connell*, 1 Sim., N. S. 225.



panies to obtain charging orders on their debtors' shares (see *Charging Order*)] ; and from that decision it would seem that those companies only are public which are either incorporated, or if unincorporated are endowed by the crown or the legislature with some special privileges, and are bound to make some kind of return or list of their members which the public have a right to see. A mere partnership, however large and however transferable its shares, is apparently not a public company."<sup>1</sup> § 11. Sometimes, however, "private company" is used to denote a company the shares in which are held by a few persons personally acquainted with one another and are not dealt with in the market. (See *Association ; Corporation ; Partnership*.)

**COMPANIES ACTS.** The principal Companies Acts now in force are—

(i) The Companies Clauses Consolidation Acts, 1845 and 1863, containing provisions applicable to companies incorporated by special acts of parliament, such as railway and canal companies. (See *Act of Parliament*, § 5.) Companies Clauses Acts.

(ii) The Companies Acts, 1862 to 1879, regulating the incorporation, management and dissolution of companies formed under them. As the majority of modern companies are formed under these acts, it may be convenient to state generally that under their provisions any seven or more persons associated for any lawful purpose may form themselves into an incorporated company, with or without limited liability, by subscribing a memorandum of association and causing it to be registered at the Registry of Joint Stock Companies ; provision is made for meetings and resolutions of the members, the periodical returns to be made to the registrar, and for the winding-up of the company. (See the various titles, also *Articles of Association*.) Companies Acts, 1862—1879.

(iii) There are also various miscellaneous acts relating to companies, such as the Companies Seals Act, 1864, enabling an English company to have a seal for use abroad ; and the Joint Stock Companies Arrangement Act, 1870, to facilitate compromises and arrangements between creditors and shareholders of companies in liquidation ; and acts relating to special kinds of companies, such as railway and life assurance companies. Miscellaneous.

**COMPARISON OF HANDWRITING.**—By the common law it was not allowable to prove the handwriting of a party to a document by a comparison between it and other documents proved or assumed to be in his handwriting.<sup>2</sup> This rule was practically abolished by the Common Law Procedure Act, 1854, ss. 27, 103, and 28 Vict. s. 18.<sup>3</sup>

**COMPENSATION** is a recompense or reward for some loss, injury or service, especially when it is given by a statute. Thus acts for the

<sup>1</sup> Lindley, 13.

S.

<sup>2</sup> Best on Evidence, 333.

<sup>3</sup> *Ibid.* 345.

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construction of railways and other public works provide for the payment of compensation to the owners of land taken compulsorily for the purposes of the works;<sup>1</sup> so the Agricultural Holdings Act, 1875 (*q. v.*), provides for the payment of compensation to agricultural tenants for improvements (draining, manuring, &c.) executed by them on their holdings, and unexhausted at the time the tenancy is determined;<sup>2</sup> and stats. 7 Geo. 4, c. 64, and 14 & 15 Vict. c. 55, empower courts of criminal jurisdiction to award compensation to persons who have been active in the apprehension of prisoners charged with certain crimes. (See also *Common Employment*, § 3.)

Vendor and  
purchaser.

§ 2. In agreements between vendors and purchasers of real estate, it is usual to stipulate that errors, misdescriptions and omissions in the particulars of sale or description of the property, shall not avoid the sale, but be the subject of compensation. But such a stipulation will not protect the vendor in the case of a misdescription arising from fraud or gross negligence, or of such a nature that in the absence of it the purchaser would presumably not have entered into the contract at all.<sup>3</sup>

§ 3. As to the doctrine of compensation with reference to questions of equitable election, see *Election*.

Absolute.  
Relative.

**COMPETENCY—COMPETENT.**—§ 1. A person is said to be competent to testify, or a competent witness, when he is allowed by law to give evidence on a trial or other judicial inquiry. The question of a witness's competency may arise either with reference to his ability to give evidence generally (absolute incompetency), or with reference to a particular fact or inquiry (relative incompetency). Thus an idiot is not competent to give evidence at all, while a person accused of a crime is not competent to give evidence as to it; nor is the husband or wife of such a person.<sup>4</sup>

§ 2. Competency is of course a different thing from credibility (*q. v.*).

**COMPLAINT.**—§ 1. In proceedings before justices of the peace to obtain an order for the payment of money, the proceedings are commenced by a complaint, which is a statement of the facts of the case made by the complainant or person aggrieved, sometimes in writing, sometimes verbally.<sup>5</sup> § 2. As to bills of complaint, see that title.

**COMPOSITION**, in its widest sense, is an arrangement between two or more persons for the payment by one to the other or others of a sum of money in satisfaction of an obligation to pay another sum differing either in amount or mode of payment. "Composition" also signifies the sum so agreed to be paid. (See *Compound*.)

<sup>1</sup> Lands Clauses Cons. Act, 1845, ss. 21 *et seq.*; Railways Clauses Cons. Act, 1845, s. 6; Hodges on Railways, 200 *et seq.*

<sup>2</sup> Sects. 5 *et seq.*

<sup>3</sup> Dart, V. & P. 134 *et seq.* See *In re Arnold*, 14 Ch. D. 270.

<sup>4</sup> Best on Evidence, 188 *et seq.*; *Omychund v. Barker*, 1 Atk. 21; stats. 1 & 2 Vict. c. 105; 6 & 7 Vict. c. 85; 14 & 15 Vict. c. 99; 16 & 17 Vict. c. 83; 22 & 23 Vict. c. 61; 32 & 33 Vict. c. 68; 40 Vict. c. 14.

<sup>5</sup> Stone's Justice of the Peace, 75.

§ 2. Compositions are generally entered into by a person who is unable to pay all his debts in full, and whose creditors have agreed to accept a certain proportion of their debts, and release him from the rest, either absolutely or conditionally on the composition being duly paid.<sup>1</sup> Such an arrangement is sometimes entered into by a deed, called a composition deed (*q. v.*); but at the present day the statutory mode of composition by an arrangement under the supervision of the Court of Bankruptcy is generally adopted.<sup>2</sup> This may be done in two ways:—§ 3. The creditors in a bankruptcy may by special resolution sanction the acceptance of a composition offered by the bankrupt, but the terms must be sanctioned by the court.<sup>3</sup> § 4. The creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of their debts: certain formalities as to notice, &c., have to be complied with, and the debtor is required to present a statement of his assets and debts. If properly passed, the resolution, with the statement, is registered in the Court of Bankruptcy, and is then binding on all the creditors named in the debtor's statement; the composition may be enforced by motion to the court.<sup>4</sup> <sup>5</sup> Proceedings by composition under sect. 126 somewhat resemble proceedings by liquidation (*q. v.*); but in the case of a composition, the property of the debtor is not taken out of him and vested in a trustee, nor distributed in the same manner in bankruptcy as is the case in liquidation; for the debtor must be left in possession of his property to enable him to pay the composition.<sup>5</sup>

Composition deed.

Composition in bankruptcy under sect. 28.

Composition under sect. 126.

§ 5. In the law of tithes any owner of land may claim exemption from tithes in respect of that land by reason of a real composition, which is an agreement made between him and the incumbent, with the consent of the ordinary and the patron, that the land shall for the future be discharged from payment of tithes by reason of some land or other real recompense given in lieu and satisfaction thereof.<sup>6</sup>

Real composition.

### COMPOSITION DEEDS are of two kinds:—

§ 1. In the most general sense of the word, a composition deed is one executed by a debtor and his creditors or a majority of them for the purpose of winding-up the debtor's estate without recourse to the Court of Bankruptcy. Thus a debtor may by deed assign all his property to trustees in trust to realize it and distribute the proceeds rateably among the creditors or to pay them a stated composition (*q. v.*). Such a deed is an act of bankruptcy (*q. v.*).

§ 2. In the stricter meaning of the term a composition deed is one by which the debtor either alone or in conjunction with a surety, covenants to pay a stated composition to his creditors. This is followed by a declaration by the creditors that they will accept the composition in full discharge of their claims.<sup>7</sup>

<sup>1</sup> Robson's Bankruptcy, 213.

<sup>2</sup> But see *Jenney v. Bell*, 2 Ch. D. 547.

<sup>3</sup> Bank. Act, 1869, s. 28.

<sup>4</sup> *Ibid.* s. 126.

<sup>5</sup> *In re Adams*, L. R., 11 Eq. 204;

*In re Kearly & Clayton*, 7 Ch. D. 615;

*Breslaue v. Brown*, 3 App. Ca. 672.

<sup>6</sup> Steph. Comm. ii. 727; stat. 2 & 3 Will. 4, c. 100, s. 2.

<sup>7</sup> Davids. Conv. v. (2), 518.

§ 3. Composition deeds are not often entered into except for the purpose of carrying out a resolution for composition under sect. 126 or sect. 28 of the Bankruptcy Act, 1869, because if the concurrence of all the creditors is not obtained, the deed is not binding on the minority creditors who do not join, and therefore they have to be paid in full.

See *Bankruptcy*; *Inspectorship Deeds*; *Letter of Licence*; *Liquidation*.

**COMPOUND.**—I. § 1. To compound for a debt is for a debtor and creditor to agree that the creditor shall accept a composition or smaller sum in discharge of the original debt, *e. g.* on the ground of the debtor's inability to pay the whole. (See *Composition*; *Accord and Satisfaction*.)

§ 2. To compound for a debt under a debtor's summons (*q. v.*) is to arrange for the payment of it to the satisfaction of the creditor; thus, agreeing for securing the debt is compounding for it in this meaning.<sup>1</sup>

Compounding  
felony.

II. § 3. In criminal law to compound a felony is to enter into an agreement, for valuable consideration, not to prosecute a person for felony, or to show him favour in a prosecution, as where a person takes back goods which have been stolen from him upon agreement not to prosecute. It is a misdemeanor (*q. v.*).<sup>2</sup> It is also a misdemeanor to compound an action or information under a penal statute without leave of the Court.<sup>3</sup>

Compounding  
penal action.

**COMPOUND HOUSEHOLDER.**—By the stat. 59 Geo. 3, c. 12, s. 19, reciting that the payment of poor's rates was greatly evaded by houses being let out in separate apartments or for short terms, it was enacted that it should be lawful to rate the owners of such houses instead of the occupiers. As the effect of this was to keep the names of the occupiers off the rate-books and thus deprive them of their municipal and parliamentary franchise, the stats. 14 & 15 Vict. c. 14, and 21 & 22 Vict. c. 43, enacted that such occupiers should have the same privileges as if they were themselves rated to the relief of the poor, provided that the rates were paid either by them or the owner. Such persons are called "compound householders." See also stats. 30 & 31 Vict. c. 102; 32 & 33 Vict. c. 41; 41 & 42 Vict. c. 26, s. 14.

**COMPTROLLER IN BANKRUPTCY** is an officer whose duty it is to receive from the trustee in each bankruptcy his accounts and periodical statements showing the proceedings in the bankruptcy, and also to call the trustee to account for any misfeasance, neglect or omission in the discharge of his duties.<sup>4</sup>

**COMPROMISE** is where the parties to a dispute dispose of it by agreement between themselves, whether legal proceedings have been commenced or not. (See *Accord and Satisfaction*; *Compound*.)

<sup>1</sup> Robson's Bankruptcy, 145.

<sup>2</sup> Steph. Com. iv. 232. As to advertisements promising that no inquiry shall be made as to stolen goods if returned, see *Advertisement*, § 2.

<sup>3</sup> Stat. 18 Eliz. c. 5; Steph. Crim. Dig. 94. As to compounding misdemeanors, see Steph. Comm. iv. 234.

<sup>4</sup> Robson's Bankruptcy, 13; Bank. Act, 1869, s. 55.

**COMPULSORY.**—In ecclesiastical procedure, a compulsory is a kind of subpoena to compel the attendance of a witness.<sup>1</sup>

As to compulsory pilotage, see *Pilotage*; and as to compulsory powers, see *Power*.

**CONCEALER.**—Concealers are persons who, having obtained grants from the crown of all “concealed” or forfeited lands within a parish or other area, proceed to bring actions against and otherwise harass the persons or bodies holding lands upon charitable trusts connected with Church purposes; thus by letters patent under the great seal, dated at Gorhamburge, the 24th of July, 1570 (12 Eliz.), her Majesty promised to grant to Sir Thomas Wentworth, Knight, Lord Wentworth. . . . all and so many of all such her Majesty’s lordships, manors and other hereditaments and advowsons to the same belonging within the realm of England and the dominions of the same as then or at that time were concealed, subtracted or unjustly detained from her Majesty.<sup>2</sup> Such grants are not usual at the present day.

**CONCEALING BIRTH.**—Endeavouring to conceal the birth of a child by any secret disposition of its dead body is a misdemeanor punishable by two years’ imprisonment with hard labour.<sup>3</sup>

**CONCEALMENT** is where a party to a contract does not disclose a fact relating to it. § 2. As a general rule, simple concealment, or rather non-disclosure, has no effect on the validity of the contract,<sup>4</sup> but in certain cases it has. Thus, in the contract of marine insurance, concealment of a material fact, though made without any fraudulent intention, makes it voidable at the insurer’s election.<sup>5</sup> (See *Insurance*.)

§. 3. Wilful or fraudulent concealment is where the concealment amounts to fraud (*q. v.*). This occurs where a person has been induced to enter into a contract or the like by means of the concealment by the other party of a fact of which he was aware, and which if disclosed would have prevented the first party from entering into the contract. The effect of fraudulent concealment is to make the contract voidable at the option of the party deceived.<sup>6</sup>

§ 4. “Active concealment” is where one party takes means to conceal a defect, or otherwise prevent the other party from learning a material fact; or makes a statement true in terms as far as it goes, but keeps silence as to other things which if disclosed would alter the whole effect of the statement, so that what is in effect told is a half-truth, equivalent to a falsehood; or allows the other party to proceed on an erroneous belief to which the acts of the concealing party have contributed.<sup>7</sup> The

<sup>1</sup> Phill. Eccl. Law, 1258.

<sup>2</sup> *Att.-Gen. v. Webster*, L. R., 20 Eq. p. 484.

<sup>3</sup> Stephen’s Crim. Dig. 155; Russell on Crimes, 1; stat. 24 & 25 Vict. c. 100, s. 60.

<sup>4</sup> *New Brunswick, &c. Co. v. Conybeare*, 9 H. L. C. 711.

<sup>5</sup> Maude and Pollock, Merch. Shipp. 398; Smith’s Merc. Law, 394.

<sup>6</sup> *Central Rail. Co. of Venezuela v. Kisch*, L. R., 2 H. L. at p. 120; *Oakes v. Turquand*, *ibid.* at p. 344.

<sup>7</sup> Pollock, 473; Benjamin on Sale, 384; *Peck v. Gurney*, L. R., 6 H. L. 392; *Keates v. Earl Cadogan*, 10 C. B. 591; 20 L. J., C. P. 76.

general rule is, that where a person is induced to enter into a contract by active concealment of a material fact, he is entitled to rescind the contract, and (in some cases) to bring an action for misrepresentation or deceit.<sup>1</sup>

Concealment  
of title deeds,  
&c.

§ 5. Concealment is also in some cases a criminal offence: as where a vendor or mortgagor of real or personal property fraudulently conceals any material title deed or incumbrance affecting the property. Such an offence is a misdemeanor, punishable with two years' imprisonment and hard labour.<sup>6</sup> (See *Misrepresentation*; *Fraud*.)

**CONCESSIT SOLVERE** is a form of action of debt on simple contract which lies by custom in the Mayors' Courts of London and Bristol; the declaration is to the effect that the defendant on a fictitious date, in consideration of divers fictitious sums of money before that time due and owing from him to the plaintiff and then in arrear and unpaid, granted and agreed to pay (*concessitolvere*) to the plaintiff the sum sued for, but has not done so.<sup>3</sup> It is said to have the advantage of being "a more comprehensive count than almost any other,"<sup>4</sup> and is therefore usually adopted in proceedings in foreign attachment, in which most of the other steps are equally full of fictions. (See *Foreign Attachment*.)

**CONCILIUM**.—In proceedings on a writ of error in a criminal case, a rule directing the case to be put down in the paper for argument is obtained as soon as the joinder in error is filed. This rule is called a rule for a concilium<sup>5</sup> (*dies concilii*, a day to hear counsel). Formerly a similar rule was required in a civil action when issue had been joined in demurrer.<sup>6</sup> (See *Writ of Error*; *Joinder*.)

**CONCLUDE** is to bar or estop (*q. v.*).<sup>7</sup>

**CONCLUSION** is (i) an irrebuttable presumption or rule of law (see *Presumption*); (ii) an estoppel (*q. v.*).

§ 2. In the old common law practice, that part of a pleading by which the party offered that the issue raised should be tried by a jury was called a "conclusion to the country."<sup>8</sup> (See *Country*.)

§ 3. Under the old admiralty practice a party who had a right to plead further might, if he thought fit, file what was called a conclusion, by which he denied the statements in the preceding pleading, and prayed that the pleadings might be concluded.<sup>9</sup> It answered to what is now called a joinder of issue (*q. v.*).

**CONCORD**, in the old books, signified an agreement for the compromise of a right of action arising out of a trespass.<sup>10</sup> It also signified a part of a fine (*q. v.*).

**CONCURRENT**. See *Jurisdiction*; *Writ*.

<sup>1</sup> *Peek v. Gurney*, L. R., 6 H. L. at pp. 391, 403.

<sup>2</sup> Stats. 22 & 23 Vict. c. 35, s. 24; 23 & 24 Vict. c. 38, s. 8.

<sup>3</sup> 1 Wms. Saund. 94 (*Turbill's Case*). See the form, Brandon, For. Attach. 159.

<sup>4</sup> Brandon, 76; Candy's Mayor's Court

Pr. 139.

<sup>6</sup> Archbold, Crim. Pl. 205.

<sup>7</sup> Tidd's Pr. 737.

<sup>8</sup> Co. Litt. 37 a, 170 a.

<sup>9</sup> Steph. Pl. (5th edit.), 79.

<sup>10</sup> Williams and Bruce's Admiralty, 249.

<sup>11</sup> Plowd. 5.

**CONDEMNATION** is where a Court of competent jurisdiction adjudges a prize or captured vessel to have been lawfully captured. The effect of a condemnation is to vest the property in the captor, unless the Court, either before or after condemnation, orders it to be sold or delivered up on bail, in which case the proceeds of sale or appraised value take the place of the property itself. The High Court of Justice, in its Admiralty jurisdiction, is the principal Court for deciding such questions in the British dominions.<sup>1</sup> (See *Capture; Prize Courts.*)

**CONDITION.**—I. § 1. A condition is a declaration or provision which makes the existence of a right dependent on the happening of an event, and the right is then called conditional, as opposed to an absolute right. Thus if A. leaves a legacy in the following form: "I give 100*l.* to B. if he shall act as my executor," the legacy is conditional, because B.'s right to the 100*l.* is dependent on the fulfilment of the condition, that is, on his acting as executor.

Conditions are either true or apparent. § 2. A true condition is where the event on which the existence of the right depends is future and uncertain<sup>2</sup> ("I give Blackacre to A. if B. shall die without leaving children").

§ 3. Apparent conditions, or conditions merely in form, are (i) where the event, though unascertained, is not future, but is either happening at the time the condition is created ("if A. is now living"), or has already happened ("if A. is dead"); (ii) where the event, though future, is not uncertain, either because it must necessarily happen ("I give Blackacre to A. if B. shall die"), or because its happening was always impossible (*infra*, § 8); (iii) where the condition is a mere repetition or expression of something implied by law from the nature of the right; as if an estate is given to A. in tail, and if A.'s issue fail, then to B.: here the words "if A.'s issue fail" do not create a condition, being merely an unnecessary expression of what is implied in A.'s estate tail, which can only last so long as he has issue.<sup>3</sup>

With reference to their creation, conditions are either express or implied. § 4. An express condition (or condition in deed) is one "expressed by the parties in legal terms of law,"<sup>4</sup> as in the examples given above. § 5. An implied condition (or condition in law) is one "created by law without any words used by the parties,"<sup>5</sup> whether the parties had it in their minds at the time or not; thus, in every policy of marine insurance, a condition or warranty that the vessel is seaworthy is implied in law.<sup>6</sup> (See *Warranty.*)

With reference to their effects, conditions are of various kinds. § 6. A condition precedent is one which delays the vesting of the right until the event happens; thus, if I give 100*l.* to A. if he shall act as my

<sup>1</sup> Maude and Pollock, *Merch. Shipping*, 41; *Manning's Law of Nations*, 476; *Naval Prize Act*, 1864.

<sup>2</sup> Savigny, *System*, iii. 121.

<sup>3</sup> *Fearne, C. R.* 242; *Page v. Hayward*, *ibid.* 424.

<sup>4</sup> *Co. Litt.* 201 a; *Shepp. Touch.* 117.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Smith's Merc. Law*, 377; *Littleton* (§§ 378 *et seq.*) calls conditional and collateral limitations, "conditions in law." (See *Limitation.*)

executor, A.'s right to the legacy is dependent on a condition precedent, because the performance of it must precede his receipt of the *100l*.

Subsequent. § 7. A condition subsequent is where the event is to destroy or divest an existing right; thus if I give an annuity of *100l.* to C. so long as she shall remain my widow, this creates a condition subsequent, because the performance of it is subsequent to the vesting of the right.

Possible. § 8. Conditions are either possible or impossible. A condition may be impossible either *ab initio* or by matter subsequent, and in the latter case the impossibility may arise from the act of the person who is to perform the condition, of the person for whose benefit it is to be performed, of a stranger, by the act of God (*e.g.* death),<sup>1</sup> by *vis major*, or by a combination of these. Impossibility is either physical ("If A. go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours"<sup>2</sup>), logical ("I give my land to my executors if they shall sell it"),<sup>3</sup> or legal, where the act required is legally inoperative ("If A. shall make a valid will during his minority"<sup>4</sup>).

Impossible. § 9. Conditions are independent when they must be performed without reference to one another, dependent, when one has to be performed before the other need be performed, and mutual, when one party need not perform his condition unless the other is willing and ready to perform his.<sup>5</sup>

Independent. § 10. A condition is illegal when its performance is forbidden by law ("If you kill such a man I will give you ten shillings"),<sup>6</sup> or where it is against some maxim or rule of law (as if I make a conveyance to a man upon condition that he shall not alien the land, this condition is repugnant and against law, and the grantee takes the land absolutely<sup>7</sup>). These divisions are important with reference to the effect of nonperformance of the condition: thus, as a general rule, if a condition precedent is illegal or impossible, the right does not vest at all, while an illegal condition subsequent has no effect.<sup>8</sup> Again, if a condition precedent, which was originally possible, becomes impossible by the act of the person intended to be benefited, the right vests as if the condition had been performed.<sup>9</sup> As to conditions in restraint of marriage, see *Restraint of Marriage*.

Dependent. Mutual. Illegal.

Conditions annexed to realty.

II. § 11. In the old writers, condition is used in the technical sense of a condition annexed to realty, which Coke defines as "a qualitie annexed by him that hath estate, interest, or right to the same, whereby an estate, &c. may either be defeated or enlarged or created upon an incertaine event."<sup>10</sup> As to estates on condition, see *Estate*. Formerly, "condition" included both conditions in the strict sense, and what are now more commonly called conditional limitations, the distinction being that when a freehold estate is limited to cease on a condition, and the condition happens, the person in whose favour the condition is reserved must make an entry or claim, otherwise the estate continues; in the case

<sup>1</sup> Co. Litt. 206 a.

<sup>2</sup> *Ibid.* 206 b; Britton, 62 b.

<sup>3</sup> Dig. xl. 4, fr. 39; Britton, 62 b.

<sup>4</sup> See Co. Litt. 206 b.

<sup>5</sup> Leake, Dig. 345; *Jones v. Barkley*, 2 Doug. 684.

<sup>6</sup> Britton, 62 b.

<sup>7</sup> Co. Litt. 206 b.

<sup>8</sup> Watson, Eq. 1107.

<sup>9</sup> Co. Litt. 206 b; Watson's Comp.

Eq. 1107. See Litt. §§ 355 *et seq.*

<sup>10</sup> Co. Litt. 201 a.



of a conditional limitation, on the other hand, the estate determines ipso facto on the happening of the event, and the remainder or reversion takes effect in immediate possession.<sup>1</sup> (See *Limitation*.) If, however, a leasehold estate is granted on condition, it determines ipso facto on breach of the condition without any entry being required, unless an entry is expressly stipulated.<sup>2</sup>

§ 12. Formerly, a condition was not assignable in any way, but by stat. 32 Hen. 8, c. 34, a condition annexed to a reversion passes on an assignment of the reversion.<sup>3</sup>

As to the apportionment of conditions, see *Apportionment*, § 4.

III. § 13. Condition is also used as equivalent to restriction or stipulation, *e.g.* conditions of sale (*q.v.*).

§ 14. The Land Transfer Act, 1875, provides for the registration, as annexed to registered land, of conditions that the land is not to be built on or put to a particular use, or of any other conditions running with or annexed to land.<sup>4</sup> (See *Covenant*.)

### CONDITIONAL LIMITATION. See *Limitation*.

**CONDITIONS OF SALE.**—When property is to be sold by auction, the terms on which the purchaser is to take it are usually specified in a document called the conditions of sale, copies of which are distributed among intending bidders. In the case of land, houses, &c., the conditions are usually printed with the particulars of sale (*q.v.*); in the case of furniture, books, &c., they are usually printed at the beginning of the catalogue.

Conditions of sale of real property generally contain elaborate provisions as to the title which the purchaser is to accept, and the means by which it is to be proved.<sup>5</sup> On the conclusion of the sale the purchaser signs a memorandum endorsed on the conditions, which thus form a contract of sale.

(See *Title*; *Abstract*.)

**CONDONATION** is forgiveness of a conjugal offence, with full knowledge of all the circumstances; its effect is to restore the offending person to the same position which he or she held before the offence was committed, so that the injured person cannot subsequently seek redress for it by proceedings for a divorce or judicial separation.<sup>6</sup> (See *Revival*.)

**CONDUCT MONEY** is money given to a witness to defray his expenses of coming to, staying at, and returning from the place of trial. A witness is entitled to decline to attend or be sworn until his expenses have been paid or tendered to him.<sup>7</sup>

<sup>1</sup> Co. Litt. 214 b; Fearn, C. R. 15; Leake, Prop. 223.

<sup>2</sup> Co. Litt. 214 b; Leake, 226.

<sup>3</sup> Williams, R. P. 246. See *Entry*.

<sup>4</sup> Sect. 84.

<sup>5</sup> Dart's Vendors and Purchasers, 114, 124 *et seq.*; Davids. Conv. i. 505.

<sup>6</sup> Browne on Divorce, 94.

<sup>7</sup> Archbold, Pr. 322.

**CONFEDERACY**, in political and popular language, is a combination of persons for any purpose. In law, it has the technical meaning of a combination for maintenance, as prohibited by the Ordinance of Conspirators (see *Conspiracy*), while the term conspiracy was appropriated to false and malicious indictments.<sup>1</sup>

**CONFERENCE** is a meeting between a counsel and the solicitor who instructs him (with or without the client), to discuss a question arising out of the business in hand.

Parliamentary.

§ 2. In parliamentary practice, "a conference is a mode of communicating important matters by one house of parliament to the other, more formal and ceremonious than a message, and sometimes better calculated to explain opinions and reconcile differences. By a conference both houses are brought into direct intercourse with each other, by deputations of their own members: and so entirely are they supposed to be engaged in it, that while the managers are at the conference, the deliberations of both houses are suspended."<sup>2</sup> The most usual occasion of a conference is where one house is unable to agree to the amendments made by the other in a bill pending in parliament.

Civil procedure.

**CONFESSION.**—§ 1. In civil procedure, a confession is a formal admission: thus, where a defendant in an action alleges any ground of defence which has arisen after the commencement of the action (*e.g.* the bankruptcy of the plaintiff), the plaintiff may confess the defence, that is, admit its validity, by delivering a confession of defence, which is in the nature of a pleading.<sup>3</sup> Under the old practice, this was called a confession of plea.<sup>4</sup> Such a confession puts a stop to the action, and entitles the plaintiff to his costs up to the defence or plea confessed.<sup>5</sup> § 2. Under the old practice, the defendant in an action of ejectment might confess the action, that is, admit the plaintiff's claim, and so entitle him to judgment, by delivering a notice to that effect;<sup>6</sup> under the new practice, the same result is obtained by the defendant abstaining from delivering a defence.<sup>7</sup> (See *Cognovit*; *Warrant of Attorney*.)

Criminal law.

§ 3. In criminal law, a confession is an admission of guilt, made either judicially, that is, in the course of a judicial proceeding, or not. Judicial confession may operate as an estoppel, and, if plenary, is sufficient to found a conviction, as where a prisoner pleads guilty;<sup>8</sup> an extrajudicial confession, if made freely, is admissible as evidence, but never operates as an estoppel.<sup>9</sup> (See *Plenary*; *Plea*; *Approve*, § 2.)

§ 4. As to confessions to priests, see *Confidential Communications*, § 2.

<sup>1</sup> Wright on Conspiracies, 15.

<sup>2</sup> May, Parl. Pr. 451.

<sup>3</sup> Rules of Court, xx. 3.

<sup>4</sup> Day's C. L. P. Acts, 499.

<sup>5</sup> See *Foster v. Gamgee*, 1 Q. B. D. 666; *Newington v. Levy*, L. R., 5 C. P. 607; 6 C. P. 180.

<sup>6</sup> Day's C. L. P. Acts, 197.

<sup>7</sup> Rules of Court, xxix. 7.

<sup>8</sup> Best on Evidence, 691; Roscoe, Crim. Ev. 39.

<sup>9</sup> Best, 693; Roscoe, 39. Confession seems originally to have been applied especially to an admission by record: thus a villein by confession was one who had confessed himself to be a villein in a court of record. Litt. § 175.

**CONFESSION AND AVOIDANCE.**—A pleading is said to be in confession and avoidance when it confesses (*i. e.*, admits) the truth of an allegation of fact contained in the preceding pleading, but avoids it (*i. e.*, deprives it of effect) by alleging some new matter. Thus if the statement of claim alleges a breach of contract, the defendant may confess and avoid by admitting the breach and alleging that the plaintiff has waived it; so in an action for assault the defendant may plead *son assault demesne* (*q. v.*); or if a defendant in an action on a covenant pleads a release, the plaintiff may reply in confession and avoidance that it was obtained by fraud.<sup>1</sup> (See *Traverse*.)

**CONFIDENTIAL COMMUNICATIONS**, in the ordinary sense of the term, are communications between a party and his solicitor, or between the solicitor and the counsel, made during and with reference to judicial proceedings, or in anticipation or for the purposes of such proceedings. Written communications are privileged from production, and verbal communications and the contents of written communications are privileged from discovery. (See *Discovery*; *Production*; *Privilege*.) § 2. The question whether communications made to spiritual advisers are privileged is one which has never been authoritatively decided, though there is (for obvious reasons) a strong leaning towards allowing the privilege;<sup>2</sup> communications to medical advisers are not protected from disclosure.<sup>3</sup> § 3. Communications between husband and wife are protected from disclosure, even after they are separated by divorce or death.<sup>4</sup>

Spiritual  
and medical  
advisers.

**CONFIRMATION**, in conveyancing, “is a conveyance of an estate or right in esse, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased.”<sup>5</sup> Thus where a person is disseised of land and executes a deed of confirmation to the disseisor, the estate of the latter becomes absolute.<sup>6</sup> A confirmation is also sometimes used when there has been a previous conveyance of the property to the grantee.<sup>7</sup> (See *Adopt*; *Affirm*; *Conveyance*; *Rectify*.)

**CONFIRMATION OF SALES ACT, 1862.** See *Minerals*.

**CONFISCATION**, in international law, is where a state seizes property belonging to another state, or to its subjects, and appropriates it. Confiscation is the punishment for carrying contraband of war (*q. v.*, and *Preemption*);<sup>8</sup> or for attempting to carry supplies to a place besieged or blockaded.<sup>9</sup>

Forfeiture as a punishment for smuggling, &c. is sometimes called confiscation.

(See *Blockade*; *Search*; *Condemnation*; *Forfeiture*.)

<sup>1</sup> See *Hall v. Eve*, 4 Ch. D. 341; *Smith's Action*, 66.

<sup>2</sup> Best on Evidence, 727 *et seq.*

<sup>3</sup> *Ibid.* 726.

<sup>4</sup> *Ibid.* 732; stat. 16 & 17 Vict. c. 83.

<sup>5</sup> Co. Litt. 295 b.

<sup>6</sup> Litt. § 519. For the varieties of con-

firmations, see Shepp. Touch. 311, and for the differences between a confirmation and a release (*q. v.*), see Littleton, §§ 516 *et seq.*

<sup>7</sup> Davids. Conv. i. 72.

<sup>8</sup> Manning's Law of Nations, 352.

<sup>9</sup> *Ibid.* 400.

**CONFLICT OF LAWS.** See *International Law*.

**CONFRONTATION.**—In matrimonial suits in the Probate, Divorce and Admiralty Division of the High Court (other than suits for dissolution) the respondent may be ordered to attend in Court while the witnesses are giving evidence, so as to be confronted with them (*i. e.* pointed out to them) for the purpose of identification.<sup>1</sup>

**CONFUSION OF BOUNDARIES.** See *Boundaries*, §§ 2, 3.

For election  
of bishop.

**CONGÉ D'ÉLIRE** (permission to elect) is a licence from the crown to the dean and chapter of a bishopric, allowing them to proceed to the election of a bishop; it is accompanied by a letter missive from the crown, containing the name of the person whom he would have them elect, "by virtue of which licence the dean and chapter shall with all speed in due form elect and choose the said person named in the letters missive, and none other, and if they delay their election above twelve days after such licence or letters missive to them delivered, the king shall nominate and present, by letters patent under the great seal, such person as he shall think convenient."<sup>2</sup>

For election  
of deans.

§ 2. A congé d'élire appears to be also used in the election of deans on some of the old foundations.<sup>3</sup>

**CONGEABLE** in the old books means lawful or allowable; "disseisin is properly where a man entreth into any lands or tenements where his entry is not congeable, and ousteth him which hath the freehold," &c.<sup>4</sup>

**ETYMOLOGY.**—Old French: *congé*, a temporary dispensation or liberation from a duty; from the Latin *commeatus*, furlough.<sup>5</sup>

**CONJUGAL RIGHTS.** See *Restitution of Conjugal Rights*.

**CONNIVANCE** is where a person knows that a wrongful act is being done, and either assists or does not interfere to prevent. Connivance may take the form of fraud or conspiracy (*q. v.*).

In divorce.

§ 2. In the law of divorce, connivance is where a person has consented or acquiesced in an adultery committed by his or her wife or husband. It is a defence to a petition for dissolution of marriage presented by the conniving party.<sup>6</sup> (See *Accessory*; *Condonation*; *Conspiracy*.)

**CONSANGUINITY** is relationship by descent, either lineally, as in the case of father and son, or collaterally, by descent from a common ancestor: thus, cousins are related by collateral consanguinity, being descended from the same grandfather or grandmother. The prohibited degrees of consanguinity, namely, those which prevent marriage between

<sup>1</sup> Browne on Divorce, 259.

<sup>2</sup> Stat. 25 Hen. 8, c. 20; Phill. Eccl. Law, 42; Bl. Comm. i. 379.

<sup>3</sup> Phill. 154.

<sup>4</sup> Litt. § 279.

<sup>5</sup> Littré, Dict. s. v.

<sup>6</sup> Browne on Divorce, 88.

persons so related, are set forth in the Book of Common Prayer.<sup>1</sup> (See *Affinity*; *Next-of-Kin*; *Half Blood*; *Cosinage*.)

ETYMOLOGY.]—Latin: *consanguineus*, related by the same blood; in Roman law *consanguinei* = brothers and sisters descended from the same father, as opposed to *uterini* = brothers and sisters descended from the same mother.

**CONSENT.**—§ 1. Where there is a protector of a settlement of Settlement. entailed lands, the tenant in tail cannot absolutely bar the entail without the consent of the protector; this consent may be contained either in the disentailing assurance or in a separate deed.<sup>2</sup> Where the Lord Chancellor is protector (which happens when the person who would otherwise be protector is a lunatic) the consent consists of an order authorizing the disentailment.<sup>3</sup>

§ 2. In civil procedure, an order to which the parties consent cannot Practice. be appealed against; but if the consent of any party is obtained by fraud or the like, the order may be set aside: in such a case there is in truth no consent. And a consent may be withdrawn at any time before the order is perfected.

**CONSEQUENTIAL.** See *Damages*.

**CONSERVANCY.** See *Conservators*.

**CONSERVATORS OF THE PEACE.**—Before the present system of appointing justices of the peace was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these some had this power annexed to other offices held by them; others had it merely by itself. Those that were conservators of the peace *virtute officii* still continue, including the crown, the lord chancellor, the judges of the Queen's Bench Division and the coroners and sheriffs within their respective jurisdictions. The other kind of conservators are superseded by the modern justices of the peace.<sup>4</sup>

**CONSERVATORS OF RIVERS** are commissioners or trustees in whom the control of a certain river is vested by act of parliament. It is often a question whether the act gives the conservators the right of navigation or passage only, or whether it also vests in them the soil of the river and its banks. They generally have power to make locks, towing-paths and similar works, to levy tolls, and to make and enforce bye-laws for regulating the navigation and use of the river.<sup>5</sup>

§ 2. The conservancy of the river Thames is regulated by the acts 20 & 21 Vict. cap. cxlvii; 29 & 30 Vict. c. 89; 30 & 31 Vict. cap. ci; 33 & 34 Vict. cap. cxlix.<sup>6</sup>

<sup>1</sup> Browne on Divorce, 72; Bl. Comm. i. 434; Steph. Comm. ii. 194, 242.

<sup>2</sup> Fines and Recoveries Act, ss. 42 *et seq.*

<sup>3</sup> *Ibid.* ss. 48, 49. As to consents under the Settled Estates Act, 1877, see

ss. 24 *et seq.*, 49; Order 5 *et seq.*

<sup>4</sup> Steph. Comm. ii. 642.

<sup>5</sup> See Coulson and Forbes on Waters, 80 *et seq.*

<sup>6</sup> *Ibid.* 451 *et seq.*

**CONSIDERATION.**—§ 1. The consideration in a contract, conveyance or other legal transaction, is an act or promise by which some right, interest, profit or benefit accrues to one party, or by which some forbearance, detriment, loss or responsibility is given, suffered or undertaken by the other, and in return for which the party who receives the benefit, or for whom the detriment is suffered, promises or conveys something to the other.<sup>1</sup> Thus, in a contract of sale, the money paid or agreed to be paid by the purchaser is the consideration to the vendor, and the property sold is the consideration to the purchaser. So, if a person foregoes a legal right, that is a detriment to him which may form a consideration for a payment or promise by the person against whom he might have enforced the right. The consideration is said to move from the party who produces the benefit or suffers the detriment of which it consists, and to move to the other party; every other person is said to be a stranger to it. Thus, where A. being indebted to B. in 70*l.*, made an arrangement with C. that C. should pay the money to B., and that A. in return should convey a house to C., in consideration of which C. promised to pay the 70*l.* to B., it was held, in an action brought by B. to enforce C.'s promise, that B. was a stranger to the consideration, and therefore could not recover.<sup>2</sup> Whether the person receiving the consideration derives any benefit from it, or whether it is adequate, is immaterial; thus, if a man who owns some goods allows another to weigh them, this being an inconvenience or detriment suffered by him is a good consideration for the other's promise to give them back in as good condition as before.<sup>3</sup> § 2. The doctrine of consideration is of importance in many ways; thus, an action does not lie for breach of a contract not under seal, unless there is a consideration between the parties (see *Contract*; *Voluntary*); nor will specific performance of a gratuitous contract be enforced, even if it is under seal;<sup>4</sup> and although no consideration is required for the validity of a complete declaration of trust or a complete transfer of any legal or equitable interest in property, yet an incomplete voluntary gift creates no right which can be enforced;<sup>5</sup> thus, if a person expresses his intention of voluntarily giving another an interest in property, but does not effect his intention by absolutely parting with it, no trust is created.<sup>6</sup> (See also *Voluntary*; *Bill of Exchange*, § 3.)

In dealing with the various kinds of considerations it will be convenient to assume that in each case the consideration forms part of a contract; that is, is in return for a promise, although, as already explained, it may form part of a conveyance.

I. With reference to its connection with the promise in regard to time, a consideration may be of various kinds.

§ 3. A past or executed consideration is some act performed, or some

Past or  
executed.

<sup>1</sup> *Currie v. Misa*, L. R., 10 Ex. p. 162; Pollock on Contract, 147. Compare the definitions in Evans's Pothier, and in Chitty on Contracts, 16; Leake on Contracts, 10; Smith, L. C. 141, 188.

<sup>2</sup> *Crowe v. Rogers*, Str. 592; Chitty, 52.

<sup>3</sup> *Bainbridge v. Firmstone*, 8 A. & E. 743.

<sup>4</sup> Pollock, 164.

<sup>5</sup> *Ibid.* 165.

<sup>6</sup> *Warriner v. Rogers*, 16 Eq. 340.

value given before the making of the promise.<sup>1</sup> Thus, if A. does an act for B.'s benefit, and B. afterwards promises to pay him 50*l.* in return, the consideration for B.'s promise is executed. The question is of importance, because such a consideration is not sufficient to support the subsequent promise, unless a previous request can be shown or implied by law, as if A. requested B. to do the act, and afterwards promised him the 50*l.*; in such a case the same result is produced as if the promise had preceded the act.<sup>2</sup> (See *Request; Promise; Contract.*)

§ 4. The consideration and the promise may be simultaneous; that is, the promise may be given and the consideration executed at the same time; as where A. pays B. ready money in consideration for B.'s promise to deliver him goods at a future time. Simultaneous.

§ 5. The consideration may be executory; that is, to be performed at some future time. An executory consideration may be either an act which the promisee is bound to perform (in which case the contract consists of mutual promises; see *Promise*), or simply an act which he may do or not at his own pleasure: thus where A. promises B. that if he will sell goods to C., A. will guarantee payment of the price; here B. is not bound to supply goods to C., and until he does so he has no claim on A.; but, as soon as he supplies goods to C., that forms a consideration for A.'s promise. (See *Guarantie; Letter of Credit.*) Executory.

§ 6. A continuing consideration is one which is part executed and in part executory, as where A., in consideration of his being tenant to B., undertook to manage the farm in a husbandlike manner.<sup>3</sup> Continuing.

II. With reference to the nature of the act of which it consists:—

§ 7. “A good consideration is such as that of blood, or of natural love and affection, being founded on motives of generosity, prudence, and natural duty;”<sup>4</sup> hence a “good” consideration is sometimes opposed to a “valuable” consideration, *i.e.*, one by which some benefit accrues to the promisor or some detriment to the promisee as above explained. It seems that the only purpose for which a good consideration in this sense is effectual in law is to support a covenant to stand seised to uses<sup>5</sup> (*q. v.*) and at the present day, covenants to stand seised being unknown, “good” and “valuable,” as applied to considerations, are synonymous terms.<sup>6</sup> “Good” and  
“valuable.”

§ 8. A promise founded on an illegal consideration is void, whether the consideration is wholly or partly illegal.<sup>7</sup> (See *Illegal; Unlawful.*) Illegal.

§ 9. When a consideration does not produce the advantage which was contemplated by the parties, it is said to have failed. Where a person has paid money on the strength of a consideration which entirely fails, he may, in some cases, recover it back: thus if A. sells goods which are not his own to B., and the true owner subsequently claims them, B. may recover the price which he paid to A., as having been paid for a consideration which has failed.<sup>8</sup> Failure of  
consideration.

<sup>1</sup> Chitty on Contract, 48.

<sup>2</sup> *Lampleigh v. Braithwaite*, Hob. 106; Smith's L. C. 141.

<sup>3</sup> Chitty, 51.

<sup>4</sup> Bl. Comm. ii. 297.

<sup>5</sup> *Ibid.* 337; Shep. Touch. 512; Hayes's Introd. to Convey. 102; Leake on Contracts, 312, n. (e).

<sup>6</sup> Chitty, 18.

<sup>7</sup> Leake, 322, 409.

<sup>8</sup> Leake, 60.

**CONSISTORIAL or CONSISTORY COURT** is the principal ecclesiastical court of a diocese, in which the chancellor or official principal sits as judge.<sup>1</sup> (See *Diocesan Courts*.)

**CONSOLIDATED FUND** comprises the produce of the customs, excise, stamps, and other taxes, with a few other sources of revenue, and it constitutes almost the whole of the ordinary public income of the United Kingdom. On it are charged the interest of the national debt, the civil list, &c.<sup>1</sup> (See *Appropriation*, § 6.)

**CONSOLIDATED ORDERS** are the orders regulating the practice of the Court of Chancery, which were issued in 1860 in substitution for the various orders which had previously been promulgated from time to time. Some of the Consolidated Orders have been abrogated by the provisions of the Judicature Acts and the new Rules of Court, but many of them are still in force. (See *Chancery*.)

Several  
defendants.

**CONSOLIDATION OF ACTIONS** is of three kinds—§ 1. Under the practice of the superior courts of common law, if several actions were pending between the same parties for the same cause of action, or brought by the same plaintiffs against different defendants for the same, or substantially the same, cause of action, the Court would stay proceedings in all but one action. The application was most frequently made in actions against underwriters on a policy of insurance; in such a case, as the question is the same against each underwriter, it was usual for the defendants to move for what was called the consolidation rule—a rule which was invented by Lord Mansfield, and the effect of which was to bind the defendants in all the actions by the verdict in one, the proceedings in the others being stayed. The order did not bind the plaintiff by the result of the selected action, and therefore if he failed in that action he might proceed in the others; if he was successful, the defendants were jointly liable to contribute to the payment of the amount claimed and the plaintiff's costs.<sup>3</sup> This practice has been adopted by the Rules of Court under the Judicature Act, and is now applicable to actions pending in any division of the High Court.<sup>4</sup>

Several  
plaintiffs.

§ 2. Another mode of consolidation is that applicable to the case of several actions being brought by different plaintiffs against the same defendant for the same cause of action; here the Court will, on the application of the plaintiffs, make one of the actions a test action by enlarging the time for the plaintiffs to proceed with the other actions until the test action has been decided, they consenting to be bound by the result of that action; the defendant is not so bound, and therefore, if he is unsuccessful in the test action, he may nevertheless defend the

<sup>1</sup> Phillimore, Eccl. Law, 1202. As to the practice of the Consistory Court of London, see Reg. Gen. 1877 (L. R., 2 P. D. 373).

<sup>2</sup> Steph. Comm. ii. 578; H. Cox, Inst. 189.

<sup>3</sup> Archbold's Pr. 1085; Coe's Pr. 126.

<sup>4</sup> Rules of Court, li. 4.



others when they are proceeded with.<sup>1</sup> If the selected action fails to decide the real issue between the parties (as if the plaintiff in that action suffers judgment to go by default against him), the Court will substitute another action as the test action.<sup>2</sup> (See *Action*, § 5.)

§ 3. Under the practice of the Court of Chancery and the Chancery Division of the High Court, two suits or actions are said to be consolidated when they are ordered to be carried on as one action, the parties to one of them being distributed as plaintiffs or defendants in the other.<sup>3</sup> Chancery actions.

§ 4. In Privy Council practice, where there are several appeals against one judgment or relating to the same subject-matter, the Court will frequently permit them to be consolidated, and to come on for hearing on one printed case on each side, and a single appendix.<sup>4</sup> Privy Council appeals.

**CONSOLIDATION OF SECURITIES.**—If the owner of different properties mortgages them to one person separately for distinct debts, or successively to secure the same debt or the same debt with further advances, and allows the time for redemption limited by all the mortgages to go by, then the mortgagee may insist that one security shall not be redeemed alone. Thus if A. mortgages Whiteacre to B. to secure 500*l.*, and afterwards mortgages Blackacre to B. to secure 1,000*l.*, A. cannot redeem (that is, pay off) the mortgage on Whiteacre without also redeeming the mortgage on Blackacre. Similarly where A. mortgages Whiteacre to B. and Blackacre to C., and C. afterwards purchases B.'s mortgage, A. cannot redeem one without redeeming the other. The doctrine has been carried to such an extent that if A. assigns the equity of redemption in Whiteacre to X., then X. cannot redeem Whiteacre without also redeeming Blackacre.<sup>5</sup> The rule, however, would not apply if the equity of redemption in Whiteacre was assigned to X. before A. mortgaged Blackacre,<sup>6</sup> and, as already stated, it does not apply except where the time for redemption of each mortgage has gone by.<sup>7</sup> The doctrine also does not apply to registered bills of sale of chattels.<sup>8</sup>

"Consolidation" must not be confounded with "tacking," although they are sometimes spoken of as synonymous.

**CONSPIRACY** consists in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means, whether the act is committed or not.<sup>9</sup> (See *Overt Act*.)

I. § 2. In private law conspiracy is a tort in the nature of trespass, for which the injured person has an action for the damage caused to him, as where several persons conspire to falsely indict a man of a crime.<sup>10</sup> (See *Malicious Prosecution*.) A combination among several persons to affect

<sup>1</sup> *Amos v. Chadwick*, 4 Ch. D. 869.

<sup>2</sup> *Robinson v. Chadwick*, 7 Ch. D. 878;  
*Amos v. Chadwick*, 9 Ch. D. 459.

<sup>3</sup> See *In re Wortley*, 4 Ch. D. 180.

<sup>4</sup> *Macpherson*, Privy C. Pr. 91.

<sup>5</sup> *Fisher on Mortgage*, ii. 630; *Williams*, R. P. 441; *Cummins v. Fletcher*, 14 Ch. D. 699. It is hoped that this absurd and unjust doctrine will shortly be abolished.

<sup>6</sup> *Mills v. Jennings*, 13 Ch. D. 639.

<sup>7</sup> *Cummins v. Fletcher*, *supra*.

<sup>8</sup> *Chesworth v. Hunt*, 5 C. P. D. 266.

<sup>9</sup> *Mulcahy v. Reg.*, L. R., 3 H. L. at p. 317; *Wright on Conspiracies*, where the criminal law of conspiracy is historically explained.

<sup>10</sup> *Finch*, Law, 305; *Steph. Comm.* iii. 384.

the market price of a commodity by unlawful means (*e.g.* fictitious purchases or sales) would also, no doubt, give a person injured thereby a right of action against the conspirators.<sup>1</sup>

## Criminal.

II. § 3. In criminal law a conspiracy is a misdemeanor<sup>2</sup> (*q. v.*); some conspiracies, however, are subject to special punishments, *e.g.* a conspiracy to murder a person, the maximum punishment for which is ten years' penal servitude.<sup>3</sup> Combinations among workmen to raise the rate of wages were formerly conspiracies, being in restraint of trade, but this is no longer so.<sup>4</sup> It has been said that, perhaps, few things are left so doubtful in the criminal law as the point at which a combination of several persons in a common object becomes unlawful.<sup>5</sup>

## High constables.

**CONSTABLES** are inferior officers of the peace, and are of various kinds. § 1. The high constables are appointed at the courts leet of the franchise or hundred over which they preside, or in default of such an appointment, then by the justices at their special sessions. Their duty seems to be to keep the peace within the hundred: but the office is in process of abolition.<sup>6</sup> § 2. The principal duty of petty or parish constables (who are appointed by the justices in petty sessions) is the preservation of the peace within their parish or township; they also have assigned to them the service of the summonses and the execution of the warrants of the justices of the peace. In many places they have been superseded by the establishment of a county police, who are under the superintendence of a chief constable appointed by the justices.<sup>7</sup>

## Petty or parish constables.

## Borough constables.

In boroughs subject to the Municipal Corporations Act (5 & 6 Will, 4, c. 76), the constables are appointed by the watch committee of each borough.

§ 3. Special constables are persons appointed (with or without their consent) by the magistrates to execute warrants on particular occasions, as in the case of riots, &c.<sup>8</sup>

**ETYMOLOGY.**—Low Latin *constabularius*, from *stabula*, a stable, the first constables having been originally masters of the king's stables and afterwards commanders of troops in time of war or disturbance, especially on the borders of the kingdom.<sup>9</sup>

**CONSTITUENT** is a person who appoints another to do some act for him by power of attorney (*q. v.*). He is also called a principal (*q. v.*).

**CONSTRUCTION** is the process of ascertaining the meaning of a written document. "Construction of law" is a fixed or arbitrary rule, by which a result follows from certain acts or words without reference to the intention of the parties: thus, "if a tenant for life maketh a lease generally,

<sup>1</sup> See *Rex v. De Berenger*, 3 M. & S. 67; *Reg. v. Aspinall*, 1 Q. B. D. 730; 2 Q. B. D. 48.

<sup>2</sup> Steph. Comm. iv. 238; Steph. Crim. Dig. 29, 87; *Reg. v. Aspinall*, *supra*.

<sup>3</sup> Stat. 24 & 25 Vict. c. 100, s. 4.

<sup>4</sup> Trades Union Act, 1871; see, however, 34 & 35 Vict. c. 32.

<sup>5</sup> Russell on Crimes, iii. 109.

<sup>6</sup> Steph. Comm. ii. 652; stat. 32 & 33 Vict. c. 47.

<sup>7</sup> Steph. 654 *et seq.*; stat. 35 & 36 Vict. c. 92.

<sup>8</sup> Steph. 657. As to other meanings of the word constable, see Co. Litt. 234 a.

<sup>9</sup> Madox, Ex. 39 *et seq.*

this shall be taken by construction of law an estate for his own life that made the lease; for if it should be a lease for the life of the lessee, it should be a wrong to him in the reversion.”<sup>1</sup> Sometimes, however, “construction of law” simply means “implication:” thus, “if I grant to you, that you and your heires, or the heires of your body, shall distreine for a rent of forty shillings within my mannor of S., this by construction in law shall amount to a grant of a rent out of my mannor of S. in fee simple or fee tail.”<sup>2</sup> (See *Implication*.)

**CONSTRUCTIVE** denotes (i) that a right, liability or status has been created by the law without reference to the intention of the parties, as in the case of a constructive trust or constructive notice (see *Notice*; *Trust*), or (ii) that a transaction or operation has not really taken place, but that something equivalent has. Thus, where delivery of goods is required, if the goods “be ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, for instance, by the delivery of the key of the warehouse in which goods are lodged, or of some other indicia of property, such as the bill of lading.”<sup>3</sup> This is called constructive delivery. § 2. So a chattel not fixed to land is sometimes for certain purposes considered as being annexed to it, as where a miller “takes the millstone out of the mill, to the intent to pick it to grind the better, although it is actually severed from the mill, yet it remains parcel of the mill as if it had always been lying upon the other stone, and by consequence, by lease or conveyance of the mill, shall pass with it.”<sup>4</sup> This is called constructive annexation. (See *Implied*; *Quasi-contract*.)

**CONSTRUCTIVE FRAUD.** See *Fraud*.

**CONSTRUCTIVE LOSS.** See *Loss*.

**CONSTRUCTIVE NOTICE.** See *Notice*.

**CONSTRUCTIVE TRUST.** See *Trust*.

**CONSULS** are a class of diplomatic agents or representatives of a foreign country. Their customary functions are to give advice and assistance to citizens of the state they represent, and to uphold their interests by due representations in the proper quarter, and to certify and attest acts and documents.<sup>5</sup> (See *Exequatur*.)

**CONSULTATION** is a writ whereby a cause which has been wrongfully removed by prohibition out of an Ecclesiastical Court to a Temporal

<sup>1</sup> Co. Litt. 183 a. As to the existing law on the subject of leases granted by tenants for life, see *Lease*.

<sup>2</sup> Co. Litt. 147 a.

<sup>3</sup> Smith's Merc. Law, 492; *Chaplin v. Rogers*, 1 East, 192.

<sup>4</sup> *Liford's Case*, 11 Co. 50; Smith's L. C. ii. 184.

<sup>5</sup> Manning's Law of Nations, 113.

Court is returned to the Ecclesiastical Court.<sup>1</sup> § 2. Consultation also signifies a meeting between counsel to discuss a question or to settle a document. (See *Conference*.)

**CONTEMNOR—CONTEMPT.**—§ 1. Contempt of Court is where a person who is a party to a proceeding in a Court of Record fails to comply with an order made against him or an undertaking given by him, or where a person, whether a party to a proceeding or not, does any act which may tend to hinder the course of justice or show disrespect to the Court's authority. Thus it is a contempt of Court to attempt by threats to induce a judicial officer to depart from the course of his judicial duties; to attempt to prevent a party from conducting his case in a proper manner; or to publish, while a cause is pending, comments upon the evidence which are calculated to injure the parties' cases, or to create ill-feeling against the witnesses. It is also a contempt to remove a ward of Court from the custody of the person with whom such ward has been residing under the authority of the Court, or to marry a ward of Court without the sanction of the Court.<sup>2</sup>

§ 2. A person committing a contempt of Court is called a contemnor.

§ 3. Contempt of Court is an offence punishable summarily by fine or imprisonment or both. (See *Attachment*, § 4; *Committal*.) Moreover, where a party to a proceeding is guilty of contempt of Court, he cannot, as a general rule, make any application to the Court while he is in contempt,<sup>3</sup> unless it is required for the purpose of his defence.<sup>4</sup>

§ 4. The contemnor is said to clear or purge his contempt when he expresses his contrition and submits himself to the Court.<sup>5</sup>

(See *Committal*; *Attachment*.)

**CONTEMPT OF PARLIAMENT.**—Whatever obstructs or tends to obstruct the due course of proceeding of either House of Parliament, or grossly reflects on the character of a member of either House, or imputes to him what it would be a libel to impute to an ordinary person, is a contempt of Parliament, and thereby breach of privilege.<sup>6</sup> Commitment with or without fine is the ordinary punishment inflicted, but a libel on either House may also be dealt with by prosecution in the Criminal Courts.<sup>7</sup>

**CONTENTIOUS.**—Probate business is divided into contentious and non-contentious, the former including actions for proving a will in solemn form or revoking a probate already granted (see *Action*, § 10), while the

<sup>1</sup> Phillimore, *Eccl. Law*, 1439.

<sup>2</sup> Daniell's *Ch. Pr.* 937; *Bl. Comm.* iv. 283. Inferior courts of record (such as county courts) appear to have power only over contempts *in facie curiæ*, that is, committed in the court itself (*Reg. v. Lefroy*, *L. R.*, 8 Q. B. 131). The distinction between ordinary contempts in process (as where a defendant in Chancery failed to put in his answer within the proper time) and special contempts (such as those above

mentioned) (Daniell, 431) seems no longer to exist.

<sup>3</sup> Daniell, 427.

<sup>4</sup> *Haldane v. Eckford*, *L. R.*, 7 Eq. 425.

<sup>5</sup> Daniell, 938.

<sup>6</sup> Shortt on Copyright, 344, 351, citing *Beaumont v. Barret*, 1 Moore's P. C. C. 76, and Holt's *Law of Libel*, 118; *Steph. Comm.* ii. 344.

<sup>7</sup> Shortt, 344.

non-contentious business consists of the grant of probates and letters of administration in common form. (See *Grant*; *Probate*; *Warning*.)

**CONTESTATION OF SUIT**, in an ecclesiastical cause, is that stage of the suit which is reached when the defendant has answered the libel by giving in an allegation (*q. v.*). If he confesses the libel, he is said to contest the suit affirmatively: if he denies it, he is said to contest the suit negatively, or he may give a qualified affirmative or negative by confessing the whole or part of the libel and adding other facts.<sup>1</sup> (See *Confession and Avoidance*.)

The term is a translation of *litis contestatio*, and is taken from the Roman law.

**CONTINGENCY—CONTINGENT.**—§ 1. An estate, interest, right, liability, or obligation is said to be contingent when its existence depends on an uncertain event, which is called a contingency. Thus, if A. guarantees B. the payment of a sum by C. the right of B. to receive, and the liability of A. to pay, the amount guaranteed, are contingent on the default of the principal debtor, C. § 2. The term is chiefly used in conveyancing as applied to remainders (*q. v.*). Where an estate is limited with substitutionary or alternative contingent remainders (as to A. for life, and if he should leave issue male then to such issue male in fee, but if he should die without issue male then to B. in fee), this is called a contingency with a double aspect.<sup>2</sup>

**CONTINUAL CLAIM.**—Under the old law, if a man had a right of entry on land he might prevent this right from being tolled or taken away by the person in possession dying seised of the land, if he made "continual claim" to the land, that is, if at intervals of a year and a day he either entered on the land, or, in case of threatened violence, went as near the land as he could and by word claimed the land to be his. The result of making continual claim was that if the person seised died within a year and a day after the claim, the claimant could enter on the heir, instead of being put to his action.<sup>3</sup>

The doctrine of continual claim was abolished by stat. 3 & 4 Will. 4, c. 27, ss. 10, 11. (See *Entry*.)

**CONTINUANCE.**—In the old common law practice, after issue or demurrer was joined in an action, as well as in some of the previous stages of the proceedings, a day was from time to time given and entered on the record for the parties to appear. The giving of this day was called a continuance, because thereby the proceedings were continued without interruption from one adjournment to another. The entry of continuances was abolished in 1833.<sup>4</sup> (See *Puis darrein Continuance*.)

**CONTINUANDO.**—In an action of trespass under the old practice, when the trespass was of a continuing nature (*e. g.* spoiling or consuming a man's herbage with cattle), the declaration might allege the injury to have been committed by continuation from one given day to another, instead of the plaintiff being compelled to bring separate actions for each day's separate offence: this was called laying the action with a *continuando*.<sup>5</sup>

<sup>1</sup> Phill. Eccl. Law, 1255; Rogers, Eccl. Law, 720.

<sup>2</sup> Fearne, Cont. Rem. 225, 373; Williams on Settlements, 207.

<sup>3</sup> Litt. §§ 414—422.

<sup>4</sup> Bl. Comm. iii. 316.

<sup>5</sup> *Ibid.* iii. 212.

**CONTRABAND OF WAR**, in international law, is the name given to such articles as may not be carried by a neutral to a belligerent, because they are calculated to be of direct service to him in carrying on war. The question whether certain goods (other than munitions of war, as to which there is no question) are or are not contraband depends partly on the practice of each nation, and partly on stipulations in treaties.<sup>1</sup> (See *Preemption* ; *Confiscation*.)

**CONTRACTS** are of various kinds.

I. § 1. With reference to the modes of their formation, contracts are generally divided into three kinds: simple, or parol contracts, specialty contracts, or contracts under seal, and contracts of record.<sup>2</sup>

Simple or  
parol.

A. Simple or parol contracts are of two kinds, according as they arise from agreement between the parties, or from implication of law.

Arising from  
agreement.

1. § 2. A simple contract arising from agreement is where two (or more) persons agree that one of them is to do or not to do some particular thing in consideration of something done or to be done by the other.<sup>3</sup> "Contract" therefore differs from "agreement" in the primary sense of that word in including, in addition to the unity of intention and the juridical nature of the subject-matter constituting a simple agreement, the incidents of one of the parties being bound to a future performance or forbearance, and of the other party doing or agreeing to do something in return. On the side of the party so bound to a future performance or forbearance, the expression of his willingness or intention to do it is called a promise (*q. v.*), and the performance or forbearance done or promised by the other party is called the consideration for his promise. Thus, if A. agrees with B. that he will sell B. goods, and B. pays him 5*l.* in respect of them, this is a contract of sale; there is a unity of intention between the parties: A. promises to deliver the goods to B. in consideration of B.'s paying him 5*l.*<sup>4</sup> (See *Promise* ; *Request* ; *Consideration*.)

Express and  
implied.

§ 3. Simple contracts created by agreement are divided, according to the manner in which the agreement appears, into express and implied. Thus, if A. says to B., "Will you sell me your horse for 50*l.*?" and B. says, "I will," this is an express contract; but if I order goods of a tradesman without promising to pay for them, my contract to do so is implied. (See *Express* ; *Implied*.) "Implied contracts" must not be confounded with "contracts implied in law" (*infra*, § 5), although the terms are sometimes used interchangeably.<sup>5</sup>

Written and  
verbal.

§ 4. Simple contracts are also divisible into contracts in writing and verbal contracts. Contracts are put into writing either voluntarily, or in

<sup>1</sup> Manning's Law of Nations, 352; Naval Prize Act, 1864.

<sup>2</sup> Chitty on Contracts, 2. In *Rann v. Hughes* (7 T. R. 370, 3 Burr. 1672), it is said "that all contracts are by the laws of England distinguished into agreements by specialty and agreements by parol." If English law did not include contracts of record and quasi-contracts among true contracts as it does, this would be a far better

classification than the ordinary one, which is that given in the text. (See *Obligation* ; *Quasi-contract*.)

<sup>3</sup> Chitty, 8.

<sup>4</sup> Leake on Contract, 8 *et seq.* ; Pollock on Contract, 5 *et seq.*

<sup>5</sup> Leake, 12; Chitty, 55; Bl. Comm. ii. 443; *Marzetti v. Williams*, 1 B. & Ad. 415.

pursuance of a rule of law, as in the case of bills of exchange and contracts falling within the Statute of Frauds and Tenterden's Act (*q. v.*). In either case the writing is the only admissible evidence of the contract, although extrinsic evidence is admissible for various purposes, *e.g.* to identify the parties and the subject-matter of the contract, or to show that it was made subject to usages of trade, &c.<sup>1</sup>

2. § 5. Simple contracts arising independently of agreement, or contracts implied in law, exist in certain cases where an obligation is created by law for the purpose of setting the parties right—where one of them has suffered loss by doing something for the benefit of the other, or where one of them has wrongfully or by accident gained an advantage over the other. The following are the most important examples:—§ 6. If A., being compelled by law, has paid money which B. is ultimately liable to pay, A. may recover it from B. under an implied contract to repay it; as if an executor has been compelled to pay legacy duty for which the legatee is ultimately liable.<sup>2</sup> This is called an action for *money paid* by the plaintiff for the use of the defendant at his request. § 7. Where a person does something for another without having been requested by him to do it, and the latter adopts and takes the benefit of the act, the law implies a contract by him to pay the reasonable value of the other's services; this is called acceptance of an executed consideration.<sup>3</sup> § 8. If A. wrongfully takes goods from B. and sells them, or has obtained money from B. by fraud, or by B.'s mistake, or the like, B. may sue A. for the amount on an implied contract by A. to pay it to him; this is called an action for *money had and received* by the defendant for the use of the plaintiff.<sup>4</sup> These forms of actions seem to have been invented partly to give a remedy which would not otherwise have been available at common law, partly because the procedure in an action of assumpsit (*q. v.*) was often more convenient than that in an action of debt or tort.

B. § 9. A contract under seal, or specialty contract, is created by the execution of a deed binding the party or parties executing it to a future act or forbearance. (See *Deed*.) Such a contract necessarily involves the element of agreement, but it derives its legal effect solely from the formality of sealing and delivery, and not from the mere fact of agreement;<sup>5</sup> it also involves the element of a promise (as opposed to a conveyance, appointment, &c.), and in these two points a contract under seal resembles a simple contract, but they differ in the important respect that no consideration is required to give validity to a contract under seal as between the parties to it. (See *Consideration*, § 2.)<sup>6</sup> As regards its effects, also, a contract under seal differs in some respects from a simple contract. (See *Debt*; *Covenant*; *Estoppel*; *Limitation of Actions*; *Merger*.)<sup>7</sup>

C. § 10. Contracts of record are not really contracts at all, but are

Implied in law.

Specialty contracts.

Contracts of record.

<sup>1</sup> Leake, 103.

<sup>2</sup> Chitty, 587; Leake, 41.

<sup>3</sup> Chitty, 50.

<sup>4</sup> *Ibid.* 558; Leake, 47.

<sup>5</sup> Leake, 76.

<sup>6</sup> Chitty, 5; Leake, 84.

<sup>7</sup> Chitty, 6; Leake, 88.

transactions which, being entered on the records of certain Courts called Courts of Record, are conclusive proof of the facts thereby appearing, and could formerly be enforced by action of law as if they had been put in the shape of a contract.<sup>1</sup> They consist of judgments, recognizances and statutes staple. (See those titles: also *Debt*; *Warrant of Attorney*; *Cognovit*; *Merger*; *Limitation of Actions*.)

II. With reference to their nature, contracts are divisible into the following kinds:—

Personal.

§ 11. A personal contract is one which depends upon the existence, or the personal qualities, skill or services of one of the parties: such as a contract of marriage, or a contract to paint a picture. It follows from the nature of a personal contract that it cannot be assigned,<sup>2</sup> and that it is discharged by the death of the party on whose personality it is founded.<sup>3</sup>

Continuing

§ 12. A continuing contract is one for the performance of several acts from time to time: thus, a contract to maintain and repair railway waggons for seven years is a continuing contract.<sup>4</sup>

Executed.

§ 13. When a contract has been performed by both parties, it is said to be executed, or when it has been performed by one of the parties, it is executed as far as he is concerned, but so long as something remains to be done by one of the parties, it is said to be executory as regards him.<sup>5</sup> When applied to contracts of sale, “executed” and “executory” have peculiar meanings. (See *Sale*.)

Executory.

III. § 14. With reference to their objects, contracts are of innumerable varieties,—such as contracts of agency, service, works, insurance, guarantee, contracts of debt<sup>6</sup> (that is, contracts for the payment in future of money), and contracts of sale, that is, contracts by which one person agrees to sell, and the other to buy, certain property. (See *Sale*.) In the case of a sale of goods, the contract is generally restricted to the question of price, quality and time of delivery; but in the case of land, leaseholds, &c. the contract

<sup>1</sup> This classification,—which by including under the same head true contracts, fictitious contracts and “contracts of record,” puts a considerable strain on the meaning of “contract,”—seems, like many other accepted classifications in English law, to be founded on the old rules of pleading. The action of debt was applicable whenever a certain sum of money was due (*Fitz. N. B.* 115g; *Stephen, Plead.* (5) 15), whether by simple contract, specialty or judgment; in the case of a judgment recovered in a personal action, the plaintiff could not at common law issue execution on it after a year and a day, but was driven to bring a new action on the judgment (*Hiscocks v. Kemp*, 3 Ad. & E. 679; *Foster on Scire Facias*, 6; *Williams v. Jones*, 13 M. & W. 628. See 43 Geo. 3, c. 46, s. 4; *Leake*, 92). “Debt” had the technical sense of an obligation to pay a certain sum of money whether created by

contract or not, and in this sense debts are correctly divided by the old writers into debts of record, debts by specialty, and debts by simple contract. (2 Bl. 465; see *Debt*.) But as a debt, in the usual sense of the word, is an obligation to pay money voluntarily entered into by the debtor, in other words, created by contract, legal writers seem to have considered it necessary to classify contracts as if they were the only source of debts in the technical sense, namely, into contracts of record, by specialty and simple.

<sup>2</sup> Chitty on Contracts, 671.

<sup>3</sup> Leake on Contracts, 642. See also as to the bankruptcy of the contractor, *ibid.* 648.

<sup>4</sup> *In re Sneezum, ex parte Davis*, 3 Ch. D. 463.

<sup>5</sup> Chitty, 136, 591.

<sup>6</sup> 2 Bl. Com. 465; *Smith's Merc. Law*, 532.



generally contains elaborate provisions (principally in the interest of the vendor) as to the investigation of the title, the delivery of the abstract and requisitions (*q. v.*), and the power of the vendor to rescind the contract if he cannot show a good title. When a person enters into a contract for the sale of land or leaseholds without making these stipulations, he is said to have entered into an open contract.<sup>1</sup> (See also *Vendors and Purchasers; Necessaries; Restraint of Marriage; Restraint of Trade.*)

Open contract.

IV. § 15. "Contract" is also sometimes used in a sense similar to that of "agreement" in its primary sense, namely, the common intention of two persons with regard to a certain subject. Thus the phrase "contract of sale" frequently denotes the ordinary transaction of A. delivering goods to B. and B. paying the price to A. at the same instant. Here there is no true contract, for "contract" implies a promise to be performed at a future time (*supra*, § 2). It is in fact merely a sale, not a contract of sale.<sup>2</sup> (See *Sale; Discharge; Release; Performance; Satisfaction.*)

**CONTRIBUTION.**—§ 1. Where one person has sustained some loss which would have fallen upon others as well as upon himself, if it had not been diverted from them at his expense, or where a payment has been made out of one property when it might have been divided between it and another property, payment by the other persons or property of the proportion which they or it ought originally to have borne, is called contribution. § 2. The commonest instance of contribution by persons occurs in the case of co-sureties: thus if A., B. and C. make themselves liable for D. to the extent of 300*l.*, and A. is compelled to pay the whole amount, he is entitled to payment (or contribution) of 100*l.* from B. and 100*l.* from C.<sup>3</sup> There is no right of contribution between wrongdoers.<sup>4</sup> (See *Contributory.*) § 3. The other kind of contribution frequently occurs in the administration of the assets of a deceased person: thus if a testator directs his real estate (value 10,000*l.*) and his personal estate (value 5,000*l.*) to be applied in payment of his debts, which amount to 1,500*l.*, each contributes rateably, *i. e.* 1,000*l.* is paid out of the real estate and 500*l.* out of the personalty. So if several properties are subject to one mortgage, and on the death of the mortgagor they devolve on different persons, each property must contribute rateably towards payment of the mortgage debt according to its value.<sup>5</sup>

Contribution by sureties.

Contribution by estate, &c.

§ 4. A similar kind of contribution occurs in the case of general average, where several persons have to contribute, and the amount of each person's contribution depends on the value of the goods belonging

Contribution in general average.

<sup>1</sup> Greenwood's Conv. 15.

<sup>2</sup> Benjamin on Sales, 227. The old writers more accurately termed the transaction a "bargain and sale" (*q. v.*); Shep. Touch. 224.

<sup>3</sup> Lindley on Partnership, 737; *Dering v. Winchelsea*, 1 Cox, 318; White &

Tudor's L. C. i. 89; *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.*, 5 Ch. D. 569.

<sup>4</sup> *Merryweather v. Nixon*, 8 T. R. 186.

<sup>5</sup> Watson, Comp. Eq. 667; Fisher on Mortgage, ii. 699 *et seq.*

to him in the ship. (See *Average*, § 3; *Adjustment*, § 2; *Contributory*; *Marshalling*; *Exoneration*; *Quasi-contract*; *Subrogation*.)

**CONTRIBUTORY** is a person who, on the winding-up of a company, is bound to contribute to its assets for the payment of its debts.<sup>1</sup> One of the first duties of the Court or the liquidators after the winding-up has been definitely commenced is to settle the list of contributories,<sup>2</sup> a process which involves that of ascertaining the liability of persons included in it.

§ 2. Persons who are contributories in their own right are distinguished from those who are contributories as the representatives of or as being liable for the debts of others—such as the executors, husbands, trustees in bankruptcy, &c. of contributories in their own right.<sup>3</sup>

§ 3. By the Companies Act, 1862, s. 38, as regards companies formed under the act, every person who was a member at the commencement of the winding-up, and every person who had been a member within one year prior to that time, is liable to be put on the list of contributories, but no past member is liable to contribute in respect of any debts of the company contracted after the time at which he ceased to be a member, nor is he liable to contribute at all unless the existing members are unable to satisfy the contributions required of them. In order to carry out these provisions the list of contributories is divided into two parts: the A. list, containing the names of the present members, hence called A. contributories; and the B. list, containing the names of persons who have been members within one year before the commencement of the winding-up, hence called B. contributories.<sup>4</sup> (See *Call*; *Balance Order*.)

A. contribu-  
tories.

B. contribu-  
tories.

**CONTRIBUTORY NEGLIGENCE.** See *Negligence*.

**CONTUMACY** is where any person having been duly cited to appear in an Ecclesiastical Court, or required to comply with the lawful order of any such Court, neglects or refuses to appear, or neglects or refuses to obey the order, or where any person commits a contempt in the face of the Court. Contumacy is punishable by imprisonment.<sup>5</sup> (See *De Contumace capiendo*.)

**CONUSANCE.**—I. § 1. The primary meaning of conusance is acknowledgment. Thus, a fine “sur conusance de droit” was a fine founded on an acknowledgment of right (see *Fine*); so, in an action of replevin the conusance was a plea by which the defendant admitted that he took the goods for which the action was brought. (See *Replevin*.)

II. § 2. Conusance also signifies jurisdiction. “Conusance of pleas” is a franchise granted to an inferior Court, giving it jurisdiction to enter-

<sup>1</sup> Companies Act, 1862, s. 74.

<sup>2</sup> Lindley on Companies, 1289; Thring on Companies, 184, 271. See form of list, general rules under Companies Act, 1862, form 25.

<sup>3</sup> Lindley, 1295.

<sup>4</sup> Thring on Companies, 157.

<sup>5</sup> Stat. 53 Geo. 3, c. 127; Phillimore, Eccl. Law, 1417.

tain certain proceedings. Thus, the universities of Oxford and Cambridge have conusance in certain personal actions. (See *Courts of the Universities*.) When an action for a cause within the conusance of an inferior Court of Record is brought in a superior Court, it may put forward a claim of conusance, and, if it is allowed, the action is remitted to the inferior Court.<sup>1</sup>

III. § 3. Conusance sometimes means judicial notice.<sup>2</sup> (See *Notice*.)

**CONVERSION.**—I. § 1. In equity, conversion is the operation of changing the nature of property; it is either actual or constructive. Actual conversion is the act of converting land or other property into money by selling it, or of converting money into land by buying land with it. Conversion in this sense is frequently directed by wills and settlements, or ordered by a Court in administering an estate.

§ 2. Constructive conversion is a fictitious conversion, which is assumed in certain cases to have taken place in order to carry out the intention of the parties. The constructive or equitable conversion of land into money (realty into personalty), and *vice versa*, takes place when an actual conversion has been directed or agreed to, but not actually carried out. The effect of this doctrine is that land directed to be sold is treated and devolves as if it were personalty, and *vice versa*; thus, if land is directed by a will to be sold and the proceeds to be paid to A., and A. dies before the sale, the land goes to A.'s personal and not to his real representatives.<sup>3</sup> But where the trust or power of sale is discretionary or conditional, no constructive conversion takes place, and the property retains its original character until it is actually converted.<sup>4</sup>

§ 3. Constructive conversion takes place from the death of the testator in the case of a will, and in the case of a deed from the date of execution.<sup>5</sup> § 4. Sometimes a double conversion, as land into money and the money again into land, is directed. In this case the property is to be considered, in general, as in that state in which it is ultimately to be converted; in the case supposed, therefore, the property would be treated as land.<sup>6</sup>

§ 5. "Conversion out and out," or conversion to all intents, is where the testator meant to give the produce of real estate the quality of personalty to all intents, that is, in any event, as opposed to conversion for the purposes of the will only; the distinction is of importance in the event of some of the dispositions of the property failing by lapse or otherwise. Thus, if a testator simply gives the proceeds of real estate to several legatees, and one of them dies in the testator's lifetime, his share goes to the testator's heir-at-law, while if the testator shows an intention that the real estate is to be considered as personalty, whether the expressed purposes of his will take effect or not, then the conversion is "out and out," and any lapsed share goes to the testator's next-of-kin; see further as to this doctrine under title *Result*.

<sup>1</sup> Archbold, Pr. 1431; *Termes de la Ley*.

<sup>2</sup> Litt. § 366.

<sup>3</sup> Haynes's Eq. 353; Snell's Eq. 140; *Fletcher v. Ashburner*, 1 Bro. C. C. 497;

White & Tudor's L. C. i. 741.

<sup>4</sup> Watson, Comp. Eq. 105.

<sup>5</sup> Snell, 142.

<sup>6</sup> Watson, 100.

Retrospec-  
tive.

§ 6. Retrospective conversion takes place where a person (*e.g.* a lessee) has an option of purchasing the land, and declares his option after the death of the owner (lessor); here the purchase-money goes to the personal representatives of the lessor, as if the option had been exercised during his lifetime.

Conversion of  
chattels.

II. § 7. At common law, conversion is that tort which is committed by a person who deals with chattels not belonging to him in a manner which is inconsistent with the rights of the lawful owner. Thus if a person in possession of goods belonging to another wrongfully refuses to deliver them up to him, or sells, disposes of, parts with or destroys them, he is guilty of a conversion. The remedy of the person injured is either by recaption (*q. v.*) or by action; if he merely claims damages, the old rule would still seem to apply, namely, that the judgment vests the property of the goods in the defendant,<sup>1</sup> but the plaintiff may if he likes claim a return of the goods in specie, and a judgment to that effect is enforceable by writs of delivery, attachment and sequestration.<sup>2</sup> (See *Trover*; *Detinue*.)

Conversion of  
joint and  
separate  
estates in  
bankruptcy.

III. § 8. In the law of bankruptcy "it is competent for solvent partners to make any arrangement which they think proper with respect either to the joint property of the firm or the separate property of the persons constituting it, and to alter the character of the property so as to convert joint into separate property, and *vice versa*; and every such agreement, if made *bonâ fide*, will bind their creditors, and in the event of bankruptcy, the property will be distributable as joint or separate estate according to the character which it then bears as between the partners themselves."<sup>3</sup> (See *Joint*.) § 9. Joint debts also may be converted into separate debts, and *vice versa*; thus if an action is brought against one partner alone for a joint debt, and judgment is obtained before the bankruptcy, the joint debt will be converted into a separate debt against that partner.<sup>4</sup>

**CONVEY—CONVEYANCE.—I.** § 1. In the widest sense of the word a conveyance is a mode by which property is conveyed or voluntarily transferred from one person to another by means of a written instrument and other formalities. It also signifies the instrument itself. Conveyances are of three classes,—by matter of record, by matter in pais, and by special custom.<sup>5</sup>

BY MATTER  
OF RECORD.

A. § 2. Conveyances by matter of record are such as are substantiated by a Court of Record. The only examples of this class in use at the present day are royal grants and vesting orders (*q. v.*). Fines and recoveries (*q. v.*) belonged to this class before their abolition.

BY MATTER  
IN PAIS.

B. § 3. Conveyances by matter in pais are such as only require the act or consent of the parties themselves, testified by the proper formalities. They are of three kinds, according as they operate by the common law, by the Statute of Uses, or under certain modern acts of parliament.

<sup>1</sup> Broom, Comm. Com. Law, 806.

<sup>2</sup> Rules of Court, xlii. 4; xlix.

<sup>3</sup> Robson's Bankr. 587; Lindley on Partner. 1151.

<sup>4</sup> Robson's Bankr. 605, 607.

<sup>5</sup> Bl. Comm. ii. 294, 344, where private acts of parliament are treated of under the head of conveyance. As to conveyances generally, see the works of Elphinstone, Davidson, Bythewood and Jarman.

(1.) § 4. Conveyances at common law are said to be original or primary At common law. when they transfer the property without reference to a previous conveyance, and derivative or secondary when they follow a previous conveyance and take effect with reference to it. To the former class belong conveyances by feoffment, gift (of estates tail), grant (of incorporeal hereditaments), lease, exchange, partition and assignment; to the latter class belong conveyances by confirmation, release, surrender and defeazance. (See the various titles.)

(2.) § 5. Conveyances under the Statute of Uses (*q. v.*) are those which Under Statute of Uses. derive their force from the stat. 27 Hen. 8, by which the use or beneficial interest in land is in certain cases converted in the legal possession and ownership. § 6. Conveyances of this kind are said to operate with transmutation of possession, where the possession of the land is first transferred by a conveyance taking effect independently of the Statute of Uses, and the statute then transfers the possession to the cestui que use. To this class belong the obsolete feoffment to uses and the modern deed of grant to uses, in each of which the land is conveyed to a feoffee or grantee, and either by the same or by a separate instrument (whether contemporaneous or subsequent) uses are declared in favour of other persons to whom the legal possession and ownership are transferred by force of the statute. Examples of such conveyances occur in a strict settlement, in which power is usually given to the tenant for life (the husband) to grant leases for twenty-one years. This is done by conveying the land to certain persons (called the "trustees of the powers") to the uses of the settlement, and by giving the tenant for life a power to appoint the land by way of lease for any term not exceeding twenty-one years.<sup>1</sup> (See *Power*.) § 7. Conveyances are said to operate without transmutation of possession where nothing but the use passes until the statute takes effect; these include the bargain and sale, the covenant to stand seised, and the lease and release.<sup>2</sup> (See those titles.)

(3.) § 8. Conveyances under modern statutes include (a) the release Under modern statutes. under the stat. 4 & 5 Vict. c. 21 (see *Lease and Release*): (b) the modern deed of grant under stat. 8 & 9 Vict. c. 106 (see *Grant*): (c) disentailing deeds and conveyances by married women under stat. 3 & 4 Will. 4, c. 74 (see *Disentailing Deed*; *Acknowledgment*, § 2): (d) registered transfers under the Land Transfer Act, 1875 (see *Land Registries*): and (e) conveyances of land to companies under the Lands Clauses Consolidation Act, 1845; transfers of ships by bill of sale under the Merchant Shipping Act, &c.<sup>3</sup>

C. § 9. Conveyances by special custom are employed for aliening BY SPECIAL CUSTOM. and dealing with copyhold lands and such customary estates as are holden

<sup>1</sup> Williams' Settlements, 37; Davids. iii. 480, 1005. When fines and recoveries were employed as modes of conveyance, any complicated limitations required (as in settlements) were effected by deeds specifying the uses to which the land was to be held. If the deed was made previously to the fine or recovery it was called a deed to

lead the uses; if subsequently, a deed to declare the uses. (Bl. ii. 363.)

<sup>2</sup> Hayes, Conv. i. 76; ii. 74, n.

<sup>3</sup> Some writers include alienation by devise among conveyances (Bl. ii. 373; Stephen, i. 588); but this is contrary to the usual meaning of the word.

in ancient demesne or in manors of a similar nature. The usual method is by surrender followed by admittance.<sup>1</sup> (See *Surrender*; *Admittance*; *Grant*; *Bargain and Sale*, § 4; *Use*; *Covenant*.)

II. § 10. In the narrower sense of the word, "conveyance" signifies the instrument employed to effectuate an ordinary purchase of freehold land (*e.g.* the modern deed of grant), as opposed to settlements, wills, leases, partitions, &c.

ETYMOLOGY.]—Apparently from the French *convoyer*, to accompany (*con* with, *voie*, Latin *via*, a way); hence to convoy, take safely from one place to another, convey.<sup>2</sup> "Conveyance" in the sense of a transfer of property seems to be a comparatively modern term, the old word being "assurance" (*q.v.*). Coke used "conveyance" as signifying that part of a pleading which serves as an explanation or introduction to the material facts.<sup>3</sup>

**CONVEYANCER—CONVEYANCING.**—§ 1. Conveyancing is that part of the lawyer's business which relates to the alienation and transmission of property and other rights from one person to another, and to the framing of legal documents intended to create, define, transfer or extinguish rights. It therefore includes the investigation of the title to land, and the preparation of agreements, wills, articles of association, private acts of parliament operating as conveyances, and many other instruments, in addition to conveyances properly so called.

§ 2. "Conveyancer" now generally means a barrister who chiefly devotes himself to the practice of conveyancing or combines it with equity drafting (see *Draftsman*). Formerly it was not unusual for a person to obtain from one of the Inns of Court a certificate allowing him to practise as a conveyancer below the bar, that is, without being called to the bar. But this is practically obsolete.<sup>4</sup> (See *Special Pleader*.)

**CONVEYANCING COUNSEL.**—By the act 15 & 16 Vict. c. 80, s. 41, the Lord Chancellor is empowered to appoint not less than six barristers, who have practised as conveyancing counsel for ten years at least, to be conveyancing counsel of the Court of Chancery, and the opinion of any of them may be received and acted on by the Court or by a judge at chambers in the investigation of the title to an estate, or in the settlement of a draft conveyance, mortgage, &c.<sup>5</sup> By the Judicature Act, 1873, s. 77, they were transferred to the Supreme Court.

**CONVICT.**—Formerly a man was said to be convict when he had been found guilty of treason or felony, but before judgment had been passed on him, after which he was said to be attaint<sup>6</sup> (*q.v.*). The term "convict" has, however, long had the popular meaning of a man who has been sentenced to death or penal servitude for treason or felony, and this use of the word has been adopted by the legislature.<sup>7</sup>

<sup>1</sup> Davids. ii. 198.

<sup>2</sup> Diez, ii. 455.

<sup>3</sup> Co. Litt. 393 a.

<sup>4</sup> Stat. 23 & 24 Vict. c. 127, s. 34; Stamp Act, 1870, s. 63; Regulations of the Council of Legal Education (of the

Inns of Court), 1872.

<sup>5</sup> Daniell's Ch. Fr. 1046.

<sup>6</sup> Co. Litt. 390 b. At that time the word was no doubt pronounced *convict*.

<sup>7</sup> Stat. 33 & 34 Vict. c. 23, s. 6. (See *Administrator*, § 2.)

**CONVICTION** is where a person is found guilty of an offence. Convictions are either ordinary or summary. § 2. An ordinary conviction Ordinary. takes place in a criminal prosecution by indictment, &c., and may either consist of the prisoner's confession and plea of guilty, or of the verdict of guilty found by a jury.<sup>1</sup> (See *Verdict*; *Judgment*; *Sentence*.)

§ 3. A summary conviction is a judgment pronounced by one or more Summary. justices of the peace or other magistrates under the authority of a statute giving them criminal or penal jurisdiction,—*e. g.* in cases of assaults.<sup>2</sup> The conviction itself is a memorial of the proceedings under the hands and seals of the justices.<sup>3</sup> (See *Jurisdiction*; *Quash*.)

**CONVOCAION** is an assembly of the clergy. There are two convocations—one for the province of Canterbury, the other for that of York, and each one consists of two houses, of which the archbishop and bishops form the upper house, the lower house consisting of deans, archdeacons, proctors representing the chapters, and proctors representing the parochial clergy. All deans and archdeacons are members of the convocation of their province, and each chapter sends one proctor; in the province of Canterbury the beneficed parochial clergy in each diocese elect two proctors, while in the province of York the clergy in each archdeaconry elect two proctors.<sup>4</sup>

§ 2. Convocation is summoned by the archbishop of the province in pursuance of the Queen's writ.<sup>5</sup>

§ 3. Formerly the beneficed clergy taxed themselves in convocation, Powers of. but they have not done so since 1663.<sup>6</sup> Convocation has no power to bind the temporalty, but it seems that it may with the licence or authority of the crown make constitutions and canons binding on the spirituality, provided they are not against the law of the land or the crown's prerogative.<sup>7</sup>

**CONVOY** consists of one or more ships of war sent by a neutral country in time of war to protect and escort merchant ships belonging to that country. It was formerly a moot point whether merchant vessels sailing with convoy were exempt from search (*q. v.*), and although the principle of that exemption was recognized at the close of the last century by most of the principal maritime powers, it was denied by Sir William Scott in the case of "The Maria" in 1798.<sup>8</sup> In 1801, however, the principle was adopted by Great Britain, with certain restrictions, in a convention with Russia.<sup>9</sup>

§ 2. In the law of marine insurance, warranty to sail with convoy is a stipulation in a policy of insurance on a ship that it will sail with convoy. Warranty of convoy.

<sup>1</sup> Bl. Comm. iv. 362; Steph. Comm. iv. 435; Archbold, Crim. Pl. 183.

<sup>2</sup> Stat. 24 & 25 Vict. c. 100, s. 42.

<sup>3</sup> Paley, Summ. Conv. 157, where the distinction between a conviction and an order is discussed; Stone's Justice, 182; Pritchard's Q. S. 1055.

<sup>4</sup> Phill. Eccl. Law, 1923 *et seq.*; Steph. Comm. iv. 525.

<sup>5</sup> Steph. 668.

<sup>6</sup> Phill. 1932.

<sup>7</sup> *Ibid.* 1958; Steph. 526.

<sup>8</sup> Rob. 340; Manning, Law of Nations, 439.

<sup>9</sup> Manning, 449.

It implies—(i) a convoy for the whole voyage, (ii) sailing orders from the officer in command of the convoy, and (iii) exertion on the part of the ship insured to keep with the convoy.<sup>1</sup>

**CO-CREDITORS—CO-DEBTORS—CO-OWNERS.** See *Joint*.

**COPARCENER—COPARCENARY.**—§ 1. Where lands descend on an intestacy to several persons as co-heirs, *e. g.* to several daughters at common law, or to several sons according to the custom of gavelkind, the persons so inheriting are called coparceners, or tenants in coparcenary.<sup>2</sup> In the former case they are called in the old books coparceners by the common law, and in the latter case coparceners by the custom.<sup>3</sup>

§ 2. Coparceners form one heir to their ancestor, and therefore they have one entire freehold in the land in respect of strangers so long as it remains undivided, “but betweene themselves to many purposes they have in judgement of law severall freeholds; for the one of them may infeoffe another of them of her part, and make liverie. And this coparcenarie is not severed or divided by law by the death of any of them; for if one die, her part shall descend to her issue.”<sup>4</sup> Coparceners may also convey to one another by deed of release, in the same way as joint tenants.<sup>5</sup>

§ 3. Coparceners could always compel one another to make partition (*q. v.*).<sup>6</sup> On a partition by agreement, the part allotted to each coparcener in severalty descends in the same way as the undivided share to which he was entitled previously to partition; in other words, the partition does not make the coparceners purchasers of their several shares within the meaning of the Inheritance Act (*q. v.*).<sup>7</sup> (See *Joint Tenancy*; *Tenancy in Common*; *Severalty*; *Estate*; *Descent*; *Partition*; *Enitia Pars*.)

ETYMOLOGY.]—§ 4. Norman French *parcenier*, *parchonnier*, one who holds something in common (*parchonnier de meurtre*, an accomplice),<sup>8</sup> from Latin *partio*, a share.

**COPARTNER—COPARTNERSHIP.** See *Partnership*.

**COPY.**—I. § 1. A copy is a document which is taken or written from another, as opposed to an original. The principal sorts of copies used for the proof of documents are—(1) Exemplifications under the Great Seal; (2) exemplifications of a record under the seal of the Court where the record is; (3) office copies, or copies made by an officer appointed for that purpose and sealed with the seal of the office; (4) examined copies, or copies sworn to be true copies by persons who have compared them with the original, either by one person comparing the copy line for line with the original, or by reading the copy while another person read the original; (5) copies signed and certified as true by the officer to whose custody the original is entrusted (see *Certified Copy*); (6) photograph

<sup>1</sup> Maude & Pollock, Merch. Shipp. 381.

<sup>2</sup> Litt. §§ 241 *et seq.*

<sup>3</sup> *Ibid.* and § 265.

<sup>4</sup> Co. Litt. 164 a.

<sup>5</sup> Williams on Seisin, 119.

<sup>6</sup> Litt. § 241; Co. Litt. 164 b; Watson's Comp. Eq. 458.

<sup>7</sup> Williams on Seisin, 72.

<sup>8</sup> Loysel, Inst. Cout. gloss. s. v.



copies.<sup>1</sup> To these may be added (7) attested copies, as to which see *Attest*, § 2.

§ 2. As to the rules governing the admissibility of copies in evidence, see *Evidence*.

II. § 3. As to tenancy by copy of court roll, or tenancy by copy, as it is called in the old books, see *Copyhold*.

III. § 4. Copy in the old writers also signifies copyright (*q. v.*).<sup>2</sup> The "right of copy" is the right to reproduce, from Latin *copiā*, abundance.<sup>3</sup>

**COPYHOLD—COPYHOLDER.**—§ 1. Copyholds, or lands held by copyhold tenure, are lands, forming part of a manor, originally granted by the lord for tenancies at will merely, which however have by immemorial custom become converted into estates independent of the will of the lord in everything but name, and of various degrees of duration, according to the custom of the particular manor. Copyholds are so called, because the evidence of the title to such lands consists of copies of the court roll of the manor, a book in which all dealings with the land are entered.<sup>4</sup> (See *Roll*.)

§ 2. All copyhold land is therefore subject to two estates, namely, that of the lord, which is a freehold estate, and that of the tenant, which is a customary estate. (See *Tenure*; *Estate*.) Except that it gives rise to certain fines (*q. v.*) and other dues, the estate of the lord is almost purely nominal. (See *Interest*.)

§ 3. The following consequences follow from the estate of the copyholder having been originally an estate at will only, and from the freehold being vested in the lord:—(1) That the minerals under and the timber on the land belong to the lord, so that the tenant cannot take them without a licence from the lord, while the lord cannot take them without the consent of the tenant, unless there is a custom enabling him to do so;<sup>5</sup> (2) that all alienations of the tenant's interest in the land must be effected by the intervention of the lord (see *Grant*; *Surrender*; *Admittance*), to whom a fine is generally payable (see *Fine*); and (3) that a copyholder cannot lease his land for a longer period than one year without a licence from the lord, unless there is a special custom enabling him to do so.

§ 4. Subject to these restrictions, the ownership of a copyholder is practically as absolute as that of a freeholder. It is true that he holds his land nominally at the will of the lord, but he also holds it according to the custom of the manor, which overrides the will of the lord;<sup>6</sup> if the tenant aliens or devises the land, or dies intestate, the lord is bound to admit the alienee, devisee or heir as tenant, and if he refuses he can be

<sup>1</sup> Best on Evidence, 619.

<sup>2</sup> *Millar v. Taylor*, 4 Burr. at p. 2311, 2396.

<sup>3</sup> Littré, Dict. s. v. *Copie*.

<sup>4</sup> "Tenant by copy of court roll is, as if a man be seised of a manor, within which manor there is a custome which hath been used time out of minde of man, that certaine tenants within the same manor have used to have lands and tenements, to hold to them and their heires in fee simple, or fee

taile or for terme of life, &c. at the will of the lord according to the custome of the same mannor." Litt. § 73. "And forasmuch as the title or estate of the copyholder is entred into the roll whereof the steward delivereth him a copie, thereof he is called copiholder." Co. Litt. 58 a.

<sup>5</sup> And when he does take them the resulting space belongs to the copyholder, *Eardley v. Granville*, 3 Ch. D. 826.

<sup>6</sup> Co. Litt. 60 b; Co. Copyh.

compelled by mandamus to do so.<sup>1</sup> Copyholds are liable for the debts of the deceased copyholder if he had an estate beyond his own life :<sup>2</sup> they are also liable to be taken in execution for his judgment debts under a writ of *elegit*,<sup>3</sup> and pass on his bankruptcy to his trustee for the benefit of his creditors.<sup>4</sup>

§ 5. The custom of each manor determines the maximum degree of property which the copyholders may have in their customary tenements. Hence copyholds are generally divided into (a) copyholds of inheritance, which are alienable for an estate of inheritance or any less estate, but not for an estate tail, unless there is a custom to entail in the manor; if there is no such custom then a gift to a man and the heirs of his body will give him a customary estate of fee simple conditional at the common law (see *Fee*; *Tail*) : (b) copyholds for lives, which are alienable for one or more lives in a great variety of manners, but for no greater estate; when a copyholder for lives has a tenant right of renewal or of appointing his successor, his estate is almost the same as a customary fee, and he is hence called a quasi-copyholder in fee : (c) copyholders for years, which are alienable for terms of years, renewable or not according to the custom, but for no greater estate.<sup>5</sup> (See generally as to estates in copyholds, title *Estate* : also *Freebench*; *Grant*.)

As to the rights of the lord to heriots, rents, fines, reliefs, forfeitures, &c., see those titles; also *Commutation*. As to the enfranchisement of copyholds, see that title: see also *Ancient Demesne*; *Customary Freeholds*; *Demesne*; *Seizure*; *Tenant by the Verge*; *Villinage*.

**COPYHOLD COMMISSIONERS** are commissioners appointed to carry into effect various acts of parliament having for their principal objects the compulsory commutation of manorial burdens and restrictions (fines, heriots, rights to timber and minerals, &c.), and the compulsory enfranchisement of copyhold lands. (See *Commutation*; *Enfranchisement*.)<sup>6</sup>

**COPYRIGHT.**—I. § 1. In the proper sense of the word, “copyright” is the exclusive right of printing or otherwise multiplying copies of a published literary work, that is, the right of preventing all others from doing so.<sup>7</sup> The infringement of this right is called piracy (*q. v.*).

Copyright is of two kinds,—by prerogative and by statute.

By prerogative.

A. § 2. The crown has the exclusive right of publishing certain books, of which the most important are the English translation of the Bible, the statutes, and reports of judicial proceedings. The privilege of publishing the Bible and some other books has been granted to the Universities of Oxford and Cambridge. The crown’s copyright is not now strictly enforced.<sup>8</sup>

By statute.

B. § 3. The right of a subject to prevent others from multiplying

<sup>1</sup> Williams on Seisin, 48.

<sup>2</sup> Stat. 3 & 4 Will. 4, c. 104.

<sup>3</sup> Stat. 1 & 2 Vict. c. 110, s. 11.

<sup>4</sup> Bankruptcy Act, 1869, ss. 22, 25.

<sup>5</sup> Elton, 44 *et seq.*

<sup>6</sup> Steph. Comm. i. 643; Elton, Copyh.

<sup>7</sup> Per Parke, B., in *Jeffreys v. Boosey*,

4 H. L. C. at p. 920; 5 & 6 Vict. c. 45, s. 2; Curtis on Copyright; Lowndes on Copyright. Compare the French statute of 19 July, 1793 (Teulet, Codes, supp. 184), and the German Copyright Act of 11th June, 1870.

<sup>8</sup> Shortt on Copyright, 36.

copies of a published work (such as a book, painting, engraving, photograph, &c.) is a statutory one, depending on the provisions of various statutes from 8 Anne, c. 19, to 25 & 26 Vict. c. 68.<sup>1</sup> They vest the copyright of the work in the author and his assigns; limit the time during which the copyright exists; and prescribe certain formalities, the principal of which are registration in the books of the Stationers' Company, and (in the case of a book) the deposit and delivery of copies of it to certain public libraries.<sup>2</sup> The term of copyright in the case of a book, pamphlet, sheet of music, map, &c., is either the life of the author and seven years more, or the period of forty-two years from the first publication of the book, whichever period is longer.<sup>3</sup> In the case of engravings, prints and lithographs, the term is twenty-eight years from publication, whether the engraving is original or taken from a picture.<sup>4</sup> The right of copying, engraving, reproducing and multiplying every original painting, drawing and photograph, is reserved to the author and his assigns for the term of his natural life and seven years after his death.<sup>5</sup>

§ 4. The right of representation and performance (*q. v.*) is sometimes called dramatic copyright.<sup>6</sup>

§ 5. The term copyright is also used to denote the exclusive right of applying ornamental or useful designs to articles of manufacture, &c., and to the right of multiplying copies or casts of sculpture and models; these are registered under the Registration of Designs Acts<sup>7</sup> (*q. v.*). Copyright in designs, sculpture, &c.

§ 6. International copyright is the right of a subject of one country to protection against the republication in another country of a work which he originally published in his own country. The right of foreigners to protection in this country against the republication here of works (books, prints, sculptures, &c.) originally published abroad can only exist by virtue of an order in council applying to the particular country, and such an order can only be made when by the law of that country reciprocal protection is given to British subjects.<sup>8</sup> International copyright.

§ 7. Similar protection may be given against the publication in this country of unauthorized translations (that is, translations not sanctioned by the author) of books published abroad, provided the original work is registered here and an authorized Authorized translations.

<sup>1</sup> Shortt on Copyright, 65 *et seq.* As to the copyright in an engraving from a picture, see *Dicks v. Brooks*, 15 Ch. D. 22.

<sup>2</sup> Stat. 5 & 6 Vict. c. 45, ss. 11, 6; Shortt, 86 *et seq.*; Watson's Comp. Eq. 122.

<sup>3</sup> 5 & 6 Vict. c. 45, s. 3. In the case of articles in encyclopædias, periodicals, &c., the copyright of each article belongs to the author, unless he and the publisher otherwise agreed, and even then it only belongs to the publisher for 28 years, after which time the right of publishing it in a separate form reverts to the author for the remainder of the term of 42 years: stat. 5 & 6 Vict. c. 45, s. 18. Where a book is published in parts (as in the case of an encyclopædia or periodical), it is only necessary to register the title and time of the first publication of the first number: stat. 5 & 6 Vict. c. 45, s. 19.

Independently of copyright, however, the publication of a periodical which imitates in form, title, &c. one which has previously been published, may be restrained by injunction, on the principle of trade-mark or trade-name (*q. v.*). See *Hogg v. Maxwell*, L. R., 2 Ch. 318; *Bradbury v. Beeton*, 39 L. J. (Ch.) 57; *Weldon v. Dicks*, 10 Ch. D. 247.

<sup>4</sup> Stat. 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; 17 Geo. 3, c. 57; Shortt, 106. See *Dicks v. Brooks*, 15 Ch. D. 22.

<sup>5</sup> Stat. 25 & 26 Vict. c. 68.

<sup>6</sup> *Chatterton v. Cave*, 3 App. Ca. 483.

<sup>7</sup> 54 Geo. 3, c. 56; 13 & 14 Vict. c. 104, s. 6; Shortt, 124, 602.

<sup>8</sup> 7 & 8 Vict. c. 12; Shortt, 130; *Fairlie v. Boosey*, 4 App. Ca. 711; *Klostermann, Geist. Eig.*; *Eisenlohr, Verträge, passim.*

translation published within a certain time from the publication of the original work.<sup>1</sup>

§ 8. Copyright is a species of incorporeal personal property; it may be assigned by a written instrument, or by an entry in the register.<sup>2</sup>

II. § 9. Copyright is also said to mean the right which the author of an unpublished literary composition has at common law to the piece of paper on which it is written and to the copies of it which he chooses to make. If he lends or entrusts a copy to another, that person cannot multiply copies of it, or publish it, or make any other use of it, except with the consent of the author.<sup>3</sup> This, however, does not seem to be an accurate use of the term copyright, nor is it common.

See *Right of Representation and Performance*.

**CORAM NON JUDICE** (before one who is not the judge) is an expression used where a Court proceeds in a matter beyond its jurisdiction. The term was generally used in reference to proceedings before justices of the peace, the general rule being that if the want of jurisdiction appeared on the face of the proceedings they were void, and no act done in pursuance of them could be justified; but this rule has been modified by the act 11 & 12 Vict. c. 44, for the protection of justices of the peace from vexatious actions for acts done by them in the execution of their office, sect. 2 of which requires the conviction or order to be quashed before an action can be brought.<sup>4</sup>

**CO-RESPONDENT**.—Where a husband brings a suit against his wife charging her with adultery, the alleged adulterer must as a rule be made a party to the petition as a co-respondent. If the adultery is proved the Court may order him to pay damages to the husband.<sup>5</sup> (See *Adultery*; *Dissolution of Marriage*.)

**CORNAGE** was a tenure by which land might formerly be held. "It is said that in the marches of Scotland some hold of the king by cornage, that is to say, to winde a horne, to give men of the countrie warning, when they heare that the Scots or other enemies are come or will enter into England; which service is grand serjeanty. But if any tenant hold of any other lord than of the king by such service of cornage, this is not grand serjeanty, but it is knight's service, . . . for none may hold by grand serjeanty but of the king only."<sup>6</sup>

Cornage was abolished by the act 12 Car. 2, c. 24, certainly so far as it constituted knight's service, and apparently also in the case of grand serjeanty, because the service of cornage could hardly be called an honorary service, which is the only kind of service excepted from the act. (From old French, *corn*, *corne*, a horn.) (See *Tenure*; *Grand Serjeanty*.)

<sup>1</sup> 15 & 16 Vict. c. 12.

<sup>2</sup> Shortt, 152.

<sup>3</sup> *Jeffreys v. Boosey*, 4 H. L. C. at p. 919; Shortt, 48; *Prince Albert v. Strange*, 2 De G. & S. 693.

<sup>4</sup> *Crepps v. Durden*, Smith, L. C. i. 716.

<sup>5</sup> *Browne on Divorce*, 143, 204; 20 & 21 Vict. c. 85, ss. 28, 33.

<sup>6</sup> Litt. § 156.

**CORNWALL.**—The eldest son of the reigning sovereign is by inheritance Duke of Cornwall during the life of the sovereign.<sup>1</sup> The principal statutes relating to the duchy lands are—7 & 8 Vict. c. 65; 25 & 26 Vict. c. 49; 26 & 27 Vict. c. 49; and 31 & 32 Vict. c. 35. Stat. 21 & 22 Vict. c. 109 relates to mines, and 9 Geo. 3, c. 16; 7 & 8 Vict. c. 105; 23 & 24 Vict. c. 53, and 24 & 25 Vict. c. 62, to the limitation of suits in relation to lands within the duchy.<sup>2</sup> (See also *Stannaries*; *Tinbounding*.)

**CORODY** was a sum of money or allowance of a house, chamber, meat, drink, clothing or other necessities paid or allowed by an abbey or other house of religion to a servant of the crown at the king's request; but the king was only entitled to demand corodies of such abbeys, &c. as he was founder of by right of his crown (see *In Capite*).<sup>3</sup> Corodies also seem to have been created by grants from one person to another, like annuities;<sup>4</sup> but they are now all obsolete. (See *Herediment*.)

**CORONER** is an officer having both judicial and ministerial duties, the former including the duty of inquiring as to the manner of death of any person who is slain or dies suddenly, or in prison. The inquest is held before at least twelve jurymen, *super visum corporis* (after viewing the dead body). If the jury return a verdict of murder or manslaughter against any person by name, the inquisition is equivalent to an indictment (*q. v.*), and it is the duty of the coroner to commit the accused for trial, unless (in case of manslaughter) he thinks fit to admit him to bail. He may also bind over any witnesses to appear at the trial. Another branch of the coroner's office is to inquire concerning shipwrecks (though this seems to have been practically abolished by modern legislation (see *Wreck*) and treasure trove. The coroner is also a conservator of the king's peace and a magistrate by virtue of his appointment. His ministerial office is only as the sheriff's substitute in executing process where the sheriff is suspected of partiality.<sup>5</sup>

§ 2. There are coroners (usually four in number) for every county in England, some counties being divided into districts for the purpose; they are elected by the freeholders.<sup>6</sup> There is also a coroner in every borough having a separate court of quarter session; he is appointed by the council of the borough,<sup>7</sup> and some franchises or liberties (such as lordships, universities, and the like) have their own coroners, being either persons acting as coroners *ex officio* (such as heads of corporations), or persons appointed by them; the right of acting as or appointing coroners in such places being derived from the crown, they are sometimes called coroners by charter. The City of London, the Cinque Ports and the Stannaries have coroners of this description. To the same class belong the coroners of the verge (see *Verge*), and the coroners of the Admiralty, who have

County coroners.

Borough coroners.

Coroners of franchises.

<sup>1</sup> Bl. Comm. i. 224; *The Prince's Case*, 8 Rep. 1.

<sup>2</sup> Steph. Comm. ii. 451, note.

<sup>3</sup> Fitz. N.B. 230; Co. Litt. 49 a; Finch, Law, 162; Cowell, s. v.

<sup>4</sup> *Termes de la Ley*, s. v.

<sup>5</sup> Jervis on Coroners, *passim*; Steph. Comm. ii. 637 *et seq.*; Pritchard, Q.S. 62.

<sup>6</sup> Stats. 7 & 8 Vict. c. 92; 23 & 24 Vict. c. 116.

<sup>7</sup> Steph. 636; stat. 5 & 6 Will. 4, c. 76, s. 62.

Official  
coroners.

jurisdiction in matters arising on the high seas, or on creeks and public rivers, their jurisdiction in the latter cases being concurrent with that of the coroner of the county. The judge of the Admiralty Division is coroner by patent; he appoints deputies or substitutes for particular districts. § 3. Official coroners are the Lord Chief Justice of England, who, by virtue of his office, is supreme coroner over all England, and the judges of the High Court of Justice, who are also sovereign coroners.<sup>1</sup>

ETYMOLOGY.]—Norman French: *corouner*, from *coroune*, the crown, apparently because the coroner was the chief representative of the crown in criminal and other business.<sup>2</sup>

**CORPORATION** is a succession or collection of persons having in the estimation of the law an existence and rights and duties distinct from those of the individual persons who form it from time to time.<sup>3</sup> Corporations are of three kinds.

Sole.

§ 2. A corporation sole consists of only one member at a time, the corporate character being kept up by a succession of solitary members. Corporations sole are always holders of a public office, the principal examples being the sovereign and ecclesiastical persons, such as bishops, parsons, &c.; the Solicitor for the Affairs of her Majesty's Treasury is a corporation sole of statutory creation.<sup>4</sup> The principal incident of such a corporation is that the property which the member holds by virtue of his office (but not his private property) passes on his death not to his real or personal representatives, but to his successor in office, as if he and the successor were the same person.<sup>5</sup>

Aggregate.

§ 3. A corporation aggregate consists of several members at the same time. The most frequent examples are incorporated companies and municipal corporations. (See *Company*; *Municipal Corporation*.) The chief peculiarity of a corporation aggregate is that it has perpetual succession (*i.e.* existence), a name, and a common seal by which its intention may be evidenced; that, being merely a creation of the law, it cannot commit a crime or enter into a personal contract or relation (see *Personal*); and that the majority of the members have power to bind the minority in matters within the powers of the corporation.<sup>6</sup>

§ 4. There are also certain corporations which are partly sole and partly aggregate, namely, those in which the property and rights of the corporation are vested in one member as the head or representative of the others, as in the case (before the Reformation) of an abbot and his convent, or (at the present day) the master of a hospital, who holds the property for the benefit of the poor brethren. These corporations are sometimes spoken of as "corporations aggregate of which the head only is capable"

<sup>1</sup> Jervis, 2, 49.

<sup>2</sup> Britton, 3 b.

<sup>3</sup> *Sutton's Hospital Case*, 10 Rep. 32 b; *Reg. v. Arnaud*, 9 Ad. & E. (N. S.) 806; Co. Litt. 250 a; Lindley on Part. i. 213; Grant on Corporations, *passim*; Smith's Merc. Law, 104; Bl. Comm. i. 468; Steph.

Comm. iii. 2; Pollock on Contract, 83; Shelford, R. P. Stat. 133.

<sup>4</sup> Treasury Solicitor Act, 1876.

<sup>5</sup> It is only in a few instances that chatels go in succession in the case of a corporation sole: Grant, 629.

<sup>6</sup> Pollock, 84; Grant, 5; Bl. Comm. i. 478.

(that is, capable of taking land in succession),<sup>1</sup> and sometimes as "corporations sole in auter droit."<sup>2</sup>

§ 5. Corporations are further divisible into *ecclesiastical* [*spiritual*], such as bishops, deans and chapters, &c., or *lay*. Lay corporations again are either *civil*—such as the sovereign, municipal corporations, and trading companies: or *eleemosynary*—such as colleges, hospitals, and other charitable corporations.<sup>3</sup>

Ecclesiastical.

Lay.

Civil.

Eleemosynary.

§ 6. There are some aggregate bodies which are not complete corporations, and are therefore sometimes called quasi-corporations: such are churchwardens, who cannot hold land in succession, and have not a common seal.<sup>4</sup>

Quasi-corporations.

§ 7. With reference to the mode of their creation, corporations exist according to the common law or under a statute. The first class includes many corporations *virtute officii*—such as the crown, bishops, parsons, &c.: and corporations existing by prescription (*q. v.*), by charter (*q. v.*), and by implication. An example of the last kind is where the crown grants land to "the men of Islington" at a certain rent; this incorporates them, for otherwise the grant could not be fully carried into effect.<sup>5</sup> Corporations created by statute may be divided into those incorporated by special act of parliament, as in the case of a railway company, and those created under a general act, *e. g.* the Companies Act, 1862.

See *Visitation*; *Dissolution*; *Seal*; *Ultra Vires*.

**CORPORATOR.**—A corporator is a member of a corporation aggregate.<sup>6</sup>

**CORPOREAL.** See *Hereditament*.

**CORPUS JURIS CANONICI.** See *Canon Law*.

**CORPUS JURIS CIVILIS** is the body of Roman law contained in the Institutes, Digest and Code compiled by the orders of Justinian, together with the Novellæ, or constitutions promulgated after the compilation of the Code: see the various titles.

**CORROBORATIVE.** See *Evidence*.

**CORRUPT.** See *Bribery*.

**CORRUPTION OF BLOOD.** See *Attainder*.

**COSINAGE** in the old books signifies consanguinity. A writ of cosinage was a real action which lay for the recovery of lands, &c. of which the heir's great grandfather's father was seised on the day of his death, and which had been abated by a stranger.<sup>7</sup> (See *Abatement*, § 2.)

<sup>1</sup> Co. Litt. 94 a, b.

<sup>2</sup> Litt. §§ 443, 645, 653 *et seq.*; Co. Litt. 103 a, 325 b, 338 b, 341 b; Bl. Comm. ii. 431.

<sup>3</sup> Bl. Comm. i. 470; Phill. Eccl. Law, 1982; Brice on Ultra Vires, 13.

<sup>4</sup> Grant, 600.

<sup>5</sup> *Ibid.* 8; Bl. Comm. i. 472.

<sup>6</sup> Grant on Corporations, 48; *Russell v. Wakefield W. Co.*, L. R., 20 Eq. at p. 479.

<sup>7</sup> Litt. § 286.

**COST BOOK.**—A cost book mining company is a partnership formed for the purpose of working a mine under the local customs of the district where the mine is situate. The shareholders appoint an agent, commonly called a purser, for the purpose of managing the affairs of the mine subject to the control of the shareholders. They write in a book, called the cost book, the agreement into which they have entered, and in the same book the purser inserts from time to time the receipts and expenditure of the mine, the names of the shareholders, their respective accounts with the mine, and transfers of shares. Each member may transfer or relinquish his share. As a general rule the capital is not paid up in the first instance, but calls are made from time to time at meetings of the members when required. Cost book companies are generally within the jurisdiction of the Stannaries Court (*q. v.*).<sup>1</sup>

Solicitor's  
costs.

**COSTS.**—I. § 1. The term "costs" has two meanings. In one sense it denotes the charges which a solicitor (and also to some extent a special pleader or certificated conveyancer) is entitled to make and recover from the client or person employing him as his remuneration for professional services, such as legal advice, attendances, drafting and copying documents, conducting legal proceedings, &c. A solicitor's bill of costs is subject to special provisions as to taxation, &c. (*q. v.*), with a view to the protection of the client.

Litigant's  
costs.

II. § 2. The term "costs" also denotes the expenses which a person is entitled to recover by reason of his being a party to legal proceedings. They include court fees, stamps, &c., and also, where the party is represented by a solicitor, the reasonable charges and fees of the solicitor and counsel. The amount of these costs is ascertained by the process of taxation (*q. v.*), which is regulated by certain principles of general application.

Costs from  
opponent.

§ 3. In contentious proceedings (such as an action to recover a debt or damages, &c.) the successful party generally recovers his costs from his opponent, unless the Court or judge otherwise orders, the rule now being that the costs follow the event, not only on the main issues in the action, but also on interlocutory proceedings.<sup>2</sup>

Costs out of  
estate.

§ 4. In administrative proceedings, *e. g.*, actions for the administration of the estate of a deceased person, actions for the execution of trusts, proceedings to ascertain the construction of a will, and bankruptcy and winding-up proceedings, those parties who have properly or necessarily taken part in the proceedings (such as the executors, trustees and persons beneficially interested who have established their rights) commonly obtain their costs out of the estate or fund which is the subject of the proceedings.<sup>3</sup>

Costs in the  
cause.

§ 5. The costs of the general or ordinary proceedings in an action or suit are called "costs in the cause" or "costs in the action." Costs of some interlocutory proceedings are not included in the "costs in the

<sup>1</sup> Lindley on Partn. 148; Tapping on the Cost Book, *passim*; Stannaries Act, 1869; *Chynoweth's Case*, 15 Ch. D. 13.

<sup>2</sup> See Rules of Court, iv.; Rules of August, 1875; Memorandum, 1 Ch. D.

41; *Ex parte Masters*, 1 Ch. D. 113; *Garnett v. Bradley*, 3 App. C. 944. As to the old statutes relating to costs, see Steph. Comm. iii. 575.

<sup>3</sup> Daniell, Ch. Fr. 1239, 1271.



cause" unless so ordered. The costs of an interlocutory application are sometimes ordered to be the costs of one of the parties in any event; so that even if he loses the action he is entitled to set off the amount of those costs against the costs in the cause which he has to pay.

Costs in any event.

§ 6. When a trial, motion or other step in an action is put off at the request of one of the parties, the Court usually requires him to pay the other party the costs which he has been put to in preparing for the trial or motion, and which are thrown away by the postponement. These are called "costs of the day."<sup>1</sup>

Costs of the day.

§ 7. Some old statutes expressly or impliedly gave a successful litigant in certain cases double or treble the amount which he would otherwise have been entitled to in respect of costs. These statutes were abolished by stat. 5 & 6 Vict. c. 97.<sup>2</sup> (See *Certificate*, § 5.)

Double and treble costs.

In the Chancery Division the following varieties of costs require notice:—§ 8. The costs allowed a successful litigant in ordinary cases are termed "costs as between party and party," and do not include all the expenses to which the party has been put. § 9. In certain cases the Court allows costs to be taxed upon a more liberal scale, so as to include many charges which would not be allowed in taxation as between party and party: these are called "costs as between solicitor and client." The most usual instance of their allowance is where a trustee or executor is a party to proceedings in his representative character, and there is a fund under the control of the Court out of which the costs can be paid.<sup>3</sup> § 10. In some cases the Court goes even further, and directs a trustee's costs to include "costs, charges and expenses" properly incurred by him, although not strictly costs in the action: these include such allowances as the trustee would be entitled to in an account between him and his cestui que trust.<sup>4</sup> (See *Allowance*.)

Party and party.

Solicitor and client.

Costs, charges and expenses.

As to the costs in actions brought in the High Court which ought to be brought in the County Court, see *Certificate*, § 5.

See *Affidavit*, § 4; *Dives*; *Higher and Lower Scale*; *In Formâ Pauperis*; *Pauper*; *Security*.

**COUNCIL OF CONCILIATION.**—By the act 30 & 31 Vict. c. 105, power is given for the crown to grant licences for the formation of councils of conciliation and arbitration, consisting of a certain number of masters and workmen in any trade or employment, having power to hear and determine all questions between masters and workmen which may be submitted to them by both parties, arising out of or with respect to the particular trade or manufacture, and incapable of being otherwise settled. They have power to apply to a justice to enforce the performance of their

<sup>1</sup> Archbold, Pr. 1208.

<sup>2</sup> *Ibid.* 429.

<sup>3</sup> Daniell, 1240, 1299.

<sup>4</sup> *Ibid.* 1304. As to costs in ecclesiastical cases, see Phill. 1297. As to costs in lunacy, see Pope, 202 *et seq.* As to the costs of criminal prosecutions, see stats. 7 Geo. 4, c. 64; 10 & 11 Vict. c. 82; 18 &

19 Vict. c. 126; 29 & 30 Vict. c. 52; 30 & 31 Vict. c. 35; 33 & 34 Vict. c. 23; Steph. Comm. iv. 435; Pritchard, Q. S. 339. As to parliamentary costs given to the promoters of, or petitioners against, a private bill, see stats. 28 & 29 Vict. c. 27; 34 & 35 Vict. c. 3; May, Parl. P. 805, and *Taxation*.

award. The members are elected by persons engaged in the trade.<sup>1</sup> (See *Trade Union*.)

**COUNCIL OF JUDGES.**—Under the Judicature Act, 1873, an annual council of the judges of the Supreme Court is to be held for the purpose of considering the operation of the new practice, offices, &c. introduced by the act, and of reporting to a Secretary of State as to any alterations which they consider should be made in the law for the administration of justice. An extraordinary council may also be convened at any time by the Lord Chancellor.<sup>2</sup> The only meeting of the Council which has hitherto taken place is that held in November, 1880, to consider the advisability of abolishing the offices of the Lord Chief Justice of the Common Pleas Division and the Lord Chief Baron of the Exchequer, and of consolidating the three common law divisions of the High Court.

**COUNSEL** is a general name for barristers, used especially in certain locutions. Thus, we speak of “instructing counsel,” of “giving a brief to counsel,” of “the plaintiff’s counsel,” and so on, meaning that the instructions or brief are given to a barrister: that the plaintiff in a certain case is represented by a barrister, &c.

As to “counsel’s signature,” see *Brief*, § 2.

Indictment.

**COUNT.**—§ 1. In criminal procedure, the statement of the indictment is divided into paragraphs called counts. If the defendant is charged with several offences in any one count, the indictment is open to the objection of duplicity, or being double, which may be taken by demurrer, though it is cured by verdict.<sup>3</sup> In some cases, the indictment may charge several offences in several counts; but in other cases, if this is done, the Court may quash the indictment, or require the prosecutor to elect on which charge he will proceed.<sup>4</sup> (See *Attempt*, § 3.)

Civil action.

§ 2. In civil procedure count originally meant the declaration in a real action.<sup>5</sup> In a personal action, if the plaintiff included several causes of action in the same declaration, each section of the declaration was called a count.<sup>6</sup> It was usual to put at the end of a declaration a number of claims analogous to that arising out of the real cause of action (*e. g.* in an action of debt the declaration concluded with claims for money paid by the plaintiff for the defendant at his request, for money received by the defendant for the use of the plaintiff, and for money found due from the defendant to the plaintiff on an account stated), and these were called common counts. Count “cometh of the French word *conte*, which in Latyne is *narratio*.”<sup>7</sup>

Common counts.

**COUNTER-CLAIM.**—§ 1. If the defendant in an action has a claim against the plaintiff, which he might have asserted by bringing a separate action against the plaintiff, he may raise it in the existing action

<sup>1</sup> Davis on Friendly Societies, 232.

<sup>2</sup> Sect. 75.

<sup>3</sup> Archbold, Crim. Pl. 66.

<sup>4</sup> *Ibid.* 71.

<sup>5</sup> Stephen on Pl. (5) 30.

<sup>6</sup> *Ibid.* 302.

<sup>7</sup> Co. Litt. 17 a, 303 a; Stephen, App. lxxv.

by adding to his statement of defence a statement of the facts on which he bases his claim, and of the relief which he claims against the plaintiff; this is called a counter-claim: so if the defendant has a claim connected with the subject of the action against the plaintiff and another person (*e.g.* a co-defendant or a stranger), he may set it up by counter-claim; in the latter case, the statement of defence has, in addition to the original title of the action, a new title setting forth the names of the persons against whom the counter-claim is set up; if any one of them is not a party to the action, he is served with a copy of the defence, indorsed with a notice to appear, and is thenceforth in the same position as if he had been sued in an independent action by the defendant,<sup>1</sup> except, of course, that his statement in answer to the counter-claim is called a reply and not a defence.<sup>2</sup>

§ 2. If the counter-claim is of such a nature that it cannot be conveniently disposed of in the pending action, or is otherwise objectionable, it is liable to be struck out.<sup>3</sup>

§ 3. The Court gives judgment both on the original claim and on the counter-claim; and if the balance is in favour of the defendant, judgment is given for the defendant as if he were plaintiff in an action against the original plaintiff in the pending action.<sup>4</sup>

As to counter-claims in County Court actions, see Pollock, C. C. Pr. 54. See *Set-off*.

**COUNTERFEIT COIN** is coin not genuine, but resembling or apparently intended to resemble or pass for genuine coin, and includes genuine coin prepared or altered so as to resemble or pass for coin of a higher denomination. Making or importing counterfeit coin, whether to pass for coin current in any part of her Majesty's dominions, or to pass for gold or silver foreign coin, is felony; making counterfeit foreign copper coin is a misdemeanor.<sup>5</sup> (See *Utter*.)

**COUNTERMAND.**—To countermand is to recall or revoke: thus to countermand an authority is to revoke it.<sup>6</sup> (See *Revocation*.) Notice of trial in an action in the High Court may be countermanded by consent of the parties, or by leave of the Court or a judge.<sup>7</sup>

**COUNTERPART.** See *Lease*; *Indenture*.

**COUNTRY** is used in certain antiquated locutions to signify (1) a jury, as in the expressions "trial by the country,"<sup>8</sup> and "conclusion to the country," which was the mode by which a plaintiff or defendant in pleading offered his case for trial by jury;<sup>9</sup>

<sup>1</sup> Judicature Act, 1873, s. 24; *Furness v. Booth*, 4 Ch. D. 586, and the cases there cited; *Holloway v. York*, Week. N. (1877), 112; *Original Hartlepool Co. v. Gibb*, 5 Ch. D. 713; *Harris v. Gamble*, 6 Ch. D. 748.

<sup>2</sup> Rules of Court, xxii. 8.

<sup>3</sup> *Ibid.* xix. 3, xxii. 9; Coe's Pr. 79.

<sup>4</sup> Rules of Court, xxii. 10.

<sup>5</sup> Stat. 24 & 25 Vict. c. 99; Russell on Crimes, i. 200; Stephen's Crim. Dig. 292; *Reg. v. Hermann*, 4 Q. B. D. 284.

<sup>6</sup> Co. Litt. 52 b.

<sup>7</sup> Rules of Court, xxxvi. 13.

<sup>8</sup> Bl. Comm. iv. 349.

<sup>9</sup> Stephen, Pleading (5), 79.

(2) any place other than a Court, as in the expressions "maintenance in the country" (see *Maintenance*), and a "deed in the country," as opposed to an alienation by record, that is, in Court.<sup>1</sup> (See *In Pais*.)

**COUNTY** or shire is a civil division of England and Wales, of which there are at present forty in England and twelve in Wales. The division is of importance in law with reference to the jurisdiction of commissioners of assize, justices of the peace, sheriffs, coroners, county courts, &c., and to parliamentary elections and local taxation.<sup>2</sup> (See *Rate*.) § 2. Ordinary counties are sometimes called "counties at large," to distinguish them from "counties corporate" or "counties of cities or towns," which are certain cities and towns, some with more, some with less, territory annexed to them, and having, by the special grace of various kings, the privilege to be counties of themselves, and not to be comprised in any other county, but to be governed by their own sheriffs and other magistrates. Such are London, York, Bristol, and many others.<sup>3</sup> For some purposes, however, these counties corporate are deemed part of the adjoining counties at large.<sup>4</sup> (See *County Palatine*; *Hundred*; *Sheriff*.)

ETYMOLOGY.]—Norman French: *counté*, from *counté*, an earl or lord lieutenant.<sup>5</sup>

**COUNTY COURTS.**—§ 1. The modern or statutory County Courts are local and inferior Courts of Record established throughout England by various acts of parliament<sup>6</sup> for the purpose of providing a cheap and summary mode of procedure in civil cases involving small amounts. For this purpose the country is divided into districts, in each of which is held a County Court, presided over by a judge, who is assisted by a registrar and high bailiff (*q. v.*). Two or more districts are frequently formed into one circuit, in which one judge holds Courts alternately.<sup>7</sup> The ordinary process of the Court is by plaint and summons (*q. v.*), but in some cases proceedings by petition, similar to those in use in the Chancery Division of the High Court and the Bankruptcy Court, are applicable.

§ 2. County Courts are divisible into those having ordinary and those having extraordinary jurisdiction. The ordinary jurisdiction is again divisible into original and auxiliary.

Original  
jurisdiction.

§ 3. The original jurisdiction may be said generally to extend to claims of debt or damages not exceeding 50*l.*, to claims for the recovery of land the yearly value of which does not exceed 20*l.*, and to claims for the administration of estates, execution of trusts, foreclosure and redemption of mortgages, specific performance, and proceedings under the Trustee Acts and Trustee Relief Acts, where the value of the estate,

<sup>1</sup> Litt. § 728.

<sup>2</sup> Steph. Comm. i. 126; Co. Litt. 109 b, 168 a.

<sup>3</sup> Bl. Comm. i. 120.

<sup>4</sup> Stephen, 133; stats. 2 Will. 4, c. 45, s. 17; 38 Geo. 3, c. 52; 14 & 15 Vict. cc. 55 and 100; *Reg. v. Crompton*, 5 Q. B.

D. 341.

<sup>5</sup> Britton, 274 b; Co. Litt. 168 a.

<sup>6</sup> 9 & 10 Vict. c. 95, amended and extended by numerous acts. See Pollock's County Court Practice, xxvi.

<sup>7</sup> Pollock, 1 *et seq.*

mortgage, property, &c., does not exceed 500*l.*;<sup>1</sup> also to contentious business in probate and administration matters where the estate of the deceased is under a certain value.<sup>2</sup>

§ 4. The auxiliary jurisdiction is principally applied in the trial of, or the taking of evidence in, actions and other proceedings pending in the High Court.<sup>3</sup> Auxiliary jurisdiction.

§ 5. Extraordinary jurisdiction. By stat. 31 & 32 Vict. c. 71, provision is made for assigning to convenient County Courts jurisdiction in Admiralty matters (namely, claims for salvage, towage, necessities, wages, collision, &c., not exceeding a certain amount), and by 31 & 32 Vict. c. 71, provision is made for the appointment of County Courts to exercise the jurisdiction in bankruptcy which by that act is given to the County Courts over all persons not residing within the London district.<sup>4</sup> Admiralty and bankruptcy jurisdiction.

§ 6. The High Court has concurrent jurisdiction with the County Courts in matters within their ordinary jurisdiction, but in many cases where the County Courts have jurisdiction a plaintiff who brings an action in the Superior Courts, though he is successful, runs the risk of losing his costs (see *Certificate*, § 5), and such actions may be remitted to the County Court on the application of the defendant.<sup>5</sup> By the County Courts Act, 1867, s. 28, no action which can be brought in a County Court shall be brought in an inferior Court not of record.

§ 7. An appeal lies from the judgment of a County Court (i) if given in its ordinary and Admiralty jurisdiction, to a divisional Court of the High Court of Justice;<sup>6</sup> (ii) if given in its Bankruptcy jurisdiction, to the Chief Judge of the London Bankruptcy Court.

As to the power of the County Courts to commit for non-payment of judgment debts, see *Debtors Act*, 1869, and for contempt of Court, see p. 196, note (2).

§ 8. The old County Court was presided over by the earl of the county, or in his absence by the sheriff; the suitors, that is the freemen or landholders, were the judges. The County Courts were the principal civil Courts until the system of assizes (*q. v.*) was introduced, after which they fell into disuse, until nearly the whole business transacted in them was that which they still retain, namely, the proclaiming of outlawries and the election of sheriffs. They were not Courts of Record.<sup>7</sup> Sheriff's county courts.

See *Courts of Requests*; *City of London Court*; *Court*.

**COUNTY PALATINE** is a county the owner of which formerly had *jura regalia*, or royal franchises and rights of jurisdiction similar to those possessed by the crown in the rest of the kingdom; thus he had the

<sup>1</sup> For an enumeration of the statutes under which the County Courts have jurisdiction in respect of friendly societies, agricultural holdings, &c. see Pollock, xxxi. *et seq.*

<sup>2</sup> Pollock, 331.

<sup>3</sup> *Ibid.* xxxvi.

<sup>4</sup> *Ibid.* xxxix.

<sup>5</sup> 30 & 31 Vict. c. 142, ss. 5, 7; Judicature Act, 1873, s. 67; *Neale v. Clarke*, 4 Ex. D. 286.

<sup>6</sup> Jud. Act, 1873, s. 45; Rules of December, 1875; *The Glanibanta*, 2 P. D. 45.

<sup>7</sup> Pollock, i; Reeves's Hist. i. 7; Bl. Comm. iii. 36.

power of pardoning crimes and appointing judges and officers within his county. Three counties palatine—Chester, Durham, and Lancaster, still exist, but they have long been united to the crown, and assimilated in all important respects to the rest of the kingdom, though the Duchy of Lancaster still has some local Courts, as to which see *Duchy of Lancaster*; also *Chancellor*, § 3; *Chancery*, § 6; *Clerk of the Crown*; *Palatine Courts*.<sup>1</sup>

**COURT** has the following meanings:—(1) “A place where justice is judicially ministred”<sup>2</sup>; (2) the judge or judges who sit in a Court; and (3) an aggregate of separate Courts or Judges, as when we speak of the Supreme Court of Judicature (*q. v.*), which never sits as a Court, being merely a name for the Court of Appeal and High Court of Justice. (See *Council of Judges*.)

**Of record.** § 2. Courts are of two principal classes—of record and not of record. A Court of Record is one whereof the acts and judicial proceedings are enrolled for a perpetual memory and testimony, and which has authority to fine and imprison for contempt of its authority.<sup>3</sup> Such were the superior Courts of common law before their abolition, and such are the modern High Court of Justice and Court of Appeal, the London Bankruptcy Court, and the County Courts; many of the ancient inferior Courts (*infra*, § 4) are also Courts of Record.

**Superior.** § 3. Courts are also divided into superior and inferior, superior Courts being those which are not subject to the control of any other Courts, except by way of appeal: such are the Court of Appeal, the High Court of Justice, and the London Bankruptcy Court.<sup>4</sup>

**Inferior.** § 4. The inferior Courts include the County Courts, the Mayor's Court of London, the Stannaries Court, the Ecclesiastical Courts, Borough Courts, Courts Baron, Courts Leet, and other local Courts. No action which can be brought in a County Court may be brought in an inferior Court not of record. (See *County Court*, § 6.) When an inferior Court refuses to exercise its jurisdiction, it may be compelled to do so by mandamus, and if it exceeds its jurisdiction it may be restrained by prohibition.<sup>5</sup> (See *Mandamus*; *Prohibition*.)

**Supreme or ultimate.** § 5. A third class of Courts may be said to consist of the Supreme Courts, which are not subject to the appeal of any other Courts, and whose decisions are therefore final. These are the House of Lords and the Privy Council; the so-called Supreme Court of Judicature (*supra*, § 1) is not a supreme Court in this sense, being subject to the appellate jurisdiction of the House of Lords.

**Civil.** § 6. Lastly, Courts are divided into civil, criminal, and ecclesiastical. **Criminal.** Those hitherto mentioned belong to the first class. The criminal Courts include the High Court of Justice (in which is now vested the criminal

<sup>1</sup> Steph. Comm. i. 129 *et seq.*, iii. 347; Jud. Act, 1873, s. 99.

<sup>2</sup> Co. Litt. 58 a.

<sup>3</sup> Steph. Comm. iii. 269.

<sup>4</sup> The palatine common law courts of Lancaster and Durham were also superior courts, because the counts palatine had

*jura regalia* within their counties, and their courts were therefore not subject to the control of any other courts.

<sup>5</sup> The characteristics of inferior courts are referred to in detail in *Mayor, &c. of London v. Cox*, L. R., 2 H. L. 239.

jurisdiction of the Court of Queen's Bench and of the Courts of Assize under commissions of "oyer and terminer" and "gaol delivery," *q. v.*), the Central Criminal Court and the courts of magistrates and justices of the peace. (See the various titles.)

As to the Ecclesiastical Courts, see that title.

Ecclesiastical.

ETYMOLOGY.]—Norman French: *court*,<sup>1</sup> which originally meant a manor or large farm; low Latin, *cortis* or *curtis*, from Latin *cohors*, *cors*, a yard.<sup>2</sup>

**COURT OF ADMIRALTY.** See *Admiralty*; *High Court of Admiralty*.

**COURT OF ANCIENT DEMESNE**, as its name implies, is a Court in which the freeholders of land in ancient demesne are the judges, in much the same way as the freeholders of an ordinary manor are the judges in a Court Baron (*q. v.*). The two Courts closely resemble one another.<sup>3</sup> (See *Ancient Demesne*; *Manor*.)

**COURT OF APPEAL** is that division of the Supreme Court of Judicature (*q. v.*) which exercises appellate jurisdiction in all causes and matters originating in the Supreme Court. It consists of (a) five ex-officio judges—the Lord Chancellor, Lord Chief Justice of England, Master of the Rolls, Lord Chief Justice of the Common Pleas and Lord Chief Baron of the Exchequer,<sup>4</sup> who only sit when it is convenient and necessary for them to do so, and never all at the same time; and (b) six ordinary judges, styled Lords Justices of Appeal (*q. v.*). The Lord Chancellor also has power to summon not more than four additional judges from the Queen's Bench, Common Pleas, Exchequer and Probate Divisions of the High Court to attend as judges of the Court of Appeal,<sup>5</sup> but the exercise of this power has to a great extent, if not altogether, been made unnecessary by the addition of the three justices of appeal by the Appellate Jurisdiction Act, 1876. (See *Lords Justices of Appeal*.) The Court of Appeal generally sits in two divisions, one at Lincoln's Inn to take appeals from the Chancery and Probate Divisions (including Admiralty business) and from the Bankruptcy Court; the other at Westminster, to take appeals from the common law divisions.

§ 2. The Court of Appeal hears appeals from all the divisions of the High Court, and from the Courts whose jurisdictions are transferred to the High Court, thus exercising the jurisdiction of the old Court of Appeal in Chancery, of the Exchequer Chamber, and of the Privy Council in admiralty and lunacy appeals. The appellate jurisdictions of the Palatine Court of Lancaster and of the Stannaries Court are also transferred to the Court of Appeal.<sup>6</sup> (See *High Court of Justice*.)

<sup>1</sup> Britton, 274 a.

<sup>2</sup> Littré, s. v. *Cour*.

<sup>3</sup> 4 Inst. c. lviij.

<sup>4</sup> Jud. Act, 1875, s. 4.

<sup>5</sup> *Ibid.*

<sup>6</sup> Jud. Act, 1873, s. 18.

**COURT OF APPEAL IN CHANCERY** consisted of the Lord Chancellor and two Lords Justices of Appeal (*q. v.*). When they all sat together they constituted the full Court; but generally the Lords Justices sat together as one Court and the Lord Chancellor alone as another Court.<sup>1</sup> The Court heard appeals from the Master of the Rolls and the Vice-Chancellors and from the London Bankruptcy Court, and also had jurisdiction in lunacy (*q. v.*); and from its decisions in most cases an appeal lay to the House of Lords. The jurisdiction of the Court is now transferred to the Court of Appeal (*q. v.*).

**COURT OF ARCHES** is an ecclesiastical Court exercising appellate jurisdiction over each of the diocesan Courts within the province of Canterbury. It may also take original cognizance of causes by letters of request from one of those Courts.<sup>2</sup> The judge is called the Dean of Arches or the Official Principal of the Court: he is also the Official Principal of the Chancery Court of York (see *Chancery*, § 7), and is appointed by the two primates.<sup>3</sup>

§ 2. The Court is "so called of Bow Church in London, by reason of the steeple thereof raised at the top with stone pillars in fashion like a bow bent archwise; in which church this Court was ever wont to be held."<sup>4</sup> (See *Provincial Courts*; *Dean of Arches*.)

**COURTS OF AUDIENCE** are ecclesiastical Courts, in which the primates once exercised in person a considerable part of their jurisdiction. They seem to be now obsolete, or at least to be only used on the rare occurrence of the trial of a bishop.<sup>5</sup>

**COURT BARON** is a Court held in a manor, and is of two kinds:

Freeholders.

§ 2. A Court Baron, in the original sense of the word, is a Court in which the fretenants or freeholders of the manor are the judges, and the steward of the manor is the registrar.<sup>6</sup> In it all suits concerning lands held of the manor might be, and in early times not unfrequently were, determined,<sup>7</sup> but their jurisdiction in real actions has been practically abolished (see *County Court*, § 6), and now such Courts are rarely held, except in those manors where the freeholders have a set of customs relating to fines, heriots, regulation of commons and the like.<sup>8</sup>

Customary.

§ 3. A Customary Court Baron is one which "doth concerne copiholders, and therein the lord or his steward is the judge."<sup>9</sup> The province of such a Court seems to be to deal with all matters concerning the rights of the copyholders between themselves (as where their consent is to be given to an enclosure of part of the waste), but more especially to register alienations of the copyhold land, all of which were originally transacted in the Customary Court and entered on the court rolls, whence the tenants are called tenants by copy of court roll.<sup>10</sup> At the present day, a Customary

<sup>1</sup> Haynes's Equity, 33.

<sup>2</sup> Phillimore, Eccl. Law, 1202.

<sup>3</sup> Public Worship Regulation Act, 1874,

s. 7.

<sup>4</sup> Phill. 259.

<sup>5</sup> Phillimore, Eccl. Law, 1201, 1204.

<sup>6</sup> Co. Litt. 58 a; Steph. Comm. iii. 279.

<sup>7</sup> Williams on Seisin, 16.

<sup>8</sup> Elton on Copyholds, 239; County Courts Act, 1867, s. 28.

<sup>9</sup> Co. Litt. 58 a; 4 Co. 26 b.

<sup>10</sup> Co. Litt. 58 a; Elton, 242; Burton, 394; Williams on Seisin, 36.



Court may be held without the presence of any copyholder, unless the business to be transacted requires the consent of the homage.<sup>1</sup>

See *Presentment*; *Roll*; *Manor*; *Hundred Court*.

ETYMOLOGY.]—§ 4. It has been said that in the term Court Baron, “baron” means merely a freeman who holds land;<sup>2</sup> but this seems inconsistent with the old names given to the Court, viz. *court de baroun*,<sup>3</sup> *curia baronis E. C. militis manerii sui predicti*,<sup>4</sup> where “baron” clearly means the lord of the manor.

**COURT OF CHIVALRY**, or Court Military, was a Court not of record, held before the Lord High Constable and Earl Marshal of England. It had jurisdiction, both civil and criminal, in deeds of arms and war, armorial bearings, questions of precedence, &c., and as a court of honour. It has long been disused.<sup>5</sup>

**COURT CHRISTIAN** is the old name for an Ecclesiastical Court.

**COURTS OF CONSCIENCE** were the same thing as Courts of Request (*q. v.*).

**COURT FOR CROWN CASES RESERVED** is the Court created by stat. 11 & 12 Vict. c. 78, for the decision of questions of law arising on the trial of a person convicted of treason, felony or misdemeanor (*e.g.* at the Central Criminal Court, the assizes or quarter sessions), and reserved by the judge or justices at the trial for the consideration of the Court. For this purpose, the judge or justices state and sign a case setting forth the question and the facts out of which it arises.<sup>6</sup> The jurisdiction is now exercised by the judges of the High Court of Justice, or five of them at the least. Their decision is final.<sup>7</sup>

**COURT OF DELEGATES.** See *Delegates*.

**COURT FOR DIVORCE AND MATRIMONIAL CAUSES** was established by stat. 20 & 21 Vict. c. 85, which transferred to it all jurisdiction then exercisable by any Ecclesiastical Court in England in matters matrimonial, and also gave it new powers. The Court consisted of the Lord Chancellor, the three chiefs and three senior puisne judges of the common law Courts, and the Judge Ordinary, who together constituted and still constitute the “full Court.” The Judge Ordinary heard almost all matters in the first instance. By the Judicature Act, 1873, s. 3, the jurisdiction of the Court was transferred to the Supreme Court of Judicature; but the only effect of the transfer seems to be to have changed the name of the Court to that of the Probate, Divorce and Admiralty Division of the High Court of Justice, and the name of the Judge Ordinary to that of the President of the Division, for the practice of the Court remains as before. (See *Probate, Divorce and Admiralty Division*.)

**COURT OF THE DUCHY CHAMBER OF LANCASTER** is a Court held before the Chancellor of the Duchy or his deputy, and having jurisdiction in all matters of equity relating to lands held of the

<sup>1</sup> Stat. 4 & 5 Vict. c. 35, s. 86 *et seq.*; Williams, R. P. 372.

<sup>2</sup> Williams on Seisin, 15, following, apparently, Co. Litt. 58 a.

<sup>3</sup> Britton, 274 a.

<sup>4</sup> 4 Inst. cap. lvii.

<sup>5</sup> Bl. Comm. iii. 103; Steph. Comm. iii. 335, n. (l).

<sup>6</sup> Archbold, Crim. Pl. 191.

<sup>7</sup> Judicature Act, 1873, ss. 47, 100.

crown in right of the Duchy of Lancaster; these are said to include a large district of land within the city of Westminster.<sup>1</sup>

**COURT OF HUSTINGS** is a Court in the city of London analogous to the sheriff's county court<sup>2</sup> (see *County Court*, § 8), which it resembles in having formerly had jurisdiction in causes of action arising within its district, namely, the city.

**COURT LEET.**—The lords of a great number of manors have the privilege of holding a Court Leet, which, so far as it is useful in the present day, is held for the purpose of presenting small offences in the nature of a common nuisance, which require immediate attention and redress.<sup>3</sup> It is a Court of Record; the steward of the manor is the judge and the jury is formed from the inhabitants.<sup>4</sup> Originally it was a court of criminal jurisdiction over the tenants and residents (or persons resident within the manor)<sup>5</sup> in all matters in which the sheriff's tourn had jurisdiction, from which court it is said to be derived; it also had the "view of frank pledge" (see *Frank Pledge*),<sup>6</sup> but these portions of its jurisdiction are quite obsolete. (See *Commorant*; *Manor*; *Presentment*; *Sheriff*.)

**COURT MARTIAL** is a Court convened by or under the authority of the crown to try an offence against military or naval discipline, committed by a soldier or sailor in her Majesty's service. Courts martial proceed and pass sentence according to the Articles of War, the Articles of the Navy (*q. v.*), and the acts regulating the discipline of the army and navy respectively.<sup>7</sup>

**COURT OF PASSAGE** is an inferior Court, possessing a very ancient jurisdiction over causes of action arising within the borough of Liverpool. It appears to have been also called the Borough Court of Liverpool.<sup>8</sup> It has the same jurisdiction in admiralty matters as the Lancashire County Court.<sup>9</sup>

**COURT OF PECULIARS**, according to Blackstone, is a branch of and annexed to the Court of Arches, and has jurisdiction over all those parishes dispersed through the province of Canterbury in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only.<sup>10</sup> It seems, however, to have been practically abolished by the stats. 3 & 4 Vict. c. 86, and 10 & 11 Vict. c. 98.<sup>11</sup>

<sup>1</sup> Bl. Comm. iii. 78; Steph. Comm. iii. 347, n. (b).

<sup>2</sup> Steph. Comm. iii. 293, n. (w.)

<sup>3</sup> Elton on Copyh. 239.

<sup>4</sup> *Ibid.* 241.

<sup>5</sup> Williams on Seisin, 16.

<sup>6</sup> 2 Inst.; Magna Charta, c. 35; Steph. Comm. iv. 321.

<sup>7</sup> Steph. Comm. ii. 589 *et seq.*; Naval Discipline Act, 1866; Army Discipline Act, 1879.

<sup>8</sup> *Laughton v. Taylor*, 6 M. & W. 695.

<sup>9</sup> Roscoe's Admiralty, 75.

<sup>10</sup> Bl. Comm. iii. 65.

<sup>11</sup> Phill. Eccl. Law, 260.

**COURT OF PLEAS** at Durham was a Court of the county palatine of Durham, having a local common law jurisdiction. It was abolished by the Judicature Act, which transferred its jurisdiction to the High Court.<sup>1</sup> (See *County Palatine; Palatine Courts.*)

**COURT OF PROBATE.**—By the stat. 20 & 21 Vict. c. 77, it was enacted that the voluntary and contentious jurisdiction and authority of all ecclesiastical, peculiar, manorial and other courts and persons in England having jurisdiction or authority to grant probate of wills or letters of administration should cease, and that such jurisdiction and authority should thenceforth be exercised in the name of her Majesty in a court to be called the Court of Probate, consisting of a judge and a number of registrars (see *Registrar*). By the Judicature Act, 1873, the jurisdiction of the Court was transferred to the Supreme Court of Judicature, the principal effect of the transfer being to change the name of the Court to that of the Probate, Divorce and Admiralty Division of the High Court of Justice (*q. v.*), and to alter the practice in contentious business. (See *Action*, § 10; *Caveat*, § 2; *Citation*, §§ 4, 5; *Pleading; Probate; Warning.*)

**COURTS OF REQUEST** were inferior Courts having local jurisdiction in claims for small debts, established in various parts of the kingdom by special acts of parliament. They were abolished in 1846, and the modern County Courts (*q. v.*) took their place.<sup>2</sup>

§ 2. There was also a minor court of equity called the Court of Requests, presided over by the lord privy seal and the masters of the requests (similar to the masters in chancery), which entertained suits by poor persons. It was virtually abolished in Queen Elizabeth's reign by a decision of the Court of Queen's Bench.<sup>3</sup>

**COURT OF REVIEW** was part of the old Court of Bankruptcy under stats. 1 & 2 Will. 4, c. 56, and 5 & 6 Vict. c. 122, and exercised a kind of supervision or appellate jurisdiction over the commissioners. It was abolished in the year 1847.<sup>4</sup> (See *Bankruptcy Courts; Commissioners in Bankruptcy.*)

**COURT ROLL.** See *Copyhold*, § 1; *Court Baron*, § 3.

**COURTS OF SURVEY** are Courts for the hearing of appeals by owners or masters of ships from orders for the detention of unsafe ships made by the Board of Trade under the Merchant Shipping Act, 1876.<sup>5</sup> A Court of Survey consists of a judge summoned by the registrar from a list of Wreck Commissioners (*q. v.*), stipendiary magistrates, &c., which is provided for the purpose, and of two assessors, one appointed by the Board of Trade, and the other summoned by the registrar out of a list of persons provided for the purpose.<sup>6</sup>

**COURTS OF THE UNIVERSITIES** of Oxford and Cambridge have jurisdiction in all personal actions to which any member or servant of the respective university is a party, provided that the cause of action arose within the liberties of the university, and that the member or servant was resident in the university when it arose, and when the action was brought.<sup>7</sup> Each University Court also has a criminal jurisdiction in all offences committed by its members.<sup>8</sup>

<sup>1</sup> Jud. Act, 1873, s. 16; Bl. Comm. iii.

<sup>2</sup> Steph. Comm. iii. 283.

<sup>3</sup> Spence's Equity, i. 351; 4 Inst. 97.

<sup>4</sup> Robson's Bankr. 25, 81.

<sup>5</sup> Sect. 6.

<sup>6</sup> Sect. 7; Rules of Court of Survey, 1876.

<sup>7</sup> Steph. Comm. iii. 299; stat. 25 & 26 Vict. c. 26, s. 12; 19 & 20 Vict. c. xvii.

<sup>8</sup> Steph. Comm. iv. 325.

**COVENANT** is a promise under seal,<sup>1</sup> that is to say, a promise, agreement or contract contained in a deed or instrument sealed and delivered by the promisor, who is called the covenantor, the promisee being called the covenantee. A covenant, being a contract, is in many respects subject to the same rules as other contracts; as to these, see *Contract; Condition; Promise*.

Express,  
implied.

§ 2. Covenants are either express or implied. By an implied covenant (or covenant in law) is generally meant one created by the law irrespectively of the intention of the parties: thus, in a lease for years the word "demise" creates a covenant by the lessor for quiet enjoyment by the lessee (*i.e.* that he shall occupy the land free from eviction and disturbance by the lessor), unless the lease includes an express covenant to the same effect.<sup>2</sup> There are also implied covenants in the more accurate sense of the term: thus, the reddendum of a lease is an implied covenant by the lessee for payment of the rent.<sup>3</sup> (See *Express; Implied; Tacit*.)

Real,

personal.

§ 3. Covenants were formerly divided into real and personal. A real covenant was one by which a man bound himself to pass or convey lands, &c. to another, so that the land itself could be recovered: *e.g.* a covenant to levy a fine or a warranty (*q. v.*); a personal covenant, on the other hand, merely gave the right to recover damages for non-performance.<sup>4</sup> Real covenants, in this sense, no longer exist;<sup>5</sup> the term "real covenant" is, however, sometimes used to denote a covenant running with the land<sup>6</sup>

Covenants  
running with  
the land.

(*infra*, § 5). § 4. A personal covenant may deal with any subject, *e.g.* the payment of a sum of money, the execution of work and labour, &c., or it may relate to or be connected with land. Covenants connected with land are divided into those which are annexed to an estate in the land, and collateral covenants.<sup>7</sup> § 5. A covenant annexed to an estate in land, or a "covenant running with the land," is one the benefit or burden of which passes to an assignee of the estate when the owner assigns it: thus, if a lessee of buildings covenants to repair them, and assigns the lease, the covenant binds the assignee.<sup>8</sup> So we speak of covenants being annexed to, or running with, a reversion: thus, a covenant to pay rent runs with the reversion, that is, every assignee of the reversion can enforce the covenant against the tenant.<sup>9</sup> (See *Privty*.) Some covenants run with the land whether assigns are mentioned in them or not, while others only do so where assigns are expressly mentioned.<sup>10</sup> § 6. Opposed to such covenants are collateral covenants or covenants in gross, namely, to do something not concerning the land demised or conveyed, "as if the lessee covenants for him and his assigns to build a house upon the land of the lessor which is no parcel of the demise . . . it shall not

Collateral or  
in gross.

<sup>1</sup> Shepp. Touch. 160.

<sup>2</sup> Woodfall, L. & T. 155; Davids. Conv. i. 106.

<sup>3</sup> *Ibid.* 107; *Duke of St. Albans v. Ellis*, 16 East, 352.

<sup>4</sup> Shepp. Touch. 161; Co. Litt. 384 b; Bl. Comm. iii. 157.

<sup>5</sup> Stat. 3 & 4 Will. 4, c. 27, s. 36.

<sup>6</sup> Davids. Conv. i. 110.

<sup>7</sup> Shepp. 161.

<sup>8</sup> Woodfall, 146; *Spencer's case*, 5 Co. 16; Smith, L. C. i. 60; Leake on Contracts, 615; Pollock on Contract, 214.

<sup>9</sup> Leake, 620; stat. 32 Hen. 8, c. 34.

<sup>10</sup> Davids. i. 110.

bind the assignee."<sup>1</sup> § 7. A covenant, however, though it does not run with the land, may be binding in equity upon every person who takes an assignment with notice of it: such a covenant is sometimes called a "covenant running with the land in equity."<sup>2</sup>

Covenant running with the land in equity.

§ 8. Covenants are known by names indicating their object or purport. (See *Covenant to stand seised*.) Thus, on every conveyance, mortgage, &c., the grantor enters into covenants for title, usually four in number: namely, (i) that he has good right to convey the lands; (ii) that they shall be quietly enjoyed; (iii) that they are free from incumbrances; and (iv) that the grantor and his heirs will make any further assurance (*q. v.*) which may be required to vest the lands in the grantee, his heirs or assigns.<sup>3</sup>

Covenants for title.

§ 9. A vendor of land only enters into qualified covenants for title, by which his responsibility is limited to the acts of those who have been in possession since the last sale. A mortgagor gives absolute covenants. Trustees, mortgagees, and other persons having no beneficial interest in the property, merely covenant that they have not incumbered it.<sup>4</sup>

ETYMOLOGY.]—Norman French, *covenaunt*; <sup>5</sup> Latin, *convenire*, to agree.

**COVENANT TO STAND SEISED** is a conveyance adapted to the case where a person seised of land in possession, reversion, or vested remainder, proposes to convey it to his wife, child or kinsman. In its terms it consists of a covenant by him, in consideration of his natural love and affection, to stand seised of the land to the use of the intended transferee. Before the Statute of Uses this would merely have raised a use in favour of the covenantee; but by that act this use is converted into the legal estate, and the covenant therefore operates as a conveyance of the land to the covenantee. It is now almost obsolete.<sup>6</sup> (See *Conveyance*, § 7; *Statute of Uses*; *Consideration*, § 7.)

**COVERT—COVERTURE.**—A married woman is called in Norman French a *feme covert*, because she is under the protection of her husband. Coverture means—(1) the condition of a married woman, or the fact of her being married, and (2) the continuance of the marriage.<sup>7</sup> (See *Marriage*.)

**COVIN** "is a secret assent determined in the hearts of two or more to the prejudice of another: as if a tenant for term of life, or tenant in tail, will secretly conspire with another, that the other shall recover against the tenant for life the land which he holds, &c. in prejudice of him in the reversion. Or if an executor or administrator permit judgments to be entered against him by fraud, and plead them to a bond, or [if] any fraudulent assignment or conveyance be made, the party grieved may plead covin and relieve himself."<sup>8</sup>

<sup>1</sup> *Spencer's Case*, 5 Co. 16 b; Smith, L. C. i. 60.

<sup>2</sup> See *Renals v. Cowlishaw*, 9 Ch. D. 125.

<sup>3</sup> *Dauids*, ii. 191.

<sup>4</sup> *Ibid.* i. 122; Williams, R. P. 447; Elphinstone, Conv. 122.

<sup>5</sup> Britton, 242 a.

<sup>6</sup> Steph. Comm. i. 532; Williams on Seisin, 145.

<sup>7</sup> Co. Litt. 112 a; Bl. Comm. i. 442.

<sup>8</sup> *Termes de la Ley*, s. v.; Co. Litt. 357 a.

Covin therefore seems to have merely a negative effect, that is, it avoids the transaction of which it forms part, but does not give rise to a liability, as does conspiracy or fraud. The term, however, is not now in common use.<sup>1</sup> (See *Collusion*.)

ETYMOLOGY.]—Apparently from Norman French: *covenir*, to agree. (See *Covenant*.)

**CREDIT—CREDIBILITY**—primarily signifies belief in a person's trustworthiness.

**Witness.** § 2. Thus, in the law of evidence, the objections which were formerly sufficient to make a witness incompetent are now in general only available as affecting his credibility, or his worthiness to be believed. Such are—the fact of his having an interest in the result of the proceeding, the fact of his having been convicted of felony, of his being under the age of fourteen years, &c. Credibility is a question for the jury.<sup>2</sup> (See *Competency*; *Discredit*.)

**Payment.** § 3. When a person agrees to postpone the payment of money to which he would otherwise be entitled, he is said to give credit; thus, if A. sells goods to B. and the price is to be paid at a future time, this is a sale upon credit. (See *Creditor*; *Debt*; *Letter of Credit*; *Mutual Credits*.)

**CREDITOR** is a person to whom a debt is owing by another person, called the debtor. The creditor is called a simple contract creditor, a specialty creditor, a bond creditor, or a judgment creditor, according to the nature of the obligation giving rise to the debt (see *Contract*; *Debt*); and if he has issued execution to enforce a judgment he is called an execution creditor. He may also be a sole or a joint creditor. (See *Joint*.)

**Secured and unsecured.** § 2. In the law relating to the administration of the assets of bankrupts, companies in liquidation, and persons dying insolvent, creditors claiming to share in the assets are divided into secured and unsecured. A secured creditor is a person who holds a security on the property of the individual or company,<sup>3</sup> and includes not only persons holding mortgages, charges, and liens, but also judgment creditors who have levied execution by seizure of property belonging to the individual or company,<sup>4</sup> or have obtained and served garnishee orders.<sup>5</sup>

**In bankruptcy.** § 3. In bankruptcy, a secured creditor is for the purpose of petitioning for adjudication, proving his debt, receiving dividends, and voting, deemed to be a creditor only in respect of the balance due to him after realizing or deducting the value of his security, unless he gives up his security to the trustee. If he does not comply with these conditions he is excluded from all share in the dividends.<sup>6</sup> In order to prevent persons

<sup>1</sup> See *Girdlestone v. Brighton Aquarium Company*, 3 Exch. D. 137; 4 Exch. D. 107.

<sup>2</sup> Best on Evidence, 189 *et seq.*

<sup>3</sup> Bankruptcy Act, 1869, s. 16, § 5.

<sup>4</sup> Robson's Bankruptcy, 256; *Slater v. Pinder*, L. R., 6 Ex. 228; *Ex parte Roche*, L. R., 6 Ch. 795; *In re Printing*

*&c. Co.*, 8 Ch. D. 535; *Ex parte Evans*, 13 Ch. D. 252.

<sup>5</sup> *In re Watt*, W. N. (1878) 70; *Silkstone Coal Co.*, 11 Ch. D. 160; *Ex parte Schofield*, 12 Ch. D. 337; *Levy v. Lovell*, 14 Ch. D. 234.

<sup>6</sup> Bankruptcy Act, 1869, ss. 12, 16, 40.

from under-estimating the value of their securities, it is also provided that the trustee shall have power to purchase the security of any creditor at the value which he has set on it; or if the creditor has realized it at a price exceeding his valuation, he is bound to pay the surplus to the trustee.<sup>1</sup>

§ 4. The Judicature Act, 1875, s. 10, provides that the rules of the bankruptcy law as to the respective rights of secured and unsecured creditors shall prevail and be observed in the administration by the Court of the assets of any person dying insolvent after the commencement of the act, and in the winding-up of an insolvent company under the Companies Act, 1862. The principal effect of this section appears to be to abolish the rule in *Kellock's Case*,<sup>2</sup> so as to compel a secured creditor to deduct the value of his security and prove for the balance of his debt. It also appears to have the effect of depriving a creditor of the right to interest on his debt from the date of the judgment or order of administration, which is treated as equivalent to an adjudication in bankruptcy.<sup>3</sup> Whether it entitles the executor (in the case of an administration) or the liquidator (in the case of a company) to purchase the security of a creditor at his own valuation is not clear; taken in its literal meaning the section would not have that effect. It has, however, given rise to many speculations and inconsistent decisions (some of which are referred to in note (3) to title *Administration*), and a creditor would not be safe in relying on its omissions.

In administration and windings-up.

§ 5. In the law of bankruptcy and winding-up a petitioning creditor is a creditor who presents a petition for adjudication or winding-up. In bankruptcy his debt must amount to 50*l*.<sup>4</sup> (see *supra*, § 3). In winding-up his debt must exceed 50*l*.<sup>5</sup>

Petitioning creditor.

As to frauds on creditors, see *Fraud*; *Fraudulent Conveyances*.

**CRIME—CRIMINAL LAW.**—The word "crime" has no technical meaning in the law of England, but it is generally used to include all acts amounting to treason, felony or misdemeanor (*q. v.*). Crimes are violations of "public rights and duties due to the whole community, considered as a community, in its social aggregate capacity."<sup>6</sup>

Criminal law is that part of the law which relates to crimes and their punishment.

As to the Courts of Criminal Jurisdiction, see *Queen's Bench*; *Central Criminal Court*; *Court for Crown Cases Reserved*; *Assize*; *Quarter Sessions*; *Lord High Steward*.

As to the procedure in criminal cases, see *Indictment*; *Information*; *Summary*; *Jury*; *Certiorari*; *Trial*.

**CROSS.**—When A. brings an action against B., and B., before final judgment is given in that action, brings another action against A. in

<sup>1</sup> Bankruptcy Rules, 1870, rr. 99, 100, 101. 1879, s. 6.

<sup>2</sup> L. R., 3 Ch. 789.

<sup>3</sup> *In re Summers*, 13 Ch. D. 136.

<sup>4</sup> Robson's Bankr. 153, 176; Act of

<sup>5</sup> Companies Act, 1862, s. 80.

<sup>6</sup> Bl. Comm. iv. 5; Stephen, Crim.

Dig. 8.

respect of a claim arising out of the same subject-matter, this second action is called a cross action.<sup>1</sup> Formerly it was not uncommon in Chancery practice for the defendant in a suit to bring a cross bill against the original plaintiff, either for discovery or for some relief which he could not obtain in the original suit. The suits were then generally consolidated and one judgment given in the two. Now, however, the procedure by counter-claim (*q. v.*) has almost superseded this mode of proceeding. As to cross actions against foreign governments, see *State*.

Cross actions are also sometimes brought in the Admiralty Division in respect of damage by collision of ships.<sup>2</sup> (See *Collision; Limitation of Liability*.)

**CROSS-EXAMINATION.** See *Examination*.

**CROSS REMAINDER.** See *Remainder*.

**CROSSED CHEQUE.** See *Cheque*.

**CROWN DEBTS.** See *Debts*.

**CROWN LANDS.** See *Demesne*.

**CROWN OFFICE IN CHANCERY** is one of the offices of the High Court of Chancery now transferred to the High Court of Justice. The principal official, the Clerk of the Crown, "is an officer of parliament and of the Lord Chancellor in his non-judicial capacity rather than an officer of the Courts of Law."<sup>3</sup> His principal duties are to make out and issue writs of summons and election for both Houses of Parliament and to keep the custody of poll-books and ballot-papers. Nearly all patents passing the Great Seal, except those for inventions,<sup>4</sup> are made out in his office, and he makes out the warrants for almost all letters-patents under the Great Seal. (See *Patent*.) He also does the duties formerly performed by the Clerk of the Hanaper; they chiefly consisted in collecting fees, but have now ceased almost entirely. He is registrar of the Lord High Steward's Court.<sup>5</sup>

**CROWN OFFICE IN THE QUEEN'S BENCH** was the office in which all the business of the Queen's Bench Division in respect of its prerogative and criminal jurisdiction was transacted.<sup>6</sup> It has now been transferred together with its principal officer, the Queen's Coroner (*q. v.*), to the Central Office (*q. v.*).

<sup>1</sup> See *Davis v. Hedges*, L. R., 6 Q. B. 687.

<sup>2</sup> See *Chapman v. Royal Netherlands Steam Nav. Co.*, 4 P. D. 157.

<sup>3</sup> Second Rep. Legal Dep. Comm. 39.

<sup>4</sup> Great Seal Act, 1880.

<sup>5</sup> Second Rep. Legal Dep. Comm. 39; Rep. Comm. on Fees, 5; 2 & 3 Will. 4, c. 111; 3 & 4 Will. 4, c. 84; 15 & 16 Vict. c. 87; 37 & 38 Vict. c. 81.

<sup>6</sup> Second Rep. Leg. Dep. Comm. 15.



**CRUELTY.**—§ 1. In the law of divorce, cruelty may be said generally to be where the husband has so treated his wife and manifested such feelings towards her as to have inflicted bodily injury, to have caused reasonable apprehension of bodily suffering, or to have injured health.<sup>1</sup> Acts of cruelty to children committed in the presence of the mother are sometimes called constructive cruelty to her.<sup>2</sup> § 2. Cruelty by the wife towards the husband generally requires to be of an aggravated character in order to give him a right to a judicial separation.<sup>3</sup> (See *Dissolution of Marriage; Judicial Separation.*)

As to cruelty to children, see *Children*.

§ 2. Cruelty to animals is punishable by fine or imprisonment under the stats. 7 & 8 Vict. c. 87, 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60; these acts also provide for animals in pounds being supplied with food and water. The Cruelty to Animals Act, 1876, deals with the subject of vivisection. To animals.

**CUI ANTE DIVORTIUM** was an action by which a divorced woman could recover her lands if they had been aliened during the coverture by her husband, “cui ante divortium ipsa contradicere non potuit.”<sup>4</sup> If she died before bringing the action her heir could bring an action called a “sur cui ante divortium.” They were both abolished by stat. 3 & 4 Will. 4, c. 27, s. 36.

**CUI IN VITÄ** was an action by which a widow could recover her lands if they had been aliened during the coverture by her husband, “cui in vitä suä ipsa contradicere non potuit.” If she died before bringing the action her heir had an action called “sur cui in vitä.”<sup>5</sup>

They were both abolished by stat. 3 & 4 Will. 4, c. 27, s. 36. (See *Discontinuance.*)

**CUJACIUS.**—Jacobus Cujacius (Cujas) was born at Toulouse in 1522, studied there under Ferrier, taught law from 1547, principally at Bourges, Turin and Paris, until his death at Bourges on 4th October, 1590. His principal works are notes and commentaries on the different portions of the Corpus Juris Civilis, on the Basilica, and on the Decretals; and the “Usus Feudorum.” Collections of his works have been published at Paris, Naples and other places.<sup>6</sup>

**CUM TESTAMENTO ANNEXO.** See *Letters of Administration*.

**CUMULATIVE** signifies that two things are to be added together or taken one after another, instead of one being a repetition or in substitution of the other. Thus where a testator gives two legacies of unequal amount to the same person, even by the same testamentary instrument, they are in general cumulative, that is, the legatee takes both.<sup>7</sup> So when two statutes provide different remedies, penalties or

<sup>1</sup> *Tomkins v. Tomkins*, 1 Sw. & Tr. 168; Browne on Divorce, 30.

<sup>2</sup> Browne, 36.

<sup>3</sup> *Ibid.* 40.

<sup>4</sup> Co. Litt. 326 a.

<sup>5</sup> Litt. § 594; Bl. Comm. iii. 183, n.

<sup>6</sup> Holtz. Encycl. s. v.

<sup>7</sup> Watson's Comp. Eq. 1239; Williams on Executors, 1196.

punishments for the same act or offence, it is a question of construction whether they were intended to be cumulative or whether it was intended that only one could be exercised or imposed in a given case.

**CURATE.**—A temporary or stipendiary curate is a clerk in holy orders who assists a rector or vicar, and is paid by him. In some cases the bishop may compel an incumbent to employ a curate.<sup>1</sup> A perpetual curate officiates in a parish or district to which he is nominated by an impropriator or lay rector.<sup>2</sup> A curate of the latter class seems now to be properly called a vicar.<sup>3</sup> (See also *Chapel*, § 5.)

**CURATOR** sometimes means the same thing as “guardian.” Thus in probate practice the guardian appointed to take out letters of administration *durante minore etate* is sometimes called a curator, and in divorce practice a curator ad litem is the same thing as a guardian ad litem.<sup>4</sup> (See *Guardian*.)

Felons' estates.

§ 2. By the act to abolish forfeiture for treason and felony,<sup>5</sup> where a person has been convicted of treason or felony and no administrator of his property has been appointed, an interim curator of the property may be appointed by the justices of the peace of the district where the convict last resided. The interim curator has powers similar to those of an administrator (*q. v.* § 2), but can only exercise some of them with the sanction of the justices or a Court.

**CURE.** See *Aid*, § 3.

**CURSITORS** were clerks in the chancery office, whose duties consisted in drawing up those writs which were of course, *de cursu*, whence their name. They were abolished by stat. 5 & 6 Will. 4, c. 82.<sup>6</sup>

**CURTESY.**—§ 1. Where a man marries a woman seised of land in fee simple or fee tail, and has by her issue born alive capable of inheriting the land as heir to her, notwithstanding the issue may afterwards die, yet if the husband survives the wife he shall hold the land during his life. “And he is called tenant by the curtesie of England, because this is used in no other realme but in England onely.”<sup>7</sup> If land is given to a woman and the heirs male of her body, and she marries and has issue a daughter and dies, the husband is not tenant by the curtesy, because the daughter by no possibility could inherit her mother's estate in the land.<sup>8</sup>

§ 2. Where a married woman is entitled to an equitable estate of in-

<sup>1</sup> Steph. Comm. ii. 696; stat. 1 & 2 Vict. c. 106. (See *Non-Residence*.)

<sup>2</sup> Phillimore, Eccl. Law, 299.

<sup>3</sup> Stat. 31 & 32 Vict. c. 117; Steph. Comm. ii. 682.

<sup>4</sup> Browne on Divorce, 23.

<sup>5</sup> 33 & 34 Vict. c. 23, ss. 21 *et seq.*

<sup>6</sup> Spence's Equity, 238; 4 Inst. 82.

<sup>7</sup> Litt. § 35; Co. Litt. 29 a; the law Latin phrase was *tenens per legem Angliæ*. It is said that this species of estate was not peculiar to England, and that the name is connected with *curia*; Digby, R. P. 122. In Scotland it was called *curialitas Scotiæ*; Co. Litt. 30 a.

<sup>8</sup> Co. Litt. 29 b.

heritance to her separate use and does not dispose of it by deed or will, the husband is entitled to equitable curtesy.<sup>1</sup>

§ 3. By the custom of gavelkind a man may be tenant by the curtesy without having any issue.<sup>2</sup>

§ 4. And by the special custom of some manors the widower of a deceased female copyholder is entitled to a customary curtesy.<sup>3</sup>

See *Dower*; *Freebench*.

**CURTILAGE** is a court-yard adjoining a messuage, "*i. e.*, a little garden, yard, field or piece of void ground, lying near and belonging to the messuage."<sup>4</sup> By the grant of a messuage in a deed the curtilage passes without being expressly mentioned.<sup>5</sup> (For the etymology of the word, see *Court*.)

**CUSTODY** in criminal law is the same thing as detention in civil law. Thus where the owner of a moveable thing gives it to his servant to keep until he wants it back, the servant is said to have the custody of it and the master retains the possession.<sup>6</sup> But if a thing is delivered by a stranger to a servant on behalf of his master, then the servant has the possession and not the mere custody of it.<sup>7</sup>

See *Embezzlement*.

**CUSTOM.**—I. § 1. A custom is a rule of conduct which a given class of persons observe spontaneously or by tacit consent.<sup>8</sup>

Customs are of two classes, namely, those which form part of the law of England, and those which operate by modifying contracts entered into by private persons.

A. § 2. Customs which form part of the law of England are commonly divided into three kinds, namely, general, local or particular, and personal.

§ 3. General customs, or customs of the realm,<sup>9</sup> are the universal rule of the whole kingdom, and form the common law in its stricter and more usual signification;<sup>10</sup> such are the rules as to the inheritance of land, the solemnities and obligations of contracts, the liabilities of common carriers, &c., so far as they have not been altered by statute.<sup>11</sup>

<sup>1</sup> *Cooper v. Macdonald*, 7 Ch. D. 288.

<sup>2</sup> Co. Litt. 30 a.

<sup>3</sup> Elton, Copyh. 153.

<sup>4</sup> Shepp. Touch. 94.

<sup>5</sup> Co. Litt. 5 b; Williams, R. P. 13.

<sup>6</sup> Stephen, Crim. Dig. 196.

<sup>7</sup> Stephen, 224.

<sup>8</sup> Bracton, 2; Austin, 104; Markby's Elements of Law, § 67 *et seq.* As to the relation between custom and law see also Maine, Anc. Law, ch. i.; Mr. F. Pollock on Law and Command, Law Mag. April, 1872, and The History of the Word "Law," by the present writer, Law Mag. June and July, 1874. It may now be taken that Austin's view of custom is incorrect, and that custom is a source of law in the strict

sense of the term; see Holland's Jurispr. 44 *et seq.*

<sup>9</sup> Cowp. 375.

<sup>10</sup> Bl. Comm. i. 67.

<sup>11</sup> This use of the word custom seems to be modern, for Bracton, Britton and Littleton use "custom" or "usage" in the sense of "particular custom," and say nothing about "general customs," but simply speak of the law of England. (Bracton, 1 a, 2 a; Britton, 1 a, 33 b, 187 b; Littleton, § 170.) Coke also says that the laws of England are "divided into common law, statute law and custome," and "a custome cannot be alledged generally within the kingdome of England: for that is the common law" (Co. Litt.

Particular or  
local.

§ 4. Particular or local customs are those which only affect land situate within particular districts; such are the customs of gavelkind and borough-English, which govern the descent of land in certain places,—the customs which give the inhabitants of a certain place rights over land in the neighbourhood (see *Easement; Recreation*),—the custom of tin-bounding in Cornwall,—and the customs relating to lands held by copyhold and customary freehold tenure.<sup>1</sup> § 5. The customs of gavelkind and borough-English are judicially noticed; but to make any other particular custom good, it must be reasonable and must have been peaceably and continually observed from time immemorial; it is of course not necessary to prove that it has existed from time immemorial, for proof of its existence, for say twenty years, is often sufficient evidence of its immemorial existence.<sup>2</sup>

Personal.

§ 6. The principal, if not the only, custom having the force of law and affecting a particular class of persons, is that known as the custom of merchants or law merchant, sometimes called the general custom of merchants to distinguish it from usages or customs of trade (*infra*, § 8). It resembles the common law in following precedents, for “the custom of merchants, when established and settled by known decisions, is the general law of the kingdom, and therefore ought not to be left to a jury after it has been already settled by judicial determinations; but where it is doubtful it may be fit to ascertain from merchants the facts.”<sup>3</sup> The rules as to bills of exchange, cheques, and other negotiable securities, form an important part of the law merchant: a person who makes use of a mercantile instrument, such as a bill of exchange, becomes to that extent subject to the custom of merchants.<sup>4</sup>

B. § 7. Customs which modify contracts entered into by private persons are those which have prevailed so long and so uniformly in transactions between persons engaged in a particular occupation, that when two of such persons enter into a contract relating to their occupation, and not containing anything inconsistent with the custom, they are presumed to have contracted with reference to it, and it then forms part of the contract so far as it is applicable.

110 b); but elsewhere he distinguishes between general and particular customs (115 b; see also Finch's Law, 77; Noy's Maxims, i. 17). In truth it is misleading to describe the common law as consisting of customs: if it did, a rule hitherto unrecognized might be introduced on proof of its having been observed from time immemorial. In reality, of course, this is not so; for no rule of the common law can now be recognized unless a judicial precedent can be found for it.

<sup>1</sup> Bl. i. 74; Co. Litt. 110 b; Noy's Dialogue, 27.

<sup>2</sup> Litt. § 170; Co. Litt. 110 b, 113 b, 175 b; Bl. Comm. i. 76; Broom's C. C. L. 12; Shelford's R. P. Stat. 31. The Prescription Act, 1832, applies to certain customs, and limits the length of time to be proved.

<sup>3</sup> Per Lord Mansfield, *Edie v. East India Co.*, 2 Burr. at p. 1226; 1 W. Bl. 298. It has been said that where a usage among merchants is of recent date, it may be proved by evidence and then form part of the law merchant. (*Goodwin v. Roberts*, L. R., 10 Ex. at p. 346.) This view, however, seems to involve a confusion between customs having the force of law and customs which modify contracts presumed to have been made with reference to them. In *Goodwin v. Roberts* the decision went on the ground of a usage having been established among bankers, and not on the ground of the existence of a custom having the force of law. See *S. C.*, 1 App. Ca. 476; *Smith's L. C.* 610; *Crouch v. Crédit Foncier*, L. R., 8 Q. B. at p. 386; a learned note by the reporters in 8 C. B. p. 967.

<sup>4</sup> 8 C. B. 967; Bl. Comm. i. 273.

Customs modifying contracts are generally divided into two classes.

§ 8. Usages or customs of trade are customs prevailing in a particular trade or business: thus, if by the usage of bankers, stockbrokers, &c. bonds or scrip certificates of a certain kind are treated as negotiable, a person who has deposited them with a stockbroker cannot claim them from a *bonâ fide* holder for value, who has acquired them by delivery from the stockbroker.<sup>1</sup> § 9. Such usages or customs may not only annex terms to a contract which is not inconsistent with them, but may also control the interpretation of a contract which is complete in itself but which contains terms used in a technical sense.<sup>2</sup>

Usage of trade.

§ 10. Customs of the country are customs relating to agriculture and the tenure of land for agricultural purposes, prevailing within a certain district. They are of two principal kinds: customs relating to and regulating the course of husbandry, and the periods of taking farms; and customs which modify the rule of law that the land, together with everything that is in the soil or attached to it, at the determination of a tenancy, belongs to the landlord and not to the tenant.<sup>3</sup>

Customs of the country.

The leading case on this subject is *Wigglesworth v. Dallison*; <sup>4</sup> there the defendant granted to the plaintiff a lease of a farm situate within a parish where there was an ancient and laudable custom for tenants of lands in certain cases to cut and take away after the expiration of the lease crops sown by them before the expiration of the term; the lease was silent on the question of away-going crops, and it was held that the custom formed part of the agreement between the parties, being supplemental to the lease.

Customs of this kind also regulate the rights of outgoing and incoming tenants, which vary infinitely in different parts of the country.<sup>5</sup> (See *Tenant Right*.)

**CUSTOMARY FREEHOLDS.**—I. § 1. In the proper sense of the term customary freeholds are a privileged and superior kind of copyholds. The tenants of these lands hold by copy of court roll according to the custom of the manor, but they are not said to hold at the will of the lord. This tenure is found chiefly in the north of England, where it is not unfrequently known by the name of "tenant right" (*q. v.*).<sup>6</sup>

II. § 2. Sometimes the term is inaccurately applied to lands which are really freehold, but which are subject by custom to some peculiar and customary mode of alienation: as in the case of lands held of a certain manor in which there was a custom that every feoffment should be void unless it were presented at a Manorial Court within a certain time.<sup>7</sup>

<sup>1</sup> *Goodwin v. Roberts*, 10 Ex. 76, 337; 1 App. Ca. 476; *Gorgier v. Mieville*, 3 B. & C. 45.

<sup>2</sup> *Broom's C. L.* 507.

<sup>3</sup> *Cooke's Agricultural Holdings Act*, 4.

<sup>4</sup> *Dougl.* 201; *Smith's L. C. i.* 598.

<sup>5</sup> *Woodfall's L. & T.* 706 *et seq.*

<sup>6</sup> *Williams on Seisin*, 49, citing *Duke of Portland v. Hill*, L. R., 2 Eq. 765; *Eardley v. Granville*, 3 Ch. D. 826.

<sup>7</sup> *Williams*, 130, citing *Perryman's Case*, 5 Rep. 84.

**CUSTOMS** are the duties or tolls payable upon merchandise exported from and imported into the country. The proceeds form part of the Consolidated Fund (*q.v.*).<sup>1</sup> (See *Excise*.)

**CUSTOS ROTULORUM** is the first justice of the peace and first civil officer of the county for which he is appointed. As his name implies, he is nominally keeper of the rolls or records (writs, indictments, &c.) under the commission of the peace, but in practice they are kept by the clerk of the peace (*q.v.*).<sup>2</sup>

**CY-PRÈS.**—§ 1. Where a person has expressed a general intention and also a particular mode in which he wishes it carried out, but the intention cannot be carried out in that particular mode, the Court before whom the matter comes will in certain cases direct the intention to be carried out *cy-près*, that is, as nearly as possible in the mode desired. § 2. Thus if a testator shows an intention that part of his property should be devoted to charitable purposes, but he either does not effectually indicate the particular manner in which he wishes it applied, or indicates a mode of application which is or subsequently becomes impracticable, the Court will execute the trust *cy-près*, by applying the property to charitable purposes similar to those (if any) mentioned by the testator.<sup>3</sup> (See *Scheme*, § 3.) So where an executory trust, if carried literally into effect, would be void for illegality, as where it would infringe the rule against perpetuities, the Court, in order to carry the testator's intention into effect as far as possible, or, as it is termed, *cy-près*, will direct a settlement to be made as strictly as the law permits.<sup>4</sup>

**ETYMOLOGY.**—Evidently from the French *ci* or *cy* = "this" or "here," and *près*, = "near," although the phrase does not seem to occur in French.

## D.

**DAMAGE** is where one person has done a wrongful act for which the person injured may obtain compensation in an action.

Damage in law.

§ 2. Damage in law or general damage is where no actual damage has been caused, but where the person whose right has been infringed brings an action to vindicate that right: thus if A. enters on B.'s land without permission, B. may bring an action and recover nominal damages against A. for the trespass, though no actual injury to the land was caused, for repeated trespasses on the land might eventually give rise to an easement or right over the land.<sup>5</sup> So A. may recover nominal damages against B. for a libel although it caused A. no pecuniary loss.<sup>6</sup>

Actual damage or special (I.).

§ 3. Actual or special damage is where the wrongful act has caused a

<sup>1</sup> Steph. Comm. ii. 560; stats. 16 & 17 Vict. c. 107, to 39 & 40 Vict. c. 36.

<sup>2</sup> Pritchard, Q. S. 34; Bl. Comm. iv. 272.

<sup>3</sup> Watson's Comp. Eq. 43; Tudor's Char. Trusts, 259.

<sup>4</sup> White & Tudor's L. C. i. 33.

<sup>5</sup> Broom's C. C. L. 90, 860.

<sup>6</sup> *Ibid.* 89.

loss or injury which can be assessed in money: as where A. negligently drives a carriage so as to cause bodily injury to B., whereby B. is prevented from carrying on his business and put to medical expense; or where a slander injures a person in his business.

§ 4. "Special damage" is also used in the sense of extraordinary Special (II.). damage: as where a person suffers damage from a public wrong (*e.g.* a public nuisance), differing in kind from the damage suffered by the community in general.<sup>1</sup>

§ 5. Consequential damage is that which is either the natural result of the wrongful act, according to the usual course of things, or, in the case of a breach of contract, such damage as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it.<sup>2</sup> Thus medical expenses incurred in consequence of an injury may be recovered;<sup>3</sup> again, in an action for the breach of a warranty of a chain cable, it was held that the plaintiff might recover the value of the anchor to which the cable was attached and which was lost by the breaking of the cable.<sup>4</sup> (See *Remote*.) Consequen-  
tial.

**DAMAGE-FEASANT.** See *Distress*.

**DAMAGES** are a sum of money adjudged to be paid by one person to another as compensation for a loss sustained by the latter in consequence of an injury committed by the former.<sup>5</sup> The test by which the amount of the damages is ascertained is called the measure of damages. Thus where a vendor sues his vendee for breach of contract for the sale of goods, the measure of damages is the price of the goods if the property in them has passed to the vendee, or the difference between the contract price and the market price at the time of the breach if the vendor has re-sold the goods.<sup>6</sup> As to when interest is payable as damages, see *Interest*. Measure of  
damages.

§ 2. When the parties to a contract agree that on a breach of its provisions the one shall pay to the other a specified sum of money, the question frequently arises whether that sum is merely a penalty (*q. v.*), or whether it is liquidated damages, that is, a sum agreed to be paid on the breach in order to save the trouble and expense of ascertaining the damage actually sustained. The language in which the provision is expressed is immaterial if its true nature is apparent. Thus where A. agreed to do certain services for B., for which B. agreed to pay him 3*l.* 6*s.* 8*d.* per day, and the Liquidated  
damages.

<sup>1</sup> Broom's C. C. L. 657; see also *infra*, note (2).

<sup>2</sup> Chitty on Contracts, 814. Consequential damage is sometimes called special damage, as opposed to general damage, which is the immediate result of the breach; Leake on Contracts, 564.

<sup>3</sup> Underhill on Torts, 59.

<sup>4</sup> *Borradaile v. Brunton*, 8 Taunt. 535; Chitty, 816.

<sup>5</sup> Co. Litt. 257 a; Mayne on Damages, 1.

<sup>6</sup> Broom's C. C. L. 631; Mayne, 78. As to damages for breach of contract, see Chitty on Contracts, 807 *et seq*; Leake on Contracts, 56 *et seq*. As to torts see Broom, 852 *et seq*. In some cases a measure of damages is fixed by statute, *e.g.* by the Merchant Shipping Act, 1854, s. 510.

contract stipulated that if either party should commit a breach of any part of it he should pay the other 1,000*l.* as "liquidated and ascertained damages, and not a penalty or penal sum," it was held that on a breach the plaintiff was only entitled to recover the damage actually sustained, and not 1,000*l.*, because otherwise if B. had failed to make a single payment of 3*l.* 6*s.* 8*d.*, A. would have become entitled to 1,000*l.* as damages.<sup>1</sup> On the other hand, where a lease stipulated that the lessee should pay 5*l.* for every acre of meadow land which he should plough up, this was held to be liquidated damages and not a penalty.<sup>2</sup>

Nominal.

§ 3. Nominal damages are damages to such a small amount (*e.g.* a farthing) as to shew that they are not intended as any equivalent or satisfaction to the party recovering them. They are given when the plaintiff in an action for an invasion of his right establishes his right but does not show that he has sustained any damage.<sup>3</sup>

Exemplary or vindictive.

§ 4. Exemplary or vindictive damages are damages given not merely as pecuniary compensation for the loss actually sustained by the plaintiff, but likewise as a kind of punishment to the defendant, with the view of preventing similar wrongs in future, as in actions for malicious injuries, fraud, seduction, oppression, continuing nuisances, &c.<sup>4</sup> (See *Aggravation*.)

As to excessive damages, see *New Trial*; see also *Double Damages*; *Inquiry*; *Writ of Inquiry*.

ETYMOLOGY.]—Norman French, *damages*; <sup>5</sup> from Latin, *damnum*.<sup>6</sup>

**DAME** is the legal title of the wife or widow of a knight or baronet.

**DAMNIFY.**—To cause damage or injurious loss to a person.

**DAMNUM ABSQUE INJURIA** is a loss which does not give rise to an action of damages against the person causing it. As where a person blocks up the windows of a new house overlooking his land, or injures a person's trade by setting up an establishment of the same kind in the neighbourhood.<sup>7</sup>

**DANGEROUS GOODS.** See stat. 29 & 30 Vict. c. 69; 34 & 35 Vict. c. 105; 36 & 37 Vict. c. 85.

**DARREIN** is Norman French for "last." (See *Assise of Darrein Presentment*; *Puis darrein Continuance*.)

**DATE.** See *Deed*.

<sup>1</sup> *Kemble v. Farren*, 6 Bing. 141, cited Chitty on Contracts, 808; Leake on Contracts, 573.

<sup>2</sup> *Birch v. Stephenson*, 3 Taunt. 469, cited Chitty, 810.

<sup>3</sup> *Beaumont v. Greathead*, 2 C. B. 494;

Leake on Contracts, 567.

<sup>4</sup> Broom's C. C. L. 855; Smith's L. C. ii. 549.

<sup>5</sup> Britton, 245 b.

<sup>6</sup> Littré, Dict. s. v. *Dommage*.

<sup>7</sup> Broom, C. C. L. 75.



**DAY.**—§ 1. According to Coke, days are either natural or artificial. The natural day consists of twenty-four hours, and includes the solar day and the lunar day, which are artificial days. The solar day is from the rising to the setting of the sun: the lunar day or night is from the setting to the rising of the sun.<sup>1</sup> In the definition of burglary, however, night means the time between 9 p.m. and 6 a.m. (See *Burglary*, § 3.)

§ 2. In the space of a day all the twenty-four hours are usually reckoned; the law generally rejecting all fractions of a day, in order to avoid disputes. Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night, after which the following day commences.<sup>2</sup>

§ 3. In some cases, however, fractions of a day are taken into account: thus, bills of sale comprising the same chattels have priority in the order of the date of their registration, though they may be registered on the same day.<sup>3</sup>

**DAY TO SHOW CAUSE.**—Under the practice of the Chancery Division of the High Court, where an infant is defendant to a suit or action in which his inheritance is concerned, and a decree or judgment is made against him, he has in general a day given him after attaining twenty-one, to show cause against the decree or judgment; for this purpose a subpoena is served upon him on his coming of age, requiring him to show cause against the decree, &c.; if he does not do so, he is bound by it. The necessity for this proceeding has been taken away in some cases by statute.<sup>4</sup> (See *Demur*, § 2.)

**DAYS OF GRACE** are days allowed for making a payment or doing some other act after the time limited for that purpose has expired. Thus, insurance companies commonly allow a certain time for the payment of overdue premiums before forfeiting the policy.<sup>5</sup>

§ 2. In the law of bills of exchange, days of grace are a period allowed in many countries to the drawee or acceptor of a bill of exchange to pay the bill after the due date, originally as a favour, but now as a matter of right. The number of these days varies in different countries: in England it is three; hence, if a bill falls due on the 11th June, the acceptor is not bound to pay it until the 14th. Days of grace are not allowed in the case of bills, notes or drafts payable on demand or at sight.<sup>6</sup>

**DE BENE ESSE.**—To do a thing *de bene esse* is to do it provisionally or in anticipation of the occasion when it may be needed. Thus, "in

<sup>1</sup> Co. Litt. 135 a. In the old practice at common law, "day" had several technical meanings, as to which see Co. Litt. 134 b; Bl. Comm. iii. 277, 316; and *Continuance*. See also *Days of Grace*; *Without Day*.

<sup>2</sup> Bl. Comm. ii. 141; i. 463, note (17).

<sup>3</sup> Bills of Sale Act, 1878, s. 10, § 4; and see stat. 7 Anne, c. 20, s. 6.

<sup>4</sup> Daniell's Ch. Pr. 71, 151; Forms, 880; Fisher on Mortgage, 1084 *et seq.*; 11 Geo. 4 & 1 Will. 4, c. 47; Trustee Acts, 1850 and 1852.

<sup>5</sup> Formerly days of grace were granted in actions at the prayer of the plaintiff; Co. Litt. 134 b.

<sup>6</sup> Byles on Bills, 205; stat. 34 & 35 Vict. c. 74.

certain cases, the Court of Chancery [now the Chancery Division of the High Court] will allow evidence to be taken out of the regular course, in order to prevent the evidence being lost by the death or the absence of the witness. This is called taking evidence *de bene esse*, and is looked upon as a temporary and conditional examination, to be used only in case the witness cannot afterwards be examined in the suit in the regular way."<sup>1</sup>

**DE BONIS ASPORTATIS.** See *Trespass*.

**DE BONIS NON.** See *Grant*.

**DE CONTUMACE CAPIENDO** ("for arresting a contumacious person") is a writ issued out of the Petty Bag Office (*q. v.*) on a significavit (*q. v.*) from an Ecclesiastical Court for the enforcement of a decree pronounced by that Court. It is addressed to the sheriff, and directs the arrest of the person who refuses to obey the decree.<sup>2</sup> (See *Contumacy*.)

**DE CORONATORE ELIGENDO—DE CORONATORE EXONERANDO**—are writs issued out of the Petty Bag Office (*q. v.*); the former, for the election of a county coroner,—the latter, for his removal from office for inability or misbehaviour.<sup>3</sup>

**DE DONIS.** See *Tail*.

**DE EXCOMMUNICATO CAPIENDO** is a writ issuing out of Chancery and directed to the sheriff, commanding him to arrest and imprison a person who has been excommunicated.<sup>4</sup> (See *Excommunication*; *Significavit*; *De Contumace Capiendo*.)

**DE MEDIETATE LINGUÆ.** See *Jury*.

**DE NON DECIMANDO.**—A prescription *de non decimando*<sup>5</sup> is a claim to be exempt from tithes and to pay no compensation in lieu of them. Such a prescription can only be set up by spiritual persons or by corporations or persons claiming under them, and formerly it was necessary to prove that the land in question had been immemorially exempt from tithes.<sup>6</sup> But by the stat. 2 & 3 Will. 4, c. 100, non-payment of tithes during a certain period (thirty years in some cases and sixty in others) is sufficient to establish a prescriptive exemption.<sup>7</sup>

<sup>1</sup> Hunter's Suit, 75; Haynes's Eq. 183; Mitford's Pl. 52, 149; Rules of Court, xxxvii. 4.

<sup>2</sup> Stats. 53 Geo. 3, c. 127; 2 & 3 Will. 4, c. 93; 3 & 4 Vict. c. 93; Phillimore, Eccl. Law, 1261, 1417; *Hudson v. Tooth*, 2 P. D. 125.

<sup>3</sup> Jervis on Coroners, 12.

<sup>4</sup> Phillimore, Eccl. Law, 1404 *et seq.*; stat. 5 Eliz. c. 23.

<sup>5</sup> Sometimes inaccurately called a *modus de non decimando*, the word *modus* in the phrase *modus decimandi* being erroneously taken to mean prescription. The full name for a *modus* was "prescription de modo decimandi" (concerning the manner of tithing.)

<sup>6</sup> Bl. Comm. ii. 31.

<sup>7</sup> As to tithes in lay hands, see stat. 3 & 4 Will. 4, c. 27, s. 1.

**DE PARCO FRACTO** was a writ or action for damages caused by a pound-breach (*q. v.*). It has long been obsolete.<sup>1</sup>

**DE RETORNO HABENDO** is a writ of execution issued in an action of replevin to compel the return of goods rightfully taken in distress and replevied. It seems to have fallen into disuse, the ordinary writ of delivery (*q. v.*) being sufficient.<sup>2</sup> (See *Replevin*; *Elongata*.)

**DE SON TORT.** See *Executor*.

**DE VENTRE INSPICIENDO.**—Where the widow of an owner of land is suspected of feigning herself with child in order to produce a supposititious heir to the estate, the heir presumptive may have a writ *de ventre inspiciendo*, to examine whether she be with child or not; and if she be, to keep her under proper restraint until delivered. The writ appears to direct the sheriff to summon a jury of matrons for the purpose.<sup>3</sup> It is, however, practically obsolete.

**DE VI LAICÂ REMOVENDÂ**—“for the removal of lay force”—is an obsolete writ, which seems to have been applicable where an incumbent was hindered or disturbed in his possession of the benefice.<sup>4</sup>

**DEAN—DEAN AND CHAPTER**—are the council of a bishop, and also assist in the celebration of divine service in his cathedral. The dean is the president of the council. The chapter consists of dignitaries of the Church called canons.<sup>5</sup> (See *Bishop*; *Congé d'élire*; *Archdeacon*.) There are also other kinds of deans: such as rural deans (*q. v.*); deans of peculiars (of whom the Dean of Arches is one); honorary deans, such as the Dean of the Chapel Royal at St. James's; and deans of provinces or deans of bishops; the Bishop of London is dean of the province of Canterbury.<sup>6</sup> (Latin, *decanus*, one set over ten monks or canons.) (See *Corporation*, § 5.)

**DEAN OF ARCHES** is the chief judicial officer or “official principal” of the Archbishop of Canterbury.<sup>7</sup> He is the judge of the Court of Arches (*q. v.*), and is not really a dean in the modern sense of that word.<sup>8</sup>

**DEATH.**—§ 1. “There is a death in deede [or natural death], and there is a civill death, or death in law, *mors civilis* and *mors naturalis*.”<sup>9</sup> Civil death formerly took place when a man was banished or adjured the realm by the process of the common law, or when a man became professed in religion, for on such an event happening his property devolved as if he were really dead,<sup>10</sup> and therefore grants of land for life were

<sup>1</sup> Co. Litt. 47 b; Bl. Comm. iii. 146.

<sup>2</sup> Woodfall's Landlord and Tenant, 481.

<sup>3</sup> Co. Litt. 8 b, 123 b and notes; Bl. Comm. i. 456; *Theaker's Case*, Cro. Jac. 685.

<sup>4</sup> Phillimore, Eccl. Law, 513; *Ex parte Jenkins*, L. R., 2 P. C. 258.

<sup>5</sup> Bl. Comm. i. 382; Steph. Comm. ii. 674; stats. 3 & 4 Vict. c. 113; 35 & 36 Vict. c. 8.

<sup>6</sup> Co. Litt. 95 a, n. (1).

<sup>7</sup> Phillimore, Eccl. Law, 1203.

<sup>8</sup> *Ibid.* 260.

<sup>9</sup> Co. Litt. 132 a.

<sup>10</sup> Litt. § 200; Bl. Comm. i. 132.

formerly made for the term of the man's natural life. The doctrine of civil death in such cases is now abolished,<sup>1</sup> and also in the case of conviction for treason or felony (see *Attainder*); but it seems that it may still occur where a person is outlawed,<sup>2</sup> which still produces the effect of attainder. (See *Commorientes*; *Donatio Mortis Causá*.)

§ 2. In criminal law the punishment of death is inflicted by hanging the offender by the neck until he is dead.<sup>3</sup> (See *Murder*; *Piracy*; *Treason*.)

**DEBENTURE** is an instrument issued by a company or public body as security for a loan of money. It contains either expressly or impliedly a promise to pay the amount mentioned in it, and almost invariably creates a charge on the whole or part of the property of the company or public body. A debenture generally forms part of a series or issue of similar instruments, with a provision that they shall all rank *pari passu* in proportion to their amounts.<sup>4</sup>

Debentures are of two classes.

Mortgage  
Debenture  
Acts.

A. Debentures so called by the statutes under which they are issued:—

i. § 2. Mortgage debentures issued under the Mortgage Debenture Acts, 1865 and 1870.—The object of these acts is to enable a company formed for the purpose of lending or borrowing money on real securities, to raise money by issuing debentures charged on the securities for the time being in its possession, whether they belong to the company itself or to persons who have borrowed money of it. Provision is made for the registration in the Land Registry<sup>5</sup> of the securities on which the debentures are to be charged, and for ascertaining their value; also for registering the debentures themselves, and for enabling a person who has borrowed money of the company to redeem his security notwithstanding that the company has made use of it by issuing debentures charged on it.

Local Loans  
Act.

ii. § 3. Debentures issued by a local authority (*e.g.*, an urban sanitary authority) pursuant to the Local Loans Act, 1875 (repealing the County Debentures Act, 1873).—The provisions of this act are made applicable to a local authority either by a special act of parliament incorporating its provisions, or by sanction of the Local Government Board. The security generally consists of a local rate, with or without other property. The amount of the debenture may be made payable either to the bearer or to a person named therein, his executors, administrators or assigns; the latter kind is called a nominal debenture.

Private acts.

iii. § 4. There are also numerous private or special acts of parliament authorizing the issue of debentures by the companies or public bodies to which they relate. The nature and incidents of such debentures of course depend on the statutory provisions in each case.

Railway  
debentures.

B. Debentures, popularly so called, are of the following varieties:—

i. § 5. Mortgages issued by railway and other companies (incorporated by special act) under the Companies Clauses Acts, 1845 and 1863.—Such

<sup>1</sup> *Rex v. Lady Portington*, 1 Salk. 162; stat. 21 Jac. I, c. 28.

<sup>2</sup> Williams, R. P. 23.

<sup>3</sup> Stephen's Crim. Dig. I.

<sup>4</sup> As to debentures generally, see Cavanagh on Securities, 267 *et seq.*

<sup>5</sup> Now regulated by the Land Transfer Act, 1875.

debentures contain an assignment of the undertaking and receipts of the company, and not merely a charge on them. Debentures issued by railway companies are also subject to the Railway Companies Securities Act, 1866, and the Railway Companies Act, 1867.<sup>1</sup> (See *Debenture Stock*.)

ii. § 6. Mortgages issued by commissioners and similar bodies under the Commissioners' Clauses Act, 1847.—The provisions of this act are similar to those of the Companies Clauses Act, 1845. (*Supra*, § 5.)<sup>2</sup> Commissioners' debentures.

iii. § 7. Debentures of a company registered under the Companies Act, 1862, issued pursuant to express powers contained in the articles of association.—Such debentures vary in form and effect according to the provisions of the articles and the skill of the draftsman, but they generally purport to create a charge on the whole or part of the property of the company<sup>3</sup> (see *Security*); sometimes, however, so-called debentures are merely bonds or in the form of promissory notes.<sup>4</sup> Companies Act, 1862.

§ 8. The payment of interest on debentures issued under statutory powers (*i.e.*, debentures belonging to all the above classes except B. iii.) may be enforced by the judicial appointment of a receiver to collect the income of the property and apply it in payment of the interest. (See *Receiver*.)

iv. § 9. Debentures issued by foreign or colonial governments cannot be enforced by legal proceedings in this country.<sup>5</sup>

§ 10. The question whether a debenture is a negotiable instrument is sometimes one of difficulty. It seems clear that the varieties mentioned under A. i., B. i. and ii., and the nominal debentures mentioned under A. ii., are merely statutory mortgages, assignable in a particular form, and not negotiable. A debenture to bearer under A. ii. appears to be negotiable so far as the issuing authority is concerned: that is, the authority would be bound to pay the bearer without reference to his title: but it does not appear whether a person wrongfully in possession of such a debenture could give a good title to a *bonâ fide* purchaser as against the true owner. The question whether a debenture under B. iii. is or can be negotiable in the latter sense (*i.e.*, as between the successive holders of it) must apparently be answered in the negative: whether the holder of a particular debenture belonging to that class can claim the amount from the company, irrespectively of any question between the company and a prior holder, depends on the form of the instrument and (in some cases) on the circumstances attending its issue.<sup>6</sup> Debentures of foreign governments may by usage of trade be negotiable instruments in the full sense of the term.<sup>7</sup> Negotiability.

§ 11. A debenture is within the Mortmain or Charitable Uses Act if it gives the holder an estate or interest in land, but not otherwise. A When pure personality.

<sup>1</sup> Hodges on Railways, 118 *et seq.*; Cavanagh, 281.

<sup>2</sup> Cavanagh, 292.

<sup>3</sup> *In re Florence Land Co., Ex parte Moor*, 10 Ch. D. 530; *In re Colonial Trusts Corporation*, 15 Ch. D. 465.

<sup>4</sup> *Crouch v. Crédit Foncier of England*, L. R., 8 Q. B. 374.

<sup>5</sup> *Twycross v. Dreyfus*, 5 Ch. D. 605; *Sloman v. New Zealand*, 1 C. P. D. 563.

<sup>6</sup> See *Crouch v. Crédit Foncier*, L. R., 8 Q. B. 374; *In re Blakely Ordnance Co.*, 3 Ch. App. 154; Cavanagh, 273.

<sup>7</sup> *Goodwin v. Roberts*, L. R., 10 Ex. 76, 337.

debenture issued under the Companies Clauses Acts (*e. g.*, an ordinary railway debenture) does not give the holder any interest in the land of the railway, nor the right to possess or manage the railway, but merely the right to receive the surplus earnings, and it therefore appears that such a debenture is not within the Mortmain Act.<sup>1</sup>

ETYMOLOGY.—Latin: *debentur*, “they [moneys] are due,” the word with which certain obsolete bonds given by the exchequer began.<sup>2</sup>

**DEBENTURE STOCK** is a stock or fund representing money borrowed by a company or public body, and charged on the whole or part of its property. It differs from debentures chiefly in these respects: the title of each original holder appears in a register, instead of being represented by an instrument complete in itself: and the stock is capable of being transferred in any amounts, unless the regulations of the company, &c. forbid the transfer of amounts or fractions less than 10*l.* or the like. § 2. Provision is sometimes made for issuing to each holder a certificate representing the amount of his stock, transferable by delivery, so as to entitle the bearer for the time being to the stock in question: such certificates generally have coupons for interest attached to them, and while they are outstanding the stock ceases to be transferable on the register. § 3. Perpetual debenture stock is stock which cannot be paid off.

The principal statutes relating to debenture stock are the Companies Clauses Acts, 1845 and 1863, the Commissioners Clauses Act, 1847, and the Local Loans Act, 1875 (see *Debenture*). Debenture stock issued under these acts is not within the Mortmain or Charitable Uses Act.<sup>3</sup>

**DEBT.**—I. § 1. In the strict sense of the word a debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor).<sup>4</sup> Hence “debt” is properly opposed (1) to unliquidated damages (see *Damages*, § 2); (2) to “liability,” when used in the sense of an inchoate or contingent debt; and (3) to certain obligations not enforceable by ordinary process (see *Obligation*). “Debt” denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment.

Debts are of various kinds, according to their origin (see *Contract*, § 1).

Statutory.

§ 2. Debts may be created under the provisions of various statutes, as in the case of penalties imposed by penal statutes, and payable to an informer or to the party grieved; debts in respect of calls under the Companies Acts; debts for tolls payable under statutes, and the like.<sup>5</sup> By the provisions of the acts creating them, some of these debts have the same effect as debts created by specialty (*infra*, § 4).<sup>6</sup>

<sup>1</sup> See *Attree v. Hawe*, 9 Ch. D. 337, a decision on debenture stock; *Gardner v. London, Chatham and Dover Ry. Co.*, L.R., 2 Ch. 201.

<sup>2</sup> Blount, Law Dict.

<sup>3</sup> *Attree v. Hawe*, 9 Ch. D. 337.

<sup>4</sup> Fitz. N. B. 119 g; Bl. Comm. ii. 464; Smith, Merc. Law, 532.

<sup>5</sup> Leake on Contracts, 96.

<sup>6</sup> See the Companies Act, 1862, s. 75.

§ 3. A debt of record is a debt proved to exist by the official records of a Court of Record.<sup>1</sup> (See *Court*, § 2.) Among such debts are recognizances and statutes (*q. v.*),<sup>2</sup> but the most important are judgment debts, or debts created by the judgments, decrees, &c. of Courts of Record. (See *Judgment*). Thus if A. injures B., his liability to recompense B. does not constitute a debt, but if B. brings an action and recovers judgment against him for 500*l.*, this constitutes a judgment debt, and may therefore be proved for in the event of A. becoming bankrupt. Judgment debts have certain privileges, which however have been much curtailed by recent legislation,<sup>3</sup> though some still remain. Thus, on the death of a person, his judgment debts must be paid in full by his executors out of his personal estate before any of his debts due on contract. (See *Administration*, § 2.) The judgment creditor also has various rights of enforcing his judgment by execution and attachment (*q. v.* and *Debtors Act*).

Debts created by contract are of two kinds, specialty and simple contract debts. § 4. Specialty debts are those created by deed or instrument under seal, *e. g.*, a bond or covenant (*q. v.*).<sup>4</sup> Formerly there was an important distinction between debts of specialty in which the heirs were bound (that is, where the person entering into the instrument expressly bound his heirs as well as himself), and those in which they were not, as debts of the former class had in some cases priority in payment out of the *real* estate of the debtor after his death over ordinary specialty debts, and all specialty debts had priority in payment out of the *personal* estate over simple contract debts; thus if a man owed 500*l.* on bond and 500*l.* on a bill of exchange, his personal estate being worth 700*l.*, the bond would have been paid in full, leaving only 200*l.* to pay the other debt; but these distinctions no longer exist in the case of persons dying on or after the 1st January, 1870.<sup>5</sup> (See *Assets*.) Specialty debts, however, have still this advantage over simple contract debts, that they may be enforced by action within twenty years, while actions on simple contracts can only be brought within six years from the right of action accruing.<sup>6</sup>

§ 5. Simple contract debts are all debts not secured by record or deed, *e. g.*, the liability on a bill of exchange.<sup>7</sup>

§ 6. Debts due on specialty or simple contract are sometimes said to arise from privity of contract, as opposed to those created by privity of estate. Thus if A. devises land to B. charged with an annuity in favour of C., C.'s right to the annuity as against B. arises from privity of estate.<sup>8</sup> (See *Privity*.)

With reference to the privileges which they confer on the creditor, debts are of the following kinds:—

§ 7. Crown debts, or those due to the crown, have been invested with special privileges by various acts of parliament, some of which apply exclusively to debts due from accountants to the crown, that is, persons

<sup>1</sup> Bl. ii. 485; Wms. Pers. P. 110.

<sup>2</sup> As to debts of record due to the crown, see Chitty, Prer. 272.

<sup>3</sup> See Bl. ii. 465 *et seq.*; Wms. Real P. 84. An action cannot now be brought on a judgment; *Birmingham Estates Co. v. Smith*, W. N. (1880) 19.

<sup>4</sup> Bl. ii. 465.

<sup>5</sup> Wms. Pers. P. 121.

<sup>6</sup> 3 & 4 Will. 4, c. 42, s. 3; 21 Jac. 1, c. 16, s. 3.

<sup>7</sup> Wms. Pers. P. 125.

<sup>8</sup> *Whitaker v. Forbes*, L. R., 10 C. P. 583.

employed to collect and account for money due to the crown, hence called "accountants' debts."<sup>1</sup> Examples of these privileges are: that they bind the debtor's land if duly registered (see *Accountant to the Crown*); that on the death of the debtor his crown debts are payable in priority to other debts; and that if he becomes bankrupt and obtains his discharge he nevertheless remains liable for his crown debts.<sup>2</sup>

**Secured debts.** § 8. Secured debts are those for which the creditor has some security in addition to the mere liability of the debtor. The term is somewhat vaguely used. Examples of secured debts in the strict sense are debts secured by mortgage, charge or lien, or by the collateral liability of some other person (see *Guarantie*); but we also speak of a debt being secured by a judgment, warrant of attorney, or by the bond, promissory note, &c. of the debtor, because the enforcement of the debt is thereby facilitated or made more certain. (See *Security*.)

§ 9. Debts may also be absolute or conditional, payable at once or in future, &c.

II. In the law of bankruptcy, "debt" is used in various meanings.

**Petitioning creditor's debt.** § 10. A debt sufficient to maintain a petition for adjudication, in other words, a debt which enables the creditor to have the debtor adjudicated bankrupt, is called a good petitioning creditor's debt. Such a debt must be one "which may be the immediate subject of an action,"<sup>3</sup> and must not be less than 50*l.*, nor secured, unless the creditor is willing to give up the security or give credit for it.<sup>4</sup>

**Debt provable in bankruptcy.** § 11. The term "debt provable in bankruptcy" excludes demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise (*e.g.*, rights of action founded on tort), and also debts contracted with notice of an act of bankruptcy; but with this exception, "debt provable in bankruptcy" means any debt or liability, present or future, certain or contingent, existing before the order of adjudication, including liabilities to arise on events not likely to occur or not capable of occurring before the close of the bankruptcy, and liabilities capable of being valued or assessed by fixed rules, by a jury, or as matter of opinion.<sup>5</sup>

**Preferential debts.** § 12. Debts provable in bankruptcy are called preferential debts when they are payable in full before any other debts; they consist of taxes and rates, and wages or salaries due to clerks, servants, labourers or workmen.<sup>6</sup>

**"Debt" = aggregate of debts.** III. § 13. "Debt" sometimes denotes an aggregate of debts: thus, the "bonded or mortgage debt" of a turnpike trust,<sup>7</sup> means all the debts of the trust secured by bond or mortgage.

See *Chose in Action*; *Credit*; *Action*; *Contract*; *Due*.

**DEBTEE** is a person to whom a debt is owing; *i.e.*, a creditor.<sup>8</sup> The term is not common.

<sup>1</sup> Wms. Real P. 91, Pers. P. 111.

<sup>2</sup> *Ibid.*; Bankruptcy Act, 1869, s. 49.

<sup>3</sup> *In re Muirhead*, L. R., 2 Ch. D. at p. 25.

<sup>4</sup> Bankr. Act, 1869, s. 6.

<sup>5</sup> *Ibid.* s. 31; Robson's Bankruptcy,

185. See *In re Newman, Ex parte Brook*, 3 Ch. D. 494.

<sup>6</sup> Bankr. Act, 1869, s. 32; Robson's Bankr. 191.

<sup>7</sup> 37 & 38 Vict. c. 95, s. 11.

<sup>8</sup> 4 Ad. & El. at p. 683.



**DEBTOR** is a person who owes a debt. § 2. A person whose affairs are being liquidated by arrangement is called a liquidating debtor. (See *Liquidation*.) The status of discharged and undischarged liquidating debtors is similar to that of discharged and undischarged bankrupts.<sup>1</sup> (See *Bankrupt*, § 3.)

**DEBTORS ACT, 1869**, is the statute 32 & 33 Vict. c. 62. Its provisions may be treated of under four heads.<sup>2</sup>

§ 1. It abolishes imprisonment for debt, except in certain cases,<sup>3</sup> the most important of which are those of a defaulting trustee,<sup>2</sup> and of a judgment debtor who is able but refuses to pay.<sup>4</sup> (See *Attachment*, § 3; *Committal*, § 3.)

Imprisonment for debt.

§ 2. It abolishes arrest upon mesne process (see *Arrest*, § 4), but provides that when in any action in one of the superior Courts in which, if brought before the act, the defendant would have been liable to arrest, the plaintiff proves at any time before final judgment that he has a good cause of action for 50*l.* or upwards, that there is probable cause for believing that the defendant is about to leave England, and that his absence will materially prejudice the plaintiff in the prosecution of his action (*i. e.*, that the presence of the defendant is absolutely required for purposes of evidence),<sup>5</sup> the judge may order the defendant to be imprisoned until he gives security that he will not go out of England without the leave of the Court. When the action is for a penalty (*q. v.*), proof that the defendant's absence will be prejudicial is not required, and the security is to the effect that any sum recovered against the defendant shall be paid or that he shall be rendered to prison.<sup>6</sup> (See *Security*.)

Absconding defendant.

§ 3. It provides for the punishment of fraudulent debtors, namely, persons who having been adjudged bankrupt, or whose affairs are liquidated by arrangement, fail to discover or deliver to the trustee, or conceal or remove, their property, books, &c., or make false statements of affairs, false entries in account books, &c., or leave England with property of a certain value, with the intent of defrauding their creditors or defeating the law, or obtain property on credit by false pretences, or make false representations, for the purpose of obtaining the consent of their creditors to an agreement for composition, discharge, &c. Most of these offences are misdemeanors.<sup>7</sup>

Fraudulent debtors.

§ 4. It regulates the manner of executing and enforcing warrants of attorney, cognovits and orders for judgment.<sup>8</sup>

Warrants of attorney.

**DEBTOR'S SUMMONS.**—A debtor's summons is a summons

<sup>1</sup> *Ex parte Williams*, L. R., 20 Eq. 743.

<sup>2</sup> See *Middleton v. Chichester*, L. R., 6 Ch. 152; *Evans v. Bear*, L. R., 10 Ch. 76; *Marris v. Ingram*, 13 Ch. D. 338; *Metcalfe's Case*, 13 Ch. D. 815.

<sup>3</sup> Sect. 4—10, as amended by the Debtors Act, 1878.

<sup>4</sup> The power of committal for non-payment of judgment debts is not restricted to

debts of 50*l.* or under, although there is a prevailing impression to this effect, apparently produced by a misleading marginal note to the act. (See *Judgment*.)

<sup>5</sup> Day, C. L. P. Acts, 407; Coe's Practice, 165.

<sup>6</sup> Smith's Action, 102; Pollock's County Court Practice, 346.

<sup>7</sup> Sect. 11—23.

<sup>8</sup> Sect. 24—28.

under the seal of a Court of Bankruptcy giving notice to the person to whom it is addressed (the debtor), that unless he pays or compounds for a debt (not less than 50*l.*) due by him to a person therein named (the creditor) within a certain time, he will have committed an act of bankruptcy and will be liable to be adjudicated a bankrupt, unless he disproves the debt.<sup>1</sup>

A trader debtor's summons is one for service on a trader, and differs from a non-trader debtor's summons in giving the debtor a shorter time for compliance with its terms. (See *Act of Bankruptcy*, § 4; *Bankruptcy*, note (4).)

**DECEIT.**—§ 1. An action upon the case for a deceit was an action which lay to recover damages caused by the fraud or false affirmation by the defendant of a thing within his knowledge.<sup>2</sup> This tort is now more commonly called fraud or misrepresentation (*q. v.*).

§ 2. The writ of deceit to reverse a judgment in a real action obtained by fraud or collusion was abolished by stat. 3 & 4 Will. 4, c. 27, s. 36.<sup>3</sup>

**DECEM TALES.** See *Tales*.

**DECLARATION** is a formal statement intended to create, preserve, assert or testify to a right. The following are the principal kinds of declarations:—

Of uses.

§ 2. A declaration of use or trust is a statement or admission (which in the case of land or chattels real must be written<sup>4</sup>), that property is to be held to the use of or upon trust for a certain person. Thus under the Statute of Uses land may be conveyed to A. to such uses as B. shall declare, and a declaration of the uses by B. takes effect accordingly by vesting the land in the person or persons in whose favour it is made. Deeds to declare uses were commonly employed before the abolition of fines and recoveries, which being only adapted to convey the absolute estate, could not be made to answer the purposes of family settlements where a variety of substitutional limitations are required, and therefore the land was conveyed by fine or recovery to a given person, and the uses afterwards declared by a separate deed.<sup>5</sup> Appointments of uses under powers are identical in effect with declarations of uses, but, strictly speaking, the latter term is only applied in the case of uses created by a fine or recovery.

Of trusts.

§ 3. A declaration of trust is the ordinary mode of creating a trust when the trust property is already vested in the intended trustee. Thus if A. being owner of property wishes to create a trust in it for the benefit of B. without conveying it to another person, he executes a deed whereby he declares that he holds the property in trust for B.

Bankruptcy.

§ 4. A declaration of inability to pay debts is a declaration by a person admitting his inability to pay his debts; such a declaration when signed

<sup>1</sup> Bankruptcy Act, 1869, ss. 6, 7, Form 4.

<sup>2</sup> See Chitty on Contracts, 628; Broom's Comm. C. L. 340; Comyn, Dig. *Action upon the Case for a Deceit*, A. 10; *Pasley v. Freeman*, 3 T. R. 51; Smith's L. C.

ii. 64.

<sup>3</sup> Bl. Comm. iii. 405.

<sup>4</sup> Stat. 29 Car. 2, c. 3, s. 7 (Statute of Frauds).

<sup>5</sup> Bl. Comm. ii. 363; see *supra*, p. 205, note (1).

and filed with the required formalities constitutes an act of bankruptcy on which the debtor may be adjudicated a bankrupt.<sup>1</sup> Under the old law it was called a declaration of insolvency.<sup>2</sup> The commonest instance of a declaration of inability to pay debts is where a person presents a petition for liquidation declaring that he is insolvent.<sup>3</sup>

§ 5. In the law of evidence, declaration is commonly used to denote a statement made (not on oath) by a deceased person and admissible in evidence contrary to the general rule against derivative evidence. Thus in a case of murder, the dying declaration of the murdered person is admissible; and so in a civil case is a declaration made by a deceased person against his proprietary or pecuniary interest, or on a question of pedigree, &c.<sup>4</sup> § 6. A statutory declaration is a written statement of facts which the person making it (the declarant) signs and solemnly declares to be true before a commissioner or magisterial officer. Making a false declaration is a misdemeanor.<sup>5</sup> (See *Affidavit*; *Affirmation*, § 3; *Oath*.) Statutory declarations were introduced to prevent the frequent use of oaths in extrajudicial proceedings, and oaths are accordingly forbidden in these cases. Thus the execution of a deed, if required to be proved extrajudicially, is properly proved by a statutory declaration. But as the act does not apply to the colonies, proof of the execution in England of a deed for use in one of the colonies is properly made by an extrajudicial affidavit.

§ 7. In a judgment, decree, or order, the declaration or declaratory part is that part which gives the decision or opinion of the Court on the question of law in the case; thus in an action raising a question as to the construction of a will, the judgment or order declares that according to the true construction of the will the plaintiff has become entitled to the residue of the testator's estate, or the like.<sup>6</sup> (See *Declaration of Title Act*.)

II. § 8. In the old common law and probate practice, a declaration was the first pleading delivered by the plaintiff, corresponding to the Statement of Claim (*q. v.*) under the new practice.<sup>7</sup> It was divided into counts (*q. v.*) and was framed in technical language. (See *Pleading*; *Venue*.)

**DECLARATION OF TITLE ACT, 1862** (25 & 26 Vict. c. 67), provides that any person entitled to land in possession for an estate in fee simple, whether absolutely or subject to incumbrances, &c., may apply to the High Court of Justice, by petition in the Chancery Division, for a declaration that he has a good title to the land, and the Court, after causing the title to be investigated, may make a declaration *nisi*, and cause notice thereof to be given to all persons interested. If no one

<sup>1</sup> Robson's Bankruptcy, 136; Bankruptcy Rules, 1870, s. 16.

<sup>2</sup> 2 Bl. Comm. 488, note (6); stat. 4 Geo. 4, c. 16.

<sup>3</sup> Robson, 137.

<sup>4</sup> Best on Evidence, 630.

<sup>5</sup> Stat. 5 & 6 Will. 4, c. 62.

<sup>6</sup> See Hunter's Suit, 89.

<sup>7</sup> Smith's Action at Law; Browne's Probate Pr. 285.

shows cause against the declaration within a certain time, the Court may make a declaration that the petitioner has the title which he claims.<sup>1</sup>

It is believed that the act has not yet been put in force to any extent.

**DECLARATORY.**—§ 1. A declaratory statute is one which declares or formally states what the existing law is on a given subject, so as to remove any doubts which may have been raised.

§ 2. A declaratory decree or judgment is one which simply declares the rights of the parties, or expresses the opinion of the Court on a question of law, without ordering anything to be done. (See *Declaration*, § 7.)

As to declaratory evidence, see *Declaration*, § 6; *Evidence*.

**DECREE** is an order of a Court pronounced on the hearing of a suit.

Decree nisi.

§ 2. In matrimonial suits in the Probate, Divorce, and Admiralty Division of the High Court, every decree for dissolution or nullity of marriage is in the first instance a decree nisi, that is, provisional, and cannot be made absolute until after the expiration of a certain time (generally six months), during which period any person is at liberty to show cause to the Court why the decree should not be made absolute, by reason of its having been obtained by collusion, or of material facts not brought before the Court; and, on cause being so shown, the Court deals with the case by making the decree absolute, or by reversing it, or by requiring further inquiry.<sup>2</sup>

Court of  
Arches.

§ 3. In the Court of Arches (*q. v.*), a suit is commenced by a process called a decree, which is the same thing as a citation (*q. v.* § 7).<sup>3</sup> (See *Vires et Modis*.) § 4. A final interlocutory decree is the same thing as a definitive sentence (*q. v.*), except that it is under the hand of the registrar, and not of the judge.<sup>4</sup>

§ 5. Under the practice in Chancery before the Judicature Acts, the decree was an order pronounced on the hearing of a suit, and was either final or interlocutory, in which latter case the "further consideration" (*q. v.*) was reserved. The decree usually contained a declaration (*q. v.* § 7), followed by the ordering or mandatory part.<sup>5</sup>

§ 6. Under the present practice, what was formerly called the decree is now usually represented by the judgment (*q. v.*); in administration actions and actions for accounts, &c. it sometimes takes the form of an order.<sup>6</sup> (See *Motion for Decree*; *Hearing*; *Further Consideration*; *Enrolment*.)

**DECRETAL.**—In the former Chancery practice, a decretal order was an order made on motion or otherwise not at the hearing of the cause (that is, not on motion for decree), but having the effect of a decree.<sup>7</sup>

<sup>1</sup> Daniell's Ch. Pr. 1957.

<sup>2</sup> Browne on Divorce, 298; 23 & 24 Vict. c. 144, s. 7; 29 Vict. c. 32, s. 3; 36 Vict. c. 31, s. 1. It is not now necessary to make a motion to have the decree made absolute; Divorce Rules, July, 1880.

<sup>3</sup> Phillimore, Eccl. Law, 1253.

<sup>4</sup> *Ibid.* 1260.

<sup>5</sup> See generally as to decrees, Hunter's Suit, 84; Daniell's Ch. Pr. 850 *et seq.*; Seton on Decrees, *passim*.

<sup>6</sup> See Rules of Court, xv., xxxiii.

<sup>7</sup> Hunter's Suit, 85.

# **DECRETALS.** See *Canon Law*.

**DEDICATION** is where a person expressly or tacitly throws open for public use a road on his land, and the public assent to or avail themselves of the dedication.<sup>1</sup> "For instance, if a man build a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is instantly a highway."<sup>2</sup> A dedication will be implied from an uninterrupted use by the public of the right of way claimed,<sup>3</sup> even for a few years.<sup>4</sup>

§ 2. A dedication may be limited in point of time, so that the highway is useable by the public at certain times only; or may be qualified so as to make the use of the highway subject to a right of user by the owner of the soil for other purposes, or subject to an existing obstruction or excavation, which, if made after the dedication, would have been a nuisance.<sup>5</sup> (See *Highway*; *Way*.)

**DEDIMUS POTESTATEM** is a writ sued out of Chancery, empowering the persons to whom it is directed to administer the oath of allegiance and a judicial oath to a person who has been newly appointed a justice of the peace.<sup>6</sup> The writ was also formerly used to appoint special commissioners in the country to take a consueance of a fine, or to swear an answer to a bill in equity.<sup>7</sup> And in still earlier times it was required when a person wished to appoint an attorney to represent him in Court (*dedimus potestatem de attornato faciendo*), because the law required the parties to appear in Court personally.<sup>8</sup>

**DEED.**—I. § 1. "A deed is a writing or instrument written on paper or parchment, sealed and delivered, to prove and testify the agreement [*i. e.* the intention] of the parties whose deed it is, to the things contained in the deed."<sup>9</sup> A deed cannot be written on wood, leather, cloth, stone, or any other material than paper or parchment.<sup>10</sup> A deed differs from other instruments not merely in its formalities (as to which, see *Seal*; *Delivery*; *Execution*; *Registration*; *Stamp*), but also in its effects (as to which, see *Bond*; *Contract*, § 9; *Covenant*; *Estoppel*; *Limitation*; *Merger*).

§ 2. All deeds are either poll or indented. A deed poll is a deed made by one person or by several persons in the same interest, as where several persons appoint an attorney by deed, or bind themselves by a bond. A deed poll is so called because the paper or parchment is polled or cut even, as opposed to a deed indented.<sup>11</sup> In the old writers "deed" is generally used in the sense of deed poll.<sup>12</sup>

<sup>1</sup> Smith's L. C. ii. 146, 150.

<sup>2</sup> *Woodyer v. Hadden*, 5 Taunt. 125, cited in Smith's L. C. ii. 146 (notes to *Dovaston v. Payne*).

<sup>3</sup> *R. v. Lloyd*, 1 Camp. 260, cited *ibid*.

<sup>4</sup> *Shelford's R.* P. Stat. 63.

<sup>5</sup> Smith's L. C. ii. 148, citing *Fisher v. Prowse*, 2 B. & S. 770.

<sup>6</sup> Stone's Justice of the Peace, 5.

<sup>7</sup> Bl. Comm. ii. 351, iii. 447.

<sup>8</sup> Fitz. Nat. Brev. 25 a.

<sup>9</sup> Shepp. Touch. 50.

<sup>10</sup> Co. Litt. 35 b, 229 a.

<sup>11</sup> *Ibid.* 229 a; Shepp. 50.

<sup>12</sup> Co. Litt. 229 a.

As to deeds indented, see *Indenture*. As to deeds acknowledged, see *Acknowledgment*, § 2. As to deeds enrolled, see *Enrolment*; *Disentailing Deed*; *Bargain and Sale*, § 3.

§ 3. A deed generally consists of the following parts, or some of them,—the premises, the habendum, the tenendum, the reddendum, the conditions, and the covenants.<sup>1</sup> See the various titles.

§ 4. Deeds are essential to the validity of certain legal acts, especially for almost all conveyances and leases of real property,<sup>2</sup> and for the alienation of chattels where there is no contract of sale or delivery of possession.<sup>3</sup> (See *Bill of Sale*.) Bonds, powers of attorney, and a few other instruments, are in practice always made by deed. (See *Escrow*.)

II. § 5. Deed is also used in the expression “in deed” to signify that a thing has been really or expressly done, as opposed to “in law,” which means that it is merely implied or presumed to have been done (see *Condition*, §§ 4, 5); therefore, when we say that a surrender in deed of an estate in land must be made by deed, the word “deed” is used in different senses.

ETYMOLOGY.—Deed seems formerly to have signified a writing under seal not concerning land, as opposed to a charter.<sup>4</sup> It is obviously derived from *do* in the sense of execute, possibly in imitation of the Norman French *fet, fait*.<sup>5</sup>

**DEED OF SETTLEMENT.**—A joint-stock company formed before November 1st, 1844, was usually formed by a deed of settlement, constituting certain persons trustees of the partnership property, and containing regulations for the management of its affairs. It was sometimes accompanied by a private act of parliament or by letters patent.<sup>6</sup> (See *Company*.) Companies registered after 1st November, 1844, under the 7 & 8 Vict. c. 110, and before 1862, were regulated by deeds of settlement,<sup>7</sup> in the same way as companies formed under the Act of 1862 are regulated by a memorandum and articles of association (*q. v.*).

**DEER.** See *Animals Fere Naturæ*.

**DE FACTO.**—The stat. 11 Hen. 7, c. 1, enacts that no person serving the king for the time being in his wars shall be convicted or attaind of high treason for so doing. The intention was to protect persons serving the king *de facto* against punishment or forfeitures imposed by the king *de jure* on his recovering the kingdom.

**DEFAMATION** is the act of maliciously making a false and disparaging statement concerning a person; by “disparaging” is meant that the statement is calculated to expose him to contempt, ridicule or public hatred, or to injure his character or credit, or to cause him to be

<sup>1</sup> Shepp. 52, 74; Co. Litt. 229 b.

<sup>2</sup> Steph. Comm. i. 481; stat. 8 & 9 Vict. c. 106.

<sup>3</sup> Williams, P. P. 37.

<sup>4</sup> Co. Litt. 9 a; Litt. § 259; Britton, 98 b.

<sup>5</sup> Britton, 101 a.

<sup>6</sup> Smith's M. Law, 62.

<sup>7</sup> *Ibid.* 67.

feared or avoided, or the like.<sup>1</sup> Defamation is either libel or slander (*q. v.*). (See also *Malice*; *Privilege*.)

**DEFAULT** "is legally taken for non-appearance in Court;"<sup>2</sup> but at the present day it means the failure to take any step required by the rules of procedure. Thus, if a party fails to appear or to deliver a pleading within the proper time, he is in default, and a judgment given against him in consequence is called judgment by default. Such a judgment may be set aside by the Court on proper terms, if it appears that the default was unintentional.<sup>3</sup> (See *Writ of Inquiry*.)

**DEFEASANCE**, "in a large sense, doth sometimes signify [i.] a condition annexed to an estate; and sometimes [ii.] the condition of an obligation, made with and annexed to the obligation at the time of making thereof;"<sup>4</sup> but it is more properly applied [iii.] to a condition relating to a deed, such as an obligation, recognizance, statute, or the like, but contained in a separate instrument, whether entered into at the same time as the deed itself, or afterwards; on the condition or defeasance being performed by the obligor or recognisor, the deed is made void. A conveyance of the freehold of land at common law (*e. g.*, by feoffment) could not be defeated by a defeasance unless it was executed at the same time as the conveyance.<sup>5</sup> And in this manner mortgages were in former times usually made, the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on repayment of the borrowed money at a certain day.<sup>6</sup>

Almost the only instances of defeasances at the present day occur in the case of cognovits and warrants of attorney (*q. v.*).

§ 2. "Defeasance" is also used to describe the effect of a conditional limitation in defeating or putting an end to an estate. (See *Limitation*.)

ETYMOLOGY.—Norman French: *defere*, to undo.<sup>7</sup>

**DEFEASIBLE**.—An estate or interest in property is said to be defeasible when it is subject to be defeated by the operation of a condition subsequent or conditional limitation. Thus the estate of a mortgagee is defeasible, because the mortgagor has the right to redeem, and an estate followed by a conditional limitation is defeasible on the performance of the condition; for examples of conditions, see that title; also *Limitation*. The term may also be applied to interests given by will subject to being divested (see *Divest*), and to an estate or interest subject to a power of revocation. (See *Power*.)

**DEFEAT**. See *Defeasance*.

<sup>1</sup> See Underhill on Torts, 83.

<sup>2</sup> Co. Litt. 259 b.

<sup>3</sup> Rules of Court, xiii., xxix.

<sup>4</sup> Shepp. Touch. 396.

<sup>5</sup> Co. Litt. 236 b.

<sup>6</sup> Bl. Comm. ii. 327.

<sup>7</sup> Britton, 216 b.

Self-defence. **DEFENCE.**—§ 1. The right of private or self-defence is the right which every person has to inflict death or bodily harm in order to defend himself or any other person from unlawful violence, provided that he inflicts no greater injury than he in good faith and on reasonable grounds believes at the time to be necessary.<sup>1</sup>

In pleading. § 2. In pleading, a defence is a reason given by the defendant, respondent, prisoner or other person against whom a proceeding is brought, tending to show that there is no case against him.

§ 3. In ordinary actions in the High Court, defences are of innumerable variety, both of law and of fact, and are put forward either by statement of defence or demurrer (*q. v.*). Some of the old defences at common law had short names, which are still preserved, *e.g.*, “not guilty,” “non assumpsit,” &c. (See also *Amends; Confession and Avoidance; Pleading; Traverse.*)

Matrimonial suits. § 4. In matrimonial suits, defences are divided into *absolute*, that is, such as being established to the satisfaction of the Court are a complete answer to the petition, so that the Court can exercise no discretion, but is bound to dismiss the petition; and *discretionary*, or such as being established leave to the Court a discretion whether it will pronounce a decree or dismiss the petition. Thus in a suit for dissolution, condonation is an absolute, adultery by the petitioner a discretionary, defence.<sup>2</sup>

County Court. § 5. In County Court practice, defences of set-off, infancy, coverture, statute of limitations, and discharge under the bankruptcy acts, are called special defences, and a defendant cannot set up one of them unless he gives the registrar notice of his intention to do so,<sup>3</sup> and files a notice with a concise statement giving the material facts involved in the defence.<sup>4</sup>

§ 6. As to defences in criminal procedure, see *Arrest of Judgment; Demurrer; Plea.*

ETYMOLOGY.]—Norman French: *defender*, to deny (“il defendera forsque tort et force,” = “he shall only deny the wrong and the force”),<sup>5</sup> so that defence originally signified merely a denial.<sup>6</sup>

**DEFENCE ACTS** are the acts 5 & 6 Vict. c. 94; 23 & 24 Vict. c. 112; and 36 & 37 Vict. c. 72, by which certain lands are vested in the Secretary of State for War to be used for military purposes.<sup>7</sup>

**DEFENDANT** is a person against whom an action, information, or other civil proceeding (other than a petition) is brought, including summary proceedings before magistrates and justices for the recovery of penalties. (See *Counter-Claim; Prisoner; Respondent.*)

**DEFORCEMENT — DEFORCEOR — DEFORCIANT.**—Deforcement is where a man wrongfully holds lands to which another

<sup>1</sup> Stephen's Crim. Dig. 124; Steph. Comm. iii. 241.

<sup>2</sup> Browne on Divorce, 86.

<sup>3</sup> 9 & 10 Vict. c. 95, s. 76; Pollock's C. C. Practice, 100.

<sup>4</sup> C. C. Rules, 1875, ix. 7 *et seq.*; Pollock, 100.

<sup>5</sup> Litt. § 195.

<sup>6</sup> Bl. Comm. iii. 296; Hargrave's note to Co. Litt. 127 b.

<sup>7</sup> See *Hawley v. Steele*, 6 Ch. D. 521.



person is entitled. It therefore includes disseisin, abatement, discontinuance, and intrusion,<sup>1</sup> but it is applied especially to cases, not falling under those heads, where the person entitled to the freehold has never had possession: thus, where a lord has a seignory, and lands escheat to him propter defectum sanguinis, but the seisin is withheld from him, this is a deforcement, and the person who withholds the seisin is called a deforceor.<sup>2</sup> § 2. So if a man covenants to convey lands to another and refuses to do so, continuing in possession against him, this wrongful possession is a deforcement; whence in levying a fine of lands, the person against whom the fictitious action was brought upon a supposed breach of covenant, was called the deforciant.<sup>3</sup> (See *Quod ei deforceat; Fine; Tenant by Sufferance.*) Deforciant.

**DEGRADATION** is an ecclesiastical censure, whereby a clergyman is removed from the ministry, that is, deprived of holy orders. It seems to differ from deposition in being more humiliating, but there is some confusion in the books on the subject.<sup>4</sup>

**DEGREES** in the law of real actions were certain alterations in the rights of a person who had disseised another of his land, as where the disseisor conveyed the land to a stranger, or died seised so that the land descended to his heir. The nature of the action to be brought by the disseisee depended upon the number of degrees between the original disseisor and the person actually in possession of the land.<sup>5</sup>

**DEL CREDERE.**—A del credere agent, or agent acting under a del credere commission, is an agent for the sale of goods, who, in consideration of a higher reward than is usually given, guarantees the due payment of the price of all goods sold by him, that is to say, engages to pay the price himself if the purchaser does not.<sup>6</sup> (See *Commission*, § 3.)

**DELEGATES** were commissioners appointed by the crown, by a special commission of delegacy, to hear an ecclesiastical cause either in lieu of the archbishop of the province, or by way of appeal from him. The Court of Delegates was abolished by stats. 2 & 3 Will. 4, c. 92, and 3 & 4 Will. 4, c. 41, and its jurisdiction transferred to the Judicial Committee of the Privy Council.<sup>7</sup>

**DELEGATUS NON POTEST DELEGARE.**—A person to whom a power, trust or authority is given to act on behalf or for the benefit of another, cannot delegate it—that is, he cannot put another person in his place—unless he is authorized to do so. (See *Substitute.*) The rule applies especially to persons acting under powers of attorney, to directors of companies, and to trustees, executors, &c. It must not, however, be understood of merely ministerial acts, which do not involve the exercise of discretion, and which the *delegatus* cannot reasonably be

<sup>1</sup> Co. Litt. 277 b, 331 b.

<sup>2</sup> Bl. Comm. iii. 172; Butler's note to Co. Litt. 331 b.

<sup>3</sup> Bl. iii. 174.

<sup>4</sup> Phillimore, Eccl. Law, 1399; Rogers, Eccl. Law, 335 *et seq.*

<sup>5</sup> Co. Litt. 238 b; Roscoe on Real Actions, 88.

<sup>6</sup> Chitty on Contracts, 189; Benjamin on Sales, 607, n.

<sup>7</sup> Phill. Eccl. Law, 1268 *et seq.*

expected to perform himself. Therefore a trustee may employ a banker, steward or agent to receive or pay money or the like.<sup>1</sup> (See *Agency*, § 1.)

**DELIVERANCE.** See *Replevin*.

**Chattels.**

**Actual or constructive.**

**Deeds.**

**Pleadings.**

**Execution.**

**DELIVERY.**—I. § 1. Delivery primarily signifies the act of transferring the possession of a moveable thing from one person to another:<sup>2</sup> thus the delivery of goods is a necessary part of the transaction called a sale (*q. v.*).<sup>3</sup> § 2. Delivery is either actual or constructive: thus if goods cannot conveniently be actually handed from one person to another, as if they are in a warehouse or a ship, the delivery of the key of the warehouse, a delivery order, bill of lading, &c., is a constructive or symbolical delivery of the goods themselves.<sup>4</sup> (See *Livery*; *Delivery Order*.)

II. § 3. In conveyancing, delivery is that part of the operation of executing a deed by which the grantor signifies his intention when and how the deed is to take effect. Delivery is of two kinds: (1) absolute delivery, when the grantor intends the deed to take effect at once and unconditionally, even though he should retain the deed in his own possession;<sup>5</sup> this kind of delivery is generally effected by the grantor saying at the time of signing and sealing the deed, "I deliver this as my act and deed;"<sup>6</sup> (2) delivery as an escrow, when the deed is delivered by the grantor to a third person not a party to it, to be delivered up to the grantee upon the performance of a condition, as the payment of money or the like.<sup>6</sup>

III. § 4. Pleadings are delivered by being left at the address of the opposite party or his solicitor, unless the party has failed to enter an appearance, in which case the pleading (if one is required) is delivered by being filed with the proper officer.<sup>7</sup> (See *Service*.)

IV. § 5. As to execution by delivery, see *Writ of Delivery*; *Judgment*; *Execution*.

**DELIVERY ORDER** is an order addressed by the owner of goods to a person holding them on his behalf, requesting him to deliver them to a person named in the order. Delivery orders are chiefly used in the case of goods held by dock companies, wharfingers, &c. Such an order is not a document of title, and therefore does not transfer the property or divest the vendor's lien for the purchase-money, until it is acted on by the holder obtaining either (i) actual delivery, or (ii) an entry of his title in the wharfinger's books, or (iii) the issue of a dock warrant in his name, which last operation would apparently pre-suppose the second. Until he does one of these things, the original owner may obtain delivery to himself or transfer the property in the goods to some one else.<sup>8</sup> (See *Dock Warrant*.)

<sup>1</sup> Lewin on Trusts, 224.

<sup>2</sup> Perkins speaks of the delivery (*i. e.* payment) of legacies; Prof. Book, § 7.

<sup>3</sup> As to the distinction between delivery in the formation and delivery in the performance of a contract, see Benjamin on Sales, 554.

<sup>4</sup> Wms. P. P. 37; Benjamin, 573.

<sup>5</sup> Wms. R. P. 147 *et seq.*

<sup>6</sup> *Ibid.*; Shep. Touch. 57. (See *Escrow*; *Execution*.) As to the history of delivery, see Markby's Elements of Law, § 473.

<sup>7</sup> Rules of Court, xix. 6.

<sup>8</sup> *McKewan v. Smith*, 2 H. L. C. 309; *Imperial Bank v. L. & St. K. Dock Co.*, 5 Ch. D. 195; Cavanagh on Securities, 338; Benjamin, 684.

**DELUSIONS.**—The general rule is that where a person suffers from mental delusions, his capacity to enter into contracts and make testamentary and other dispositions of his property is not affected by the delusions unless they are calculated to influence the particular contract or disposition, even although they are connected with its subject-matter. Thus where a person at the time he granted a lease laboured under the delusion that the property was impregnated with sulphur, it was properly left for the jury to say whether as a matter of fact that delusion made him incompetent to grant the lease.<sup>1</sup> (See *Lunatic*.)

**DEMAND** “in the understanding of the common law is of so large an extent as no other one word in the law is,”<sup>2</sup> and therefore if a person release to another all manner of demands, this is the best release that the latter can have, for by it all actions, executions, rights of entry, rents, commons, profits à prendre, obligations, contracts, &c. are released and discharged.<sup>3</sup> (See *Demandant*.)

§ 2. A demand also signifies a request addressed to a person that he will do some act which he is legally bound to do, after the request has been made. Thus bills of exchange and promissory notes may be, and cheques must be, made payable on demand. When a bill or note is made payable on demand the Statute of Limitations does not in general begin to run until the demand is made, unless it appears that the debt was *recoverable* on demand, and not merely *payable* on demand.<sup>4</sup>

§ 3. It is a doctrine of equity that where a claim is put forward which arose many years ago, and it is clear from the circumstances of the case that the person putting it forward has long been cognizant of his rights and has neglected to enforce them, the Court will decline to recognize his claim, although it may not be barred by the Statute of Limitations. Such a claim is called a stale demand. The term is chiefly used with reference to trusts, to which the Statutes of Limitation do not apply,<sup>5</sup> but it is also sometimes applied to ordinary debts. Thus where A. gave B. a promissory note payable three months after demand, no interest being reserved, and A. paid two half-yearly instalments of interest within eighteen months from the date, but no further interest was paid, and no proceedings were taken to enforce payment of the note for nearly forty years, the Court expressed an opinion that even if the claim had not been barred by the statute it ought to be rejected as a stale demand.<sup>6</sup>

**DEMANDANT** was the technical name for the actor in a real action, corresponding to “plaintiff” in a personal or mixed action.<sup>7</sup> (See *Actor*.)

<sup>1</sup> *Jenkins v. Morris*, 14 Ch. D. 674; see *Banks v. Goodfellow*, L. R., 5 Q. B. 549; *Smee v. Smee*, 5 P. D. 84.

<sup>2</sup> Co. Litt. 291 b.

<sup>3</sup> *Ibid.*; Litt. §§ 508 et seq.

<sup>4</sup> *Shelford*, R. P. Stat. 269. The reservation of interest from the date of the bill

or note raises a presumption that the cause of action accrued from that date, and not from the time of demand; *ibid.* and see *infra*, § 3.

<sup>5</sup> *McDonnell v. White*, 11 H. L. C. 570.

<sup>6</sup> *In re Rutherford*, 14 Ch. D. 687.

<sup>7</sup> Co. Litt. 127 b.

**DEMESNE.**—I. § 1. In its primary sense “demesne” signifies “own,” or that which is a man’s private property.<sup>1</sup>

Land

II. § 2. Hence “demesne,” as applied by the old writers to lands or rents, signified that they were in the possession or occupation of a freehold tenant, or of his lessees for years, as opposed to those which others held of him for an estate of freehold. Thus, if A. was seised for an estate of freehold of eleven acres of land, and granted six of them to B., to be held by him as A.’s tenant, then A. was said to be seised of the remaining five *in dominico*, and of the six which he had granted to B. he was seised *in servitio*.

§ 3. Under the old law when an heir brought an action to recover land belonging to his ancestor, he had to allege in the writ that his ancestor died seised of the land “in his demesne as of fee,” meaning that the immediate freehold in severalty was vested in him for an estate of fee simple, as opposed to one who held land for a term of years or for life only, or in common with others, or *in servitio*.<sup>2</sup> From this use of the phrase, *in dominico suo ut de feodo* came to be the technical description of an estate of fee simple in a real action.<sup>3</sup>

Manor.

III. § 4. Demesne was also applied to those parts of a manor which were in the occupation of the lord, or of his villeins, or tenants for years, being cultivated “for the necessary sustentation, maintenance, and supportation of the lord and his household,”<sup>4</sup> as opposed to that part of the manor which had been granted out to free tenants in consideration of services; hence, a manor is said to be held *in dominico* and *in servitio*, or to consist of demesnes and services.<sup>5</sup> At the present day the demesne lands of a manor consist (1) of the lord’s demesnes, or that part which is in the actual occupation of the lord, (2) of the copyholders’ demesnes, or the part held by copyhold tenants, and (3) of the waste land of the manor.<sup>6</sup> (See *Manor; Service*.)

Crown lands.

IV. The demesne lands of the crown are those which belong to the sovereign in her public capacity, that is, by succession from her predecessors, or by escheat, &c., as opposed to her private estates, namely, such as have been acquired by her by moneys out of her privy purse, or by gift or inheritance from any person other than her predecessors. The demesnes are under the management of the Commissioners of Woods, Forests, and Land Revenue, and their revenue

<sup>1</sup> Thus Britton (90 b) speaks of the right of some lords to hang their tenants on their *fourches demeyne*, or private gallows: *in proprio patibulo* (Fleta, 62).

<sup>2</sup> The authorities are very conflicting as to the proper meaning of *dominium*, but the explanation given above seems the most probable: see Britton, 205 b; Bracton, 263 a; Fleta, 289; Co. Litt. 17 a; Co. Copyh. § 12; Williams on Seisin, 6; Bl. Comm. ii. 105; Steph. Comm. i. 233. Of course, after the abolition of subinfeudation

(*q. v.*) no one can create an estate to be held by the grantee as his tenant unless it is less than an estate in fee simple.

<sup>3</sup> Litt. § 10.

<sup>4</sup> Co. Litt. 17 a; Britton, 205; *Att.-Gen. v. Parsons*, 2 Cr. & Jer. 279. That part of the demesne lands which was in the possession of the villeins was called *dominium villenagium*. Bracton, 263 a; Fleta, 289.

<sup>5</sup> Co. Litt. 17 a; Co. Copyh. § 2.

<sup>6</sup> Co. Copyh. § 12 *et seq.*

forms part of the Consolidated Fund (*q. v.*).<sup>1</sup> (See *Ancient Demesne*; *Seignory*; *Manor*.)

ETYMOLOGY.]-Norman-French: *demeyne*, from Latin, *dominium*, ownership.

**DEMISE** seems originally to have meant any transfer or succession Of copyholds: of a right. Thus, in the old books, copyholds are said to be demisable by copy of court roll, meaning that the lord can grant them according to the custom of the manor.<sup>2</sup> So "demise," as applied to the crown, Of crown. signifies that change in the succession which takes place when the royal dignity is transferred or demised from one king to his successor. This ordinarily occurs on the death of the king, but the expression is also used in the event of the king being deposed.<sup>3</sup>

§ 2. In its ordinary sense, however, to demise is to grant a lease of lands Lease. or other hereditaments.<sup>4</sup> It is also applied, though rarely, to chattels,—*e. g.*, a ship.<sup>5</sup> The word "demise" in a lease of land under seal implies a covenant for title; in a parol lease it implies a covenant for quiet enjoyment.<sup>6</sup>

ETYMOLOGY.]-Old French: *demise* or *desmise*, from *desmettre*; Latin, *dimittere*, to send away.<sup>7</sup>

**DEMONSTRATIVE.** See *Legacy*.

**DEMUR.**—§ 1. In pleading, to demur is to raise an objection by demurrer (*q. v.*).

§ 2. Formerly, at common law, in all actions for debt against infant Parol. heirs by specialty creditors of their ancestors, either party was entitled to pray that the parol might demur, that is, that the proceedings might be stayed until the heir had attained his full age. This rule was the foundation of a similar practice in equity, where it was by analogy extended to all cases in which the real estate of an infant was to be sold or conveyed under the decree of the Court,—*e. g.*, foreclosure and partition suits. (See *Day to show Cause*.) The demurrer of the parol was abolished by stat. 11 Geo. 4 & 1 Will. 4, c. 47, s. 10.<sup>8</sup>

ETYMOLOGY.]-"Demur" signifies to stop; "parol" seems here to signify the pleadings, which were originally oral.

**DEMURRABLE.**—A pleading, petition, or the like, is said to be demurrable when it does not state such facts as support the claim, prayer, or defence put forward.<sup>9</sup>

**DEMURRAGE**, in the law of merchant shipping, means (I.) the detention of a ship by the freighter beyond the number of days allowed

<sup>1</sup> H. Cox, *Instit.* 698; *Steph. Comm.* ii. 534; *stat.* 14 & 15 Vict. c. 42.

<sup>2</sup> *Co. Litt.* 58 b.

<sup>3</sup> *Bl. Comm.* i. 249.

<sup>4</sup> *Dauids. Conv.* i. 108.

<sup>5</sup> *Steel v. Lester*, 3 C. P. D. 121.

<sup>6</sup> *Dauids.* i. 108.

<sup>7</sup> *Skeat's Etym. Dict.* s. v.

<sup>8</sup> *Archbold*, *Pr.* 1013; *Daniell's Ch. Pr.* 149.

<sup>9</sup> *Ex parte Coates*, 5 Ch. D. 979.

for loading or unloading, and (II.) the sum which is fixed by the contract of affreightment (*e. g.*, the charterparty) as a remuneration to the shipowner for the detention of the ship; the number of days during which the ship may be detained on demurrage at the rate agreed upon (called days of demurrage) is generally fixed by the contract. When the ship is detained by the freighter beyond the days of demurrage, a claim of the same nature arises for damages for the subsequent detention.<sup>1</sup> (See *Charterparty*.)

ETYMOLOGY.—Spanish: *demorrange*, from Latin, *demorari*, to delay. (See *Demur*.)

**DEMURRER.**—§ 1. In an action in the High Court, a demurrer is a pleading by which one of the parties in effect alleges that the facts stated by the opposite party in the preceding pleading (or in a particular part of it), even assuming them to be true, do not sustain the contention based on them; that is, do not show a good cause of action or ground of defence, set-off, counterclaim, reply, &c.<sup>2</sup> § 2. Thus, in an action on a bill of exchange, by an indorsee against the acceptor, if the defendant in his statement of defence alleges that there was no consideration for the acceptance, the plaintiff may demur to the statement of defence, because a bonâ fide holder for value of a bill of exchange can recover against the acceptor notwithstanding a defect in the title of the original holder. (See *Negotiable*.) § 3. Such simple cases as this are not likely to occur in practice, and usually demurrers raise new points, *e. g.*, whether the acceptance of a composition by the joint creditors of a partnership under sect. 126 of the Bankruptcy Act, 1869, is a satisfaction of the separate debts of the partners.<sup>3</sup> (See *Joint*.)

Demurring  
*ore tenus*.

§ 4. When a demurrer comes on for hearing and the party demurring takes an objection which might have been but was not raised by the demurrer, this is called demurring *ore tenus*.<sup>4</sup>

§ 5. If on the argument of a demurrer judgment is given in favour of the demurring party, the demurrer is said to be allowed; if it is given against him, it is said to be overruled.

§ 6. A demurrer affords a rapid and inexpensive mode of determining a point of law in question between the parties, and if the whole case lies in that question, the determination of the demurrer determines the result of the action. If, however, there are several questions of fact or law in the case,<sup>5</sup> or if the demurrer is occasioned by bad pleading, the action goes on notwithstanding the determination of the demurrer, because in the former case the remaining questions have to be decided, and in the latter case the Court generally gives the party against whom a demurrer has been allowed leave to amend his pleading, so as to state facts showing a

<sup>1</sup> Maude & Pollock, *Merch. Shipp.* 306.

<sup>2</sup> Rules of Court, xxviii. 1. For form of demurrer see *Jud. Act*, 1875, Sched. App. (C), Form 28.

<sup>3</sup> *Simpson v. Henning*, L. R., 10 Q. B. 406, where there was a demurrer to the plea and a demurrer to the replication; *Leyman v. Latimer*, 3 Ex. D. 15.

<sup>4</sup> Daniell's Ch. Pr. 504; *Dawkins v. Lord Penrhyn*, 6 Ch. D. 318.

<sup>5</sup> As to demurring and pleading at the same time, see Rules of Court, xxviii. 4, 5; as to pleading after demurrer overruled, *ibid.* 12. As to demurring in divorce suits, see *Browne on Divorce*, 236.

cause of action or ground of defence. Questions of law may also be raised by special cases, motions for judgment and new trial, &c.

Formerly the nature of demurrers differed according as they were used at common law or in equity. § 7. At common law there were two kinds of demurrers, viz., *demurrers upon pleading* and *demurrers upon evidence*.<sup>1</sup> Demurrers upon pleading were similar to demurrers under the present practice, except that a joinder in demurrer was necessary by the party whose pleading was impeached, and that the pleadings down to the joinder had to be made up into a demurrer book.<sup>2</sup> (See *Issue*.) § 8. Before the Common Law Proc. Act, 1852, demurrers upon pleading were of two kinds—*general demurrers*, or *demurrers to the substance*, raising a point of law, and *special demurrers*, or *demurrers to the form*, used where the pleading demurred to did not follow the rules of pleading. The latter were called special because the defect of form objected to had to be specified in the demurrer.<sup>3</sup> Special demurrers were abolished by the C. L. P. Act, 1852, s. 51. § 9. There were also demurrers to aid prier, voucher, receipt, waging of law and the like,<sup>4</sup> but these were antiquated long before the passing of the Judicature Acts. § 10. A demurrer to evidence was raised upon the trial of an action; the party demurring declared that he would not proceed because the evidence offered on the other side was not sufficient to maintain the issue. The practice of moving for a new trial has superseded this proceeding.<sup>5</sup>

§ 11. In equity demurrers were rarely pleaded except by defendants, and were of several kinds, of which demurrers for want of equity, for want of parties, and for multifariousness, were the most important.<sup>6</sup> If a demurrer was so framed as to bring in facts not stated in the bill it was called a *speaking demurrer*, and would be overruled.<sup>7</sup>

§ 12. Demurring is also applicable to various proceedings not being actions, *e.g.*, to some old common law writs,<sup>8</sup> and to an indictment or information.<sup>9</sup>

§ 13. Demurrers in criminal prosecutions by indictment or information seldom occur in practice. A general demurrer is founded on some substantial defect in the indictment; a special demurrer, or demurrer in abatement, is founded on some formal defect; special demurrers are quite obsolete.<sup>10</sup> (See *Arrest of Judgment*.)

ETYMOLOGY.]—From Latin *demorari*, to abide; either because the party demurring relied on the point of law (“*nous demourons en vos discreions si nous etions mest a respondre*”<sup>11</sup>), or because he put a stop to the pleadings in order to have the question of law determined.<sup>12</sup> (See *Demur*.)

**DENIZATION—DENIZEN.**—I. § 1. A denizen in the primary but obsolete sense of the word is a natural-born subject of a country,<sup>13</sup> or a native or inhabitant of a city or liberty.<sup>14</sup> Denization therefore originally

Demurrer upon pleading.

Special.

Demurrer to evidence.

Speaking demurrer.

Criminal procedure.

<sup>1</sup> Co. Litt. 72 a.  
<sup>2</sup> Chitty, Pr. 928.  
<sup>3</sup> Co. Litt. 72 a; Bl. Comm. iii. 315; Steph. Pl. (5) 151.

<sup>4</sup> Co. Litt. 72 a.  
<sup>5</sup> 5 Co. 104; Co. Litt. 72 a; Steph. Pl. (5) 99, 101; 3 Bl. 372; Chitty, Pr. 439.  
<sup>6</sup> Hunter's Suit, 29; Mitford on Pl. 107 *et seq.*; Daniell's Ch. Pr. 470 *et seq.*

<sup>7</sup> Hunter, 36; Daniell, 504.  
<sup>8</sup> For an instance of a demurrer to a return to a mandamus and of a demurrer to a plea to the return, see *The Queen v. The Postmaster-General*, 1 Q. B. D. 658.

<sup>9</sup> Broom's Comm. Com. Law, 993, n. (p).

<sup>10</sup> Archbold, Crim. Pl. 131.

<sup>11</sup> Year Book, 1 Edw. 2, 8, cited Steph. Pl. (5), App. note (14).

<sup>12</sup> See Co. Litt. 71 b.

<sup>13</sup> Co. Litt. 129 a. “If the king and his subjects should conquer another kingdom or dominion, [they] are all denizens of the kingdom or dominion conquered.” *Calvin's Case*, 7 Co. 6.

<sup>14</sup> “Cest asavoir, qe lasise de pain soit garde sur le assai, ausi bien de denzeins come de foreins.” Liber Custumarum, 303.

signified making an alien into a denizen or natural-born subject;<sup>1</sup> and thus "denizen" afterwards acquired the special sense of an alien who had been "indenized" or made a natural-born subject.

II. § 2. Denizen in its modern sense denotes a person who is an alien born, but who has obtained from the crown letters patent, called letters of denization, to make him an English subject;<sup>2</sup> formerly there were several differences between denizens and naturalized subjects, principally with reference to the inheritance of land;<sup>3</sup> but since the passing of the Naturalization Act, 1870, these differences have become unimportant, and now that naturalization can be easily obtained,<sup>4</sup> letters of denization are seldom granted.<sup>5</sup> (See *Naturalization*.)

ETYMOLOGY.]—Norman French: *denzein*, from *deins*, within; the *i* seems to have been inserted by analogy to *citizen*.<sup>6</sup>

DEODAND.—Formerly if a personal chattel was the immediate and accidental cause of the death of any reasonable creature (as where a man was run over by a cart or killed by an ox), it was forfeited to the crown under the name of a deodand (*Deo*, to God, and *dandum*, to be given). This rule was abolished by stat. 9 & 10 Vict. c. 62.<sup>7</sup>

DEPARTURE, "in pleading, is said to be when the second plea containeth matter not pursuant to [the party's] former [plea], and which fortifieth not the same, and thereupon it is called *decessus*, because he departeth from his former plea."<sup>8</sup> Thus, if a plaintiff, suing as the executor of A. B., alleges in his statement of claim that the cause of action accrued to A. B. in his lifetime, and in his replication alleges that it accrued to him as executor after A. B.'s death, this is a departure.<sup>9</sup> Departure was forbidden by the rules of common law pleading, and is so still by the modern rules, although the term itself is not used.<sup>10</sup>

DEPASTURE is to feed cattle on the grass, &c. growing on land. (See *Common*, §§ 4 *et seq.*)

DEPONENT is a person who makes an affidavit,<sup>11</sup> as opposed to a declarant, who makes a declaration, and a witness, who makes an oral statement. (See *Deposition*.)

DEPORTATION. See *Abjuration*.

<sup>1</sup> "The king cannot grant to any other to make of strangers born denizens . . . for the law esteemeth it a point of high prerogative . . . to make aliens born subjects of the realm, and capable of the lands and inheritances of England in such sort as any natural-born subject is." 7 Co. 25 b.

<sup>2</sup> Co. Litt. 129 a, where particular or limited denizations, "as when one is made denizen for life, or in taile," are mentioned. (See *Allegiance*.)

<sup>3</sup> *Ibid.*

<sup>4</sup> Stat. 7 & 8 Vict. c. 66; Naturalization Act, 1870.

<sup>5</sup> Rep. of Comm. on Natur., App. 8.

<sup>6</sup> Müller, Etym. Wb. s. v.; Co. Litt. 129 a.

<sup>7</sup> Bl. Comm. i. 300; Steph. Comm. ii. 551.

<sup>8</sup> Co. Litt. 304 a.

<sup>9</sup> Stephen on Pleading (5), citing *Hickman v. Walker*, Willes, 27.

<sup>10</sup> Rules of Court, xix. 19.

<sup>11</sup> *Ibid.* xxxviii. 4.



**DEPOSIT.**—§ 1. An equitable deposit is a deposit of title-deeds or other documents of title, so as to create an equitable charge. (See *Charge*; *Mortgage*.)

§ 2. A deposit in Court is where property is deposited with an officer of the Court for safe keeping, pending litigation, *e. g.*, until a question as to the person entitled to its possession is determined; or where money is paid into Court as security, *e. g.*, under the Parliamentary Deposits Act, as security for the execution of a railway or similar work.<sup>1</sup> (See *Payment into Court*; *Bailment*.)

§ 3. On a sale of real estate, and on a sale by auction of personal property, it is usual for the purchaser to pay the vendor or auctioneer a deposit, that is, part of the purchase-money by anticipation, as security for the completion of the purchase.<sup>2</sup>

**DEPOSITION**, in ecclesiastical law, is an ecclesiastical censure by which a clergyman is removed from the ministry, that is, deprived of holy orders, as opposed to deprivation of benefice<sup>3</sup> (*q. v.* and *Degradation*).

§ 2. In procedure, depositions, in the most general sense of the word, are the statements on oath of a witness in a judicial proceeding. It is in this sense that the term is used when we say that where a witness is dead, his depositions at a former trial are admissible in evidence on a subsequent trial between the same parties.<sup>4</sup> In criminal procedure, the depositions of witnesses taken before a magistrate or justices of the peace, against a person charged with an indictable offence, are subject to the same rule.<sup>5</sup>

§ 3. In the practice of the High Court, deposition is used in a special sense to denote a statement made orally by a person on oath before an examiner, commissioner, or officer of the Court (but not in open Court), and taken down in writing by the examiner or under his direction. The deposition is filed, and is used as evidence in such manner as the Court directs.<sup>6</sup> (See *Evidence*; *Examiner*; *Commission*, § 7.)

**DEPRAVE** is to despise or exhibit contempt. Depraving the Lord's Supper or the Book of Common Prayer is a criminal offence, punishable with fine and imprisonment.<sup>7</sup>

**DEPRIVATION** is an ecclesiastical censure, whereby a clergyman is deprived of his parsonage, vicarage, or other spiritual promotion or dignity, on account of some offence.<sup>8</sup> (See *Censure*; *Deposition*, § 1.)

**DERAIGN** "commeth of the French word *derayer* or *deraigner*, that is to say, to displace or to turne one out of his order. . . . So when a monke is deraigned, he is degraded and turned out of his order of religion, and become a lay man."<sup>9</sup>

<sup>1</sup> 9 & 10 Vict. c. 20; Daniell's Ch. Pr. 1056.

<sup>2</sup> Dart's Vendors and Purchasers, 191; Davids. Conv. i. 520.

<sup>3</sup> Phillimore, Eccl. Law, 1399.

<sup>4</sup> Powell on Evidence, 183.

<sup>5</sup> Best on Evidence, 140; Roscoe, Crim. Ex. 71; stat. 11 & 12 Vict. c. 42.

<sup>6</sup> Rules of Court, xxxvii. 4.

<sup>7</sup> Stephen's Crim. Dig. 99.

<sup>8</sup> Phillimore, Eccl. Law, 1395.

<sup>9</sup> Co. Litt. 136 b.

§ 2. In the old books to deraign a warranty paramount seems to have meant to enforce or take advantage of it. Thus if A. conveyed land to B. with warranty, and B. conveyed it to C. with warranty, and C. was evicted and recovered lands of equal value against B., and B. recovered lands of equal value against A., then A. was said to deraign the warranty paramount.<sup>1</sup>

ETYMOLOGY.]—There is a Norman word, *desreyner*, to prove one's case in Court, from the late Latin *disrationare*.<sup>2</sup> (See *Arraign*.) Hence it signified to establish one's right, or to recover by legal proceedings.<sup>3</sup>

**DERELICT—DERELICTION.**—§ 1. Dereliction is the act of abandoning a chattel or moveable; as "if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use."<sup>4</sup>

**Ships.**

§ 2. The term is, however, more commonly used of ships, which are said to be derelict when they are abandoned on the high seas. If the ship is salvaged, a greater amount of remuneration is frequently allowed to the salvors than in ordinary cases of salvage.<sup>5</sup> "Abandonment" here merely means physical abandonment, not necessarily that kind of abandonment which takes place in the case of a constructive total loss; therefore if a derelict is salvaged it belongs to the owner, unless he has given notice of abandonment to the underwriters. (See *Abandonment*, § 1.)

**Land.**

§ 3. The term is also applied to land left dry by the sea shrinking back below the usual high-water mark, or by a river changing its bed. If this dereliction is sudden and considerable, the new land, in the case of the sea or a tidal river, belongs to the crown; in the case of a non-tidal river, the property in the bed and the adjoining land remains as before, so that if the river leaves its bed altogether, the old bed is divided between the riparian proprietors according to the medium filum, while the new bed remains the property of the person over whose land the river has made itself a course. If the dereliction is by small and imperceptible degrees, the new land goes to the owner of the adjoining land;<sup>6</sup> and if the owner of the original bed of the river had a several fishery over it, he has a similar right over the new bed.<sup>7</sup>

ETYMOLOGY.]—Latin: *derelinquere*, to abandon.

**DERIVATIVE.** See *Conveyance*, § 4; *Evidence*; and *Settlement* (as applied to papers).

**DEROGATE—DEROGATION.**—§ 1. To derogate from a right, obligation, or the like, is to destroy, prejudice or evade it. Thus there is a maxim that no man can derogate from his own grant, which is chiefly applied to cases of the creation of easements by implied grant. If a man erect a

<sup>1</sup> Co. Litt. 174 a, 376 b; Plowd. 7, 515.

<sup>2</sup> Britton, 42 a; Loysel, Inst. Cout. gloss.; Schmid, Ges. der Ang. gloss. s. v. *Dirationare*; Müller's Etym. Wörtl. s. v.

<sup>3</sup> Britton, 98 b, 230 a.

<sup>4</sup> Bl. Comm. ii. 9.

<sup>5</sup> Maude & Pollock, Merch. Shipp. 495; *The Cleopatra*, 3 P. D. 145.

<sup>6</sup> Bl. Comm. ii. 262; Coulson & Forbes on Waters, 22, 62, 94; cf. Just. Inst. ii. § 23, and *Alluvion*.

<sup>7</sup> *Foster v. Wright*, 4 C. P. D. 438.

house on his own land, and afterwards sell it to another, reserving the adjoining land, he cannot obstruct the windows in the house by building on the adjoining land, because the grant of the house contains an implied grant of the easement of light to its windows, and if the grantor were allowed to obstruct them he would derogate from his grant.<sup>1</sup>

§ 2. Agreements or provisions are said to be in derogation of the marriage contract when they tend to disturb or prejudice the status of lawful marriage; thus a provision in a settlement for the future separation of the husband and wife is in derogation of the marriage contract, because it is calculated to facilitate the dissolution of the marriage contract, "which the policy of the law is to preserve intact and inviolate."<sup>2</sup> (See *Separation Deeds; Immorality.*)

§ 3. An agreement is said to be in derogation of an act of parliament or of a rule of law, when it enables the parties to evade a rule made not for their benefit, but in the interest of the public.<sup>3</sup>

**DESCENT** is what takes place when land or some interest in land or other realty belonging to a person passes on his death intestate to some one related to him by consanguinity, either directly or by reference to some other person, according to certain rules of law.<sup>4</sup> Descent, therefore, is opposed on the one hand to what takes place when land on the death of a person passes to someone else by virtue of a gift or limitation to him as "persona designata" (*q. v.*); and on the other hand to the devolution of personal property, which is governed by the rules of distribution (*q. v.*).

§ 2. The rules by which the descent of realty is governed have two objects: first, to determine the stock of descent, that is, the person from whom the descent is to be traced, or, in other words, the person with reference to whom the question of consanguinity is determined; and, secondly, to settle who is to be selected from the persons related by consanguinity to the stock of descent.

Stock or root of descent.

§ 3. The rule which determines the stock of descent is that in every case descent shall be traced from the purchaser, that is, from the last person who acquired the land otherwise than by descent.<sup>5</sup> (See *Purchaser.*) Thus if land is conveyed or devised to A. and he dies intestate, the descent is traced from him, because he was the purchaser; again, if on A.'s death intestate the land descends to B., and he also dies intestate, the descent is still traced from A., because B. was not the purchaser, although he is the person from whom the land descends.<sup>6</sup> If, however,

<sup>1</sup> *Palmer v. Fletcher*, 1 Levinz, 122; Gale on Easements, 97.

<sup>2</sup> *H. v. W.*, 3 K. & J. 382.

<sup>3</sup> See *Savin v. Hoylake Rail. Co.*, L. R., 1 Ex. 9; Pollock on Contract, 242.

<sup>4</sup> Co. Litt. 13 b, 237 a. As to the descent of a warranty under the old law, see Litt. §§ 718, 735 *et seq.*

<sup>5</sup> 3 & 4 Will. 4, c. 106, s. 2.

<sup>6</sup> This view of the operation of the act seems to the author the correct one; but

it is not universally accepted. According to Mr. Joshua Williams (notes to Watkins on Descent, 119; Jurist, N. S. iv. (2) 56), where a person (B.) has acquired land by descent from the purchaser (A.) and dies intestate, the person (C.) who then takes the land by descent derives his title not from B. but from the purchaser A., so that he would take the land free from B.'s specialty debts if it were not for the act 3 & 4 Will. 4, c. 104, making the land

there is a total failure of heirs of the purchaser, the descent is traced from the person last entitled to the land.<sup>1</sup>

§ 4. The rules regulating the selection of the person to take by descent in a given case are divisible according to their source, and are of the following kinds :—

Descent by  
the common  
law.

I. § 5. Descent according to the common law means either literally the common law, or (more usually) the common law as altered by the Inheritance Act.<sup>2</sup> The rules regulating this kind of descent are called the canons of descent, and are as follows :<sup>3</sup>—

Fee simple.

A. Descent of an estate in fee simple.

(1) Inheritances in the first place lineally descend to the issue of the purchaser, in infinitum, but the issue nearest in degree to the purchaser are preferred to the more remote; consequently the children of the purchaser are preferred to their own issue.

(2) The male issue is admitted before the female in the same degree; for instance, sons are admitted before daughters.

(3) Where two or more of the male issue are in equal degree of consanguinity to the purchaser, the eldest only shall inherit; but the females shall inherit all together.

(4) The lineal descendants of any person deceased shall represent him; that is, shall stand in the same place as the person himself would have done had he been living. Therefore, if the purchaser leaves a daughter, and a grandson by a deceased son, the grandson takes the land by right of representation, to the exclusion of the daughter. (See *Per Capita*; *Per Stirpes*.)

(5) On failure of lineal descendants of the purchaser, the inheritance descends to his nearest lineal ancestor, or to the issue of such lineal ancestor, if he has died, according to the rule of representation (canon 4).

(6) The paternal line is preferred to the maternal. In other words, the father and all the male paternal ancestors of the purchaser and their descendants shall be admitted to inherit before any of the female paternal ancestors or their descendants; all the female paternal ancestors and their heirs before the mother or any of the maternal ancestors of the purchaser, or her or their descendants; and the mother and all the male maternal ancestors and their descendants before any of the female maternal ancestors or their descendants.

(7) A kinsman of the half blood shall inherit next after a kinsman in the same degree of the whole blood to the purchaser, and after the issue of such kinsman, when the common ancestor is a male, and next after the common ancestor, when such ancestor is a female. (See *Blood*, § 2.)

of every deceased owner assets for payment of his debts. The objection to this view is that the Inheritance Act does not say that every descent shall take place from the purchaser, but that where a descent takes place "the title to inherit by reason of consanguinity" shall be traced from the purchaser. See the correspondence on

this point in the Jurist, N. S. iv. (2) 56, 72, 109, 120.

<sup>1</sup> Stat. 22 & 23 Vict. c. 35, s. 19.

<sup>2</sup> 3 & 4 Will. 4, c. 106, s. 2.

<sup>3</sup> See Williams, R. P. 100, and Steph. Comm. i. 391 *et seq.*, where the operation of these canons is fully explained and illustrated.

(8) In the admission of female ancestors, the mother of the more remote male (paternal or maternal) ancestor, and her heirs, shall be preferred to the mother of a less remote male (paternal or maternal) ancestor and her heirs.

B. § 6. The descent of an estate tail follows the first four canons, unless it is barred, or unless it is limited to special heirs or to males or females, in which case the canons govern its descent so far as they are applicable<sup>1</sup> (See *Tail*; and *infra*, § 11.) Estate tail.

II. § 7. Customary descent is a descent regulated by the custom of the place where the land is situated, as in gavelkind and borough-English lands (*q. v.*); other peculiar kinds of descent occur in many manors.<sup>2</sup> Customary descent.

§ 8. An anomalous kind of descent takes place on the death of a mortgagee of land, or where a bare trustee dies intestate as to any corporeal or incorporeal hereditament of which he was seised in fee simple. In the former case the legal personal representative of the mortgagee may, on payment of the mortgage debt, reconvey the land to the mortgagor, and, in the latter case, the hereditament vests like a chattel real in the legal personal representative of the deceased trustee.<sup>3</sup> Trust and mortgage estates.

§ 9. An equitable estate or interest descends in the same way as if it were legal. Thus an equity of redemption in fee simple land descends to the heirs of the mortgagor in the same way as the fee simple would have descended. Equitable estates, &c.

§ 10. With reference to the nature and degree of the consanguinity, descent is said to be *lineal* when it takes place from an ancestor to a descendant (*e. g.*, from father to son) or *vice versâ*, and *collateral* or *transversal* when the parties are descended from a common ancestor, as in the case of uncle and nephew, cousin and cousin, &c.<sup>4</sup> (See *Consanguinity*.) Lineal.  
Collateral.

§ 11. If an estate is limited to the heirs of the body of A., a deceased person who has left two sons, B. and C., B. takes by purchase as the first donee in tail, but nevertheless the estate devolves on his death as if he had taken it by descent from A., and, therefore, on B.'s death without issue the estate devolves on C. as the heir of the body of A. This is called a descent per formam doni ("according to the form of the gift"), although it is in strictness neither a descent nor a purchase.<sup>5</sup> Descent per formam doni.

§ 12. Before the Inheritance Act there were several other kinds of descent, the most important of which were descent *ex parte paternâ* and *maternâ* (on the paternal or maternal side). If a person succeeded to land as heir to his mother and died intestate without issue, the land descended to his heir on the mother's side, that is, to a descendant of one of his mother's ancestors. In all other cases land descended to the heirs *ex parte* *Ex parte paternâ and maternâ.*

<sup>1</sup> Williams, R. P. 105.

<sup>2</sup> Williams on Seisin, 93; Elton, Copyh. 117. The Duchy of Cornwall (*q. v.*) has a special mode of descent. See also a peculiar kind of descent mentioned by Coke, by which "the shield, armorie and armes" of a nobleman descend to such of his heirs as are able to bear them; Co. Litt. 27 a.

<sup>3</sup> Vendor and Purchaser Act, 1874, s. 4; Land Transfer Act, 1875, s. 48. See *Trustee*. The latter provision does not apply to lands registered under the Land

Transfer Act.

<sup>4</sup> Under the old law lineal descent could only take place downwards, from ancestor to descendant, and not from a descendant to an ancestor (Bl. Comm. ii. 208); but there seems no inaccuracy in now describing a descent from a descendant to an ancestor as lineal descent.

<sup>5</sup> Fearn, Cont. Rem. 81; Co. Litt. 26 b. See Williams, R. P. 58; Williams on Seisin, 65.

*paternâ* of the person last seised. If a person who had acquired land as heir to his mother conveyed it to a third person and then took a reconveyance to himself, he was said to break the descent, because on his death intestate the land would descend to his heirs *ex parte paternâ*.<sup>1</sup>

See *Heir*; *Hereditament*; *Inheritance*.

**DESCENT CAST** is the same as what the older writers called a "descent which tolls entry." Where a person who had acquired land by disseisin, abatement, or intrusion, died seised of the land, the descent of it to his heir took away or "toll'd" the real owner's right of entry, so that he could only recover the land by an action.<sup>2</sup> The doctrine of descent cast was abolished by stat. 3 & 4 Will. 4, c. 27.<sup>3</sup>

§ 2. The term seems to have originally meant the happening of any descent, because the law casts the land upon the heir.<sup>4</sup>

**DESERTED PREMISES** may be recovered by the landlord in a summary way before a magistrate or justices of the peace, if they were held at a rent of three-fourths at least of their yearly value and no sufficient distress has been left by the tenant.<sup>5</sup>

**DESERTION** is where a husband voluntarily and without reasonable cause leaves his wife against her wish, or similarly where the wife leaves her husband.<sup>6</sup> Desertion for two years or upwards affords ground for an application for judicial separation, and, in some cases, for dissolution of marriage (*q. v.*); and desertion by a husband for any time enables the wife to apply for a protection order (*q. v.*).

**DESIGNATIO PERSONÆ.** See *Persona designata*.

**DESIGNS**, copyright of. See *Registration of Designs*.

**DETAINDER.**—When a person is in arrest in a civil proceeding and another writ for his arrest is lodged with the sheriff or other officer before his discharge, it is executed by detaining him. This is called a detainer.<sup>7</sup> As to detainer of lands, see *Forcible Detainer*.

**DETENTION IN A REFORMATORY**, as a punishment or measure of prevention, is where a juvenile offender, or offender under sixteen years of age, is sentenced to be sent, at the expiration of his term of imprisonment, to a certified reformatory school, and to be there detained for a period of from two to five years.<sup>8</sup>

<sup>1</sup> Williams on Seisin, 62. There were also other kinds of descent which have no modern interest, such as mediate and immediate descent (*Collingwood v. Pace*, Sir O. Bridg. 436); descent by relation and by matter subsequent (*Butler and Baker's Case*, 3 Co. 25; Rolle, Abr. *Descent*, G.); ordinary and privileged descent (1 Burr. 109; see *Descent cast*), and others (Watkins on Descent, 27).

<sup>2</sup> Litt. §§ 385 *et seq.*; Co. Litt. 237 b.

<sup>3</sup> Shelford, R. P. Stat. 228.

<sup>4</sup> Litt. § 385; Watk. Desc. 33.

<sup>5</sup> Stats. 11 Geo. 2, c. 19; 55 Geo. 3, c. 52; 3 & 4 Vict. c. 84; 11 & 12 Vict. c. 43; Woodfall, L. & T. 789.

<sup>6</sup> Browne on Divorce, 43.

<sup>7</sup> Archbold, Pr. 694.

<sup>8</sup> Reformatory Schools Act, 1866; Russell on Crimes, i. 82.

**DETENTION OF SHIPS.**—The Merchant Shipping Act, 1876, contains provisions for the detention by the Board of Trade of unsafe ships (*i. e.*, ships unfit to proceed to sea without serious danger to human life), and for the appointment by the Board of officers called detaining officers.<sup>1</sup> (See *Court of Survey*.)

**DETERMINABLE—DETERMINATION—DETERMINE.**—An estate is said to determine when it comes to an end, whether by limitation, effluxion of time, merger, surrender or otherwise. When an estate is subject to a condition, defeasance, or the like, it is said to be determinable on the happening of the event specified in the condition. Thus an estate given to a woman during widowhood is determinable on her marrying again.

**DETINUE** was the name of the action which, before the Judicature Act came into operation, was the remedy where a person claimed the specific return of goods wrongfully detained from him, or their value;<sup>2</sup> as where A. lent B. a horse, and B. refused to return it.<sup>3</sup> (See *Action*, § 7; *Recovery*; *Writ of Delivery*.)

**DEVASTAVIT** ("he has wasted [the assets]") is the name given to any violation or neglect of duty by an executor which makes him personally responsible to persons having claims on the assets, *e. g.*, creditors and legatees. Thus if an executor applies the assets in satisfaction of a debt due by himself to a third person, or collusively sells the testator's goods at an undervalue, or pays claims which he is not bound to satisfy, he is guilty of a devastavit.<sup>4</sup>

§ 2. In ordinary cases the remedy for a devastavit is by action to make him responsible or to administer the estate under the direction of the Court. (See *Administration*.)

There is also a remedy in some cases by writ of *fi. fa. de bonis propriis* or *scire fieri* inquiry. (See those titles.)

**DEVIATION**, in the law of marine insurance, happens where there Ship. is a wilful and unnecessary departure from the due course of the voyage of a ship, for any, even the shortest time. A deviation discharges the underwriters from liability in ordinary cases,<sup>5</sup> but in some cases a deviation is justifiable, *e. g.*, for the purpose of saving life.<sup>6</sup>

§ 2. In the law of railways, a deviation is a lateral alteration of the line Railway. of a railway. The Railways Clauses Act authorizes a company which is subject to its provisions to deviate from the line marked on the deposited plans within the limits delineated thereon.<sup>7</sup>

<sup>1</sup> Sects. 6, 12.

<sup>2</sup> Co. Litt. 286 b; Common Law Proc. Act, 1854, s. 78. See now Rules of Court, xlix.

<sup>3</sup> Stephen's Comm. iii. 424.

<sup>4</sup> Williams, Ex. 1658 *et seq.*

<sup>5</sup> Smith's Merc. Law, 374.

<sup>6</sup> *Scaramanga v. Stamp*, 4 C. P. D. 316; 5 C. P. D. 295.

<sup>7</sup> Hodges on Railways, 341 *et seq.*

**DEVICE.** See *Trade-mark; Registration of Designs.*

**DEVISAVIT VEL NON.**—Under the old Chancery practice, where an heir at law was a party to proceedings affecting the real estate of his ancestor under an alleged will, he was generally entitled to an issue *devisavit vel non*, that is, to have the question, whether his ancestor devised the lands or not, tried in a common law Court before a jury. The practice was in effect abolished by stat. 25 & 26 Vict. c. 42.<sup>1</sup>

**DEVISE—DEVISEE.**—§ 1. A devise is a gift of land or other realty by will, *e. g.*, “I devise Blackacre to A. for life and after his death to B.,” this gives A. an estate for life and B. the fee simple (see *Estate*). A. and B. are called devisees.

Specific or  
residuary.

§ 2. A devise may be either specific (as in the above instance), or residuary, *e. g.*, “I devise the residue of my land and realty to C.,” which gives C. all lapsed and undisposed-of real property belonging to the testator at his death.<sup>2</sup> But in some respects every residuary devise is in effect specific, for where the testator’s personal estate is insufficient for the payment of his debts, the specific devisees must contribute towards their payment rateably with the residuary devisee,<sup>3</sup> while in the case of personalty the debts are payable out of the residue in exoneration of the legacies. (See *Administration*, § 2.)

Executory.

§ 3. An executory devise is such a direct<sup>4</sup> limitation by will of a contingent interest in land as would be void at common law if made by deed; executory devises are therefore opposed on the one hand to limitations allowed at common law (such as contingent remainders), and on the other hand to limitations by use (see *Use*), though they scarcely differ from the latter except in form. Thus if A. devises land to B. (a minor) and his heirs, but if he should die under twenty-one then to C., this is an executory devise to C., the effect of which might also be produced by a shifting use, though not by a conveyance at common law, because no limitation over can follow the limitation of an estate in fee simple<sup>5</sup> (see *Limitation*). Executory devises must not transgress the rule against perpetuities, or the provisions of the *Thellusson Act* (*q. v.*).

**DICTUM** is an observation by a judge on a legal question suggested by a case before him, but not arising in such a manner as to require decision by him. It is therefore not binding as a precedent on other judges, although it may be entitled to more or less respect. “Dictum” is an abbreviation of *obiter dictum*, “a remark by the way.”

**DIEM CLAUSIT EXTREMUM** (= “he has died”) is a special writ of *extendi facias*, or extent in chief, issuing after the death of the king’s debtor, against his lands and chattels. It sets out with stating the death of the debtor, from whence it derives its name.<sup>6</sup> (See *Extent*.)

<sup>1</sup> Daniell, Ch. Pr. 772, 942.

<sup>2</sup> 1 Vict. c. 26, ss. 24, 25.

<sup>3</sup> *Hensman v. Fryer*, L. R., 3 Ch. 420; *Lancefield v. Iggulden*, 10 Ch. 136.

<sup>4</sup> That is, not created by way of use.

<sup>5</sup> Wms. Real P. 312; Watson’s Comp. Equity, 1334. See Fearn, Cont. Rem.

381 *et seq.*, who with other writers includes executory bequests under the same head. (See *Legacy*.)

<sup>6</sup> Tidd’s Pr. 1057; West on Extents, 319; Manning’s Exchequer, 9; Crown Suits Act, 1865, s. 47.



**DIES NON** or **DIES NON JURIDICUS** is a day on which no legal business can be transacted. Such is Sunday, Christmas Day, Good Friday, &c.<sup>1</sup> (See *Vacation*.)

**DIGEST.**—§ 1. In jurisprudence, a digest properly means a collection of rules of law on concrete cases, as opposed to a code, which consists of abstract rules of law. In other words, a code lays down principles, while a digest gives examples of their application to certain combinations of facts. A digest may be either a legislative work (as the Digest of Justinian), or it may be the work of a private author. (See *Code*.)

§ 2. In English phraseology, "digest" sometimes means (i) a collection of head-notes of decided cases, arranged either alphabetically or systematically, of which Comyn's and Fisher's Digests are well-known examples;<sup>2</sup> and sometimes (ii) a collection of principles or abstract rules of law, made by a private author, and which if promulgated by the legislature would be called a code: such are the Digests of the Criminal Law and of the Law of Evidence, compiled by Mr. Justice Stephen.

**DIGNITY.**—§ 1. A dignity is the right to bear a title of nobility or honour. Some dignities, such as those of peers and baronets, are created either by writ or by letters patent; a knight is created by corporeal investiture.<sup>3</sup> § 2. Dignities are either for life, such as knighthood, or of inheritance, such as baronetcies and ordinary peerages. A dignity of inheritance may also exist by prescription.<sup>4</sup> § 3. A dignity of inheritance is an incorporeal hereditament.<sup>5</sup> It is generally limited either to the heirs or the heirs of the body of the grantee, and follows the rules governing the ordinary descent of land.<sup>6</sup> If, however, a man holds an earldom to him and the heirs of his body, and dies leaving only daughters, the dignity is in suspense or abeyance until the crown declares which daughter shall hold it during her life.<sup>7</sup> (See *Abeyance*, § 3; *Office*.)

**DILAPIDATIONS.**—In ecclesiastical law, an incumbent who incurs dilapidations, that is, allows the buildings of the benefice to fall into ruin, or pulls them down, or commits waste on the timber or lands of the benefice, is liable in the Ecclesiastical Courts to be punished for so doing and to be compelled to make good the injury. He and his personal representatives are also liable to an action at law by his successor in the benefice.<sup>8</sup> (See *Waste*.)

<sup>1</sup> See Rules of Court, lvii. 2, 3, lxi. 4.

<sup>2</sup> The older digests (such as those of Rolle and Brooke) were called abridgments. The modern abridgments (such as that of Bacon) are short treatises on various branches of the law, arranged alphabetically.

<sup>3</sup> Co. Litt. 165 a; Bl. Comm. i. 272, 396.

<sup>4</sup> Co. Litt. 16 b.

<sup>5</sup> *Ibid.* 165 a; Bl. ii. 37.

<sup>6</sup> If a dignity is conferred on a man by patent, without mentioning his heirs, he has a dignity for life, without inheritance (Co. Litt. 9 b, 16 b). It was resolved by

the House of Lords (in Lord Wensleydale's case) that a peer for life has no right to sit and vote in the House of Lords (Steph. Comm. ii. 607, note). By the Appellate Jurisdiction Act, 1876, however, the crown is empowered to appoint life-peers under the title of Lords of Appeal in Ordinary (see *Lords of Appeal*).

<sup>7</sup> Bl. Comm. ii. 216.

<sup>8</sup> Phillimore, Eccl. Law, 1459, 1611; Steph. Comm. ii. 713. As to the surveying of dilapidations and loans to incumbents to execute repairs, see the Ecclesiastical Dilapidations Acts of 1871 and 1872.

**DILATORY.** See *Plea*.

**DILIGENCE** is care. As to the effect of the absence of diligence, see *Bailment*; *Negligence*.

**DIMINUTION.**—Where a record in a proceeding is ordered to be sent or certified by an inferior to a superior Court for the purpose of review, and the record is not completely or truly certified, the party injured thereby may allege a diminution of the record (*i.e.*, its incompleteness), and a certiorari will be awarded.<sup>1</sup>

**DIMISSORY LETTERS.**—Where a candidate for holy orders has a title of ordination in one diocese and is to be ordained in another, the bishop of the former diocese gives letters dimissory to the bishop of the latter to enable him to ordain the candidate.<sup>2</sup> (See *Title*.)

**DIOCESE** is a district subject to a bishop's jurisdiction, and is divided into archdeaconries (*q. v.*).<sup>3</sup> (See *Province*.)

**DIOCESAN COURTS** are ecclesiastical Courts taking cognizance of all matters arising within the diocese of each bishop. They consist of the Consistorial Court (*q. v.*); the Courts of one or more commissaries (*q. v.*); and the Courts of Archdeacons, exercising general or limited jurisdictions, according to the terms of their patents, or to local custom, or to the authority of recent legislation.<sup>4</sup> (See *Provincial Courts*.)

Trial.

**DIRECTION.**—§ 1. When an action is tried before a jury, and a question of law arises on which the verdict of the jury partly depends, the judge directs them on the subject, that is, tells them what the law is, and they find accordingly. If the judge directs them erroneously, this is a misdirection, and may be a ground for granting a new trial. (See *Trial*.)

Payment into Court.

§ 2. When money is to be paid into Court in the Chancery Division, the Paymaster-General issues what is called a "direction to pay in," which is in form a certificate by him specifying the date of the order, request, &c. under which the payment in is to be made, the sum to be paid in, the person to pay it in, and the title of the cause, matter or account to the credit of which it is to be placed. This forms the authority to the Bank of England to receive and deal with the money.<sup>5</sup> (See *Account*; *Payment into Court*.)

**DIRECTOR** of a company is a person elected by the shareholders or otherwise appointed to superintend the management of the company's

<sup>1</sup> Archbold's Pr. 484; Archbold, Crim. Pl. 203; Bl. Comm. iv. 390.

<sup>2</sup> Holthouse's Law Dict. citing Cowel; Phill. Eccl. Law, 121 *et seq.*

<sup>3</sup> Bl. Comm. i. 111.

<sup>4</sup> Phillimore, Eccl. Law, 1202.

<sup>5</sup> Chanc. Funds Comm. Rep. (1864), App. 34; Chancery Funds Rules, 1874, ss. 25 *et seq.*

affairs. There are usually several directors, with power for a certain number of them to act without the others. (See *Quorum*.) The directors are the agents of the company, and it is bound by all acts done by them within the scope of their authority.<sup>1</sup> They are not trustees in the proper sense of the word.<sup>2</sup> (See *Trustee*; also *Company*; *Qualification*; *Articles of Association*.)

**DIRECTOR OF PUBLIC PROSECUTIONS.**—By the Prosecution of Offences Act, 1879 (which came into operation on the 1st January, 1880), provision is made for the appointment of an officer to be called the Director of Public Prosecutions, whose duty it is, subject to the superintendence of the Attorney-General, to institute, undertake, carry on or give advice or assistance in criminal proceedings which appear to be of importance or difficulty, or in which special circumstances, or the refusal or failure of a person to proceed with a prosecution, appear to render the action of the Director necessary to secure the due prosecution of an offender.

**DIRECTORY.**—A provision in an act of parliament, rule of procedure, or the like, is said to be directory when it is to be considered as a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard, as opposed to an imperative provision, which must be followed. The general rule is that the prescriptions of a statute relating to the performance of a public duty are so far directory, that though neglect of them may be punishable, yet it does not affect the validity of the acts done under them; as in the case of a statute requiring an officer to prepare and deliver a document to another officer on or before a certain day.<sup>3</sup>

**DISABLE.**—I. § 1. In its ordinary sense to disable is to cause a disability (*q. v.*).

II. § 2. In the old language of pleading, to disable is to take advantage of one's own or another's disability; thus it is "an express maxim of the common law that the party shall not disable himself;" but "this disability to disable himself . . . is personal."<sup>4</sup>

**DISABILITY** is the absence of legal ability to do certain acts or enjoy certain benefits; such as the disability to sue, to take lands by descent, to enter into contracts, to alien property, &c.

§ 2. Disability is called general when it disables the person from doing all acts of a given kind, or special when it disables him from doing a specific act. Examples of general disability occur in the case of outlaws and convicts, who cannot bring any action or suit in their own right, and lunatics and infants, who cannot alien property or enter into contracts except for necessities. The disabilities of married women have recently

General and special.

<sup>1</sup> Lindley on Companies, 256, 567.

<sup>2</sup> *Smith v. Anderson*, 15 Ch. D. at p. 275.

<sup>3</sup> Maxwell on Statutes, 330 *et seq.*

<sup>4</sup> 4 Co. 123 b.

been modified by the Married Women's Property Act (*q. v.*). A special disability occurs where a person who has entered into a contract becomes incapable of performing it.<sup>1</sup> Such a disability generally arises by act of the party; as where a person who has contracted to marry a woman marries another, and thereby disables himself from performing his promise.<sup>2</sup> § 3. As a rule "disability" means a general disability, especially a disability to sue.<sup>3</sup> Disabilities of this kind are of importance with reference to the Statutes of Limitation and the Prescription Act (*q. v.*), which allow persons under certain disabilities an extended time within which to enforce their rights.<sup>4</sup>

Personal and absolute.

§ 4. Disabilities are either personal or absolute. A personal disability is one which is confined to a certain person, such as that of an infant, married woman, &c. An absolute or perpetual disability is that which not only attaches to the person disabled, but also to his descendants or successors. Thus formerly where a person was attainted of treason or felony, that was an absolute and perpetual disability by corruption of blood for any of his posterity to claim any inheritance in fee simple, either as heir to him or to any ancestor above him.<sup>5</sup> But this rule as to attainder has been abolished except in the case of lineal descent from persons outlawed.<sup>6</sup>

Civil and canonical.

§ 5. Disability is also used in the special sense of disability to enter into the contract of marriage. This may be either canonical (such as the natural inability at the time of marriage to procreate children) or civil. A canonical disability makes the marriage voidable, while a civil disability (except that for want of age) makes it void. Examples of civil disabilities are: (1) a prior and existing marriage of one of the parties; (2) want of reason; (3) consanguinity or affinity within the prohibited degrees; (4) want of age, viz., the fact that the male is under 14 or the female under 12.<sup>7</sup>

**DISABLING.** See *Statute*.

**DISAPPROPRIATION** is where the appropriation of a benefice is severed, either by the patron presenting a clerk, or by the corporation which has the appropriation being dissolved.<sup>8</sup> See *Appropriation*, § 7; *Sinecure*.

**DISBAR.**—When a barrister is expelled from his inn for misconduct he is said to be disbarred.

<sup>1</sup> *Hochster v. De La Tour*, 2 El. & Bl. 678.

<sup>2</sup> *Ibid.*; Litt. § 355.

<sup>3</sup> Co. Litt. 128 a.

<sup>4</sup> The stat. 3 & 4 Will. 4, c. 27, s. 16, includes "absence beyond seas" (*q. v.*) in the list of disabilities, although it is, strictly speaking, only a disadvantage or "impediment," as the stat. 21 Jac. 1, c. 16, s. 4,

rightly calls it.

<sup>5</sup> *Lord De La Warre's Case*, 11 Co. 1. Hence called "disability in the blood." *Collingwood v. Pace*, 1 Ventr. 413.

<sup>6</sup> Stats. 3 & 4 Will. 4, c. 106, s. 10; 33 & 34 Vict. c. 23; Shelford, R. P. Stat. 456.

<sup>7</sup> Steph. Comm. ii. 240.

<sup>8</sup> Bl. Comm. i. 385.

**DISCHARGE.**—I. § 1. To discharge a right or obligation is to deprive it of its binding force, and to discharge a person is to release him from an obligation; thus payment discharges a debt, and in the case of a guarantie, an alteration of the contract, without the consent of the surety, will in general discharge him.<sup>1</sup> § 2. Discharge is a generic term; its principal species are rescission, release, accord and satisfaction, performance, judgment, composition, bankruptcy, merger (*q. v.*).<sup>2</sup>

§ 3. Discharge by operation of law is where the discharge takes place whether it was intended by the parties or not: thus if a creditor appoints his debtor his executor, the debt is discharged by operation of law, because the executor cannot have an action against himself.<sup>3</sup>

II. § 4. In the law of bankruptcy, a discharge is the proceeding by which a person who has been adjudicated a bankrupt, or whose affairs are being liquidated, is freed from all his debts proveable in the bankruptcy or liquidation, with a few exceptions, and is also enabled to acquire property without its vesting in the trustee. As to the discharge of a bankrupt, see *Bankrupt*, § 3. Where the proceedings are by liquidation, the debtor's discharge is granted by the creditors in general meeting, and the registrar gives to the debtor a certificate of discharge.<sup>4</sup>

Discharge  
bankrupt or  
liquidating  
debtor.

Certificate of  
discharge.

III. § 5. To discharge a proceeding (such as the order of a Court or judge, or the certificate of a chief clerk, process of attachment or execution, or the like) is to set it aside, on an application made for that purpose, either to the Court in which the proceeding is pending, or to a Court of Appeal. To discharge a rule or order nisi is where the Court refuses to make it absolute. (See *Absolute*; *Nisi*.)

IV. § 6. At the trial of an action in the High Court, it sometimes becomes necessary to discharge the jury, either on account of the sudden illness of a jurymen,<sup>5</sup> or because they cannot agree; in which case, when there is no hope of their resolving on a verdict, it is now the practice to discharge them.<sup>6</sup>

Discharge of  
jury.

§ 7. A prisoner or defendant is discharged from arrest or imprisonment when he is set at liberty.

**DISCLAIM—DISCLAIMER.**—§ 1. To disclaim a right, interest or office is to expressly renounce all claim to it or refuse to accept it. Thus where property is conveyed to a person upon certain trusts, he may disclaim the trust unless he has accepted the office or has acted as trustee. The act of disclaiming is called a disclaimer, and is generally evidenced by a deed.<sup>7</sup> (See *Renunciation*.)

§ 2. Where a person has obtained a patent for an invention of which the title is inconsistent with the specification, or of which a part is neither

Patent.

<sup>1</sup> Chitty on Contracts, 492 *et seq.*;  
White & Tudor's L. C. ii. 892.

<sup>2</sup> Leake on Contracts, 413.

<sup>3</sup> Co. Litt. 264 b, n. (1); Williams on  
Executors, 1216; Chitty, 714.

<sup>4</sup> Bank. Act, 1869, s. 125, § 10; Bank.  
Rules (1870), 362; *Ex parte Hemming*,  
13 Ch. D. 163; *Lewis v. Leonard*, 5 Ex.  
D. 165.

<sup>5</sup> *Rea v. Edwards*, 3 Camp. 207.

<sup>6</sup> Smith's Action, 139.

<sup>7</sup> Elphinstone's Conv. 401; Watson's  
Comp. Eq. 877. As to disclaimer by a  
lord or tenant of land (disclaimer in the  
seignory, disclaimer in the tenancy, and  
disclaimer in the blood), see Co. Litt.  
102 a.

new nor useful, the patent is in strictness void; but by stat. 5 & 6 Will. 4, c. 83, a patentee is in such a case empowered, with the leave of the proper law officer, to enter a disclaimer of any part of either the title or the specification, and the disclaimer is then deemed to be part of the letters patent or specification, so as to render them valid for the future.<sup>1</sup> (See *Title*.)

Trustee in  
bankruptcy.

§ 3. Where any property of a bankrupt consists of land burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of property which is not saleable by reason of its binding the possessor to the performance of any onerous act, the trustee in the bankruptcy may sign a disclaimer of the property, which has the effect of determining the contract, surrendering the lease, forfeiting the shares, or determining the estate and interest of the bankrupt, according to the nature of the property,<sup>2</sup> but a disclaimer cannot prejudice the rights of third persons, such as a mortgagee of the bankrupt.<sup>3</sup>

Disclaimer in  
suit in equity.

§ 4. Under the practice of the Court of Chancery, before the Judicature Act, if a bill claiming relief was filed against a person who had no interest in the subject-matter of the suit, his proper course was to file a disclaimer, alleging that he had not any right or title, and that he did not and never did claim any title to the subject-matter of the suit. In such a case the plaintiff generally had his bill dismissed as against that defendant.<sup>4</sup>

Action.

**DISCONTINUANCE.**—I. § 1. In the procedure of the High Court discontinuance is where the plaintiff in an action voluntarily puts an end to it, either by giving notice in writing to the defendant before any step has been taken in the action subsequent to the statement of defence, or at any other time by order of the Court or a judge. The effect of discontinuance is that the plaintiff has to pay the defendant's costs, but may commence another action for the same cause.<sup>5</sup> (See *Withdrawal*.) If the defendant has put in a counter-claim, the discontinuance puts an end to it as well as to the original action.<sup>6</sup>

Land.

II. § 2. Formerly, in the law of real property, discontinuance was where a man wrongfully aliened certain lands or tenements and died, whereby the person entitled to them was deprived of his right of entry, and was compelled to bring an action to recover them. The term was specially applied to alienations by husbands seised *jure uxoris*, by ecclesiastics seised *jure ecclesie*, and by tenants in tail: thus, if a tenant in tail aliened the land and died leaving issue, the issue could not enter on the land, but was compelled to bring an action.<sup>7</sup>

The principal actions appropriate to discontinuances were: formedon, cui in vitâ, cui ante divortium.

The effect of discontinuance is taken away by stat. 3 & 4 Will. 4, c. 27, s. 39. (See *Recontinuance*.)

<sup>1</sup> Johnson on Patents, 151.

<sup>2</sup> Bankr. Act, 1869, s. 23. As to the construction of this section see Polson's Bankr. 377 *et seq.*; *In re Mercer and Moore*, 14 Ch. D. 287.

<sup>3</sup> *Ex parte Buxton*, 15 Ch. D. 289.

<sup>4</sup> Hunter's Suit, 43; Mitford on Pleading, 283; Daniell's Ch. Pr. 458.

<sup>5</sup> Rules of Court, xxiii.; *Newcomen v. Coulson*, 7 Ch. D. 264.

<sup>6</sup> *Vavasasseur v. Krupp*, 15 Ch. D. 474.

<sup>7</sup> Litt. §§ 592 *et seq.*; Co. Litt. 325 a, and Butler's note. See also §§ 470, 614, where Littleton uses discontinuance for divesting, as applied to a reversion.

**DISCOVERY.**—§ 1. Discovery is where one party to an action or suit obtains from another party information on oath. It is of two kinds—(i) discovery by interrogatories of facts relevant to the issue in the action, and within the knowledge of the party interrogated; and (ii) discovery of documents relating to the matters in question in the action, and in the possession of the party. The object of the former proceeding is partly to obtain information on subjects of which the interrogating party is ignorant or misinformed, and partly to obtain admissions so as to save the necessity of proving certain facts. For this purpose, the interrogating party delivers to the opposite party interrogatories (*q. v.*), to which the latter is bound to file his answer on oath. (See *Answer*, § 1.) For the purpose of obtaining discovery of documents, the party seeking it issues a summons, asking that the other party may be ordered to make an affidavit stating whether he has or has had in his possession any and what documents relating to the matters in question in the action. The proceeding is merely a preliminary to the more important one of production or inspection<sup>1</sup> (*q. v.*, and see *Affidavit*, § 3; *Privilege*; *Confidential Communications*).

§ 2. Sometimes an action is brought against a person for the sole purpose of obtaining information to enable the plaintiff to take proceedings against some other person: such an action is called an action for discovery, as opposed to an action in which relief is sought against the defendant.<sup>2</sup>

**DISCREDIT.**—§ 1. To discredit a witness is to throw doubts on the correctness of a statement made by him in giving evidence, either—(i) by giving evidence of his general bad character for veracity, or by cross-examining him on the subject (see *Character*, § 2); (ii) by showing that he has on former occasions made statements inconsistent with the evidence he has given relevant to the cause; (iii) by proving misconduct connected with the proceedings, *e. g.*, his having been bribed by one of the parties.

§ 2. A party cross-examining an opponent's witness may use any of these modes. A party examining his own witness cannot as a rule discredit him, except collaterally, that is, by adducing evidence to show that the evidence he gave was untrue in fact. But if a witness prove adverse, the party calling him may use the second mode of discrediting above mentioned.<sup>3</sup> (See *Witness*.)

**DISCRETION—DISCRETIONARY.**—Discretion is a man's own judgment as to what is best in a given case, as opposed to a rule governing all cases of a certain kind. Thus a trustee often has a discretion given him by the settlor, as to the management or application of the trust property. So a judge or Court often has a discretion in making orders or imposing conditions on litigants, *e. g.*, as to payment of costs, relaxing rules of practice, &c. Discretion, however, is "to discern by the right

<sup>1</sup> See Rules of Court, xxxi.

<sup>2</sup> *Orr v. Diaper*, 4 Ch. D. 92.

<sup>3</sup> Best on Evidence, 803; stats. 17 & 18 Vict. c. 125; 28 & 29 Vict. c. 18.

line of law, and not by the crooked cord of private opinion, which the vulgar call discretion;"<sup>1</sup> and, therefore, if a judge proceeds on a wrong principle in a matter within his discretion, his order may be set aside by a Court of Appeal,<sup>2</sup> and if a trustee acts fraudulently or negligently, the possession of a discretionary power will not protect him.<sup>3</sup> (See also *Delegation; Power; Trust.*)

**DISENTAILING DEED** is an assurance by which a tenant in tail bars his estate tail so as to convert it into an estate in fee, either absolute or base. By the Fines and Recoveries Act, by which this mode of barring entails was introduced, every tenant in tail may dispose of the land for an estate in fee simple absolute, so as to defeat the rights of all persons claiming under and after him: provided (i) that the disposition, in the case of freehold land, is by deed enrolled in the High Court of Justice, or if the land is copyhold, by surrender enrolled on the court rolls of the manor, unless the estate tail is equitable, when it may be barred either by surrender or by deed enrolled; and (ii) that if there is a protector under the instrument creating the entail, no disposition made without his consent by the tenant in tail bars the persons entitled in remainder or reversion expectant on the determination of the estate tail. An ordinary disentailing deed consists of a conveyance of the land by the tenant in tail to a nominee to such uses as the tenant in tail shall appoint, and in default of appointment to the use of him and his heirs.<sup>4</sup> (See *Enrolment; Surrender; Protector; Fee.*)

**DISGAVEL.**—To convert gavelkind land into ordinary freehold land. Several private acts have been passed disgavelling land in Kent.

**DISHONOUR.** See *Bill of Exchange*, § 5; *Honour*.

**DISMISSAL OF ACTION.**—If the plaintiff in an action does not deliver his statement of claim within the time during which he is bound to do so, or if the plaintiff does not set down the action for trial within the proper time, the defendant may apply to the Court or a judge to dismiss the action for want of prosecution, thereby putting an end to the action. He may also take this step if the plaintiff fails to comply with an order to answer interrogatories or produce documents.<sup>5</sup>

**DISORDERLY HOUSE** is any common (*i.e.*, public) bawdy house, common gaming or betting house, or disorderly place of entertainment. It is a common nuisance, and therefore a misdemeanor, to keep a disorderly house.<sup>6</sup>

**DISPARAGE—DISPARAGEMENT.**—§ 1. As to disparaging statements, see *Defamation*.

§ 2. Under the old law, if a tenant of land held by knight's service died leaving an

<sup>1</sup> Co. Litt, 227 b.

<sup>2</sup> See *Watson v. Rodwell*, 3 Ch. D. 380.

<sup>3</sup> Lewin on Trusts, 511.

<sup>4</sup> Stat. 3 & 4 Will. 4, c. 74, ss. 15, 40 *et seq.*; Shelford, R. P. Stat. 320, 343.

<sup>5</sup> Rules of Court, xxix. 1, xxx., xxxvi.

<sup>6</sup> Stephen's Crim. Dig. 109.



infant heir, the lord of whom the land was held was entitled to the marriage of the heir, that is, to bestow him or her in marriage. (See *Marriage*.) It was necessary, however, that the proposed marriage should be without disparagement, that is, suitable to the heir; otherwise the heir was said to be disparaged.

§ 3. Disparagements were of several kinds, of which the principal were: *propter vitium animi*, as where the proposed wife or husband was an idiot, &c.; *propter vitium sanguinis* (as in the case of villeins, "men of trade," &c.), and *propter vitium corporis*, by reason of some bodily defect.<sup>1</sup>

ETYMOLOGY.]—Latin: *dis*-, apart; and old French, *parage*, lineage, rank.<sup>2</sup>

**DISPAUPER.**—A person who has been admitted to sue in formá pauperis (*q. v.*) is said to be dispaupered when that privilege is withdrawn: as where it appears that he has means.<sup>3</sup>

**DISPOSITION OF THE OWNER OF TWO TENEMENTS.** See *Easement*, § 10.

**DISSEISIN** "is the wrongful putting out of him that is actually seised of a freehold;"<sup>4</sup> in other words, the act of wrongfully depriving a person of the seisin of land,<sup>5</sup> rents,<sup>6</sup> or other hereditaments, as where a man not having a right of entry on certain lands or tenements enters into them and ousts him who has the freehold.<sup>7</sup> In the case of land, the disseised person has both a right of entry and a right of action (*q. v.* and *Descent cast*). In the case of incorporeal hereditaments, as the disseisin is only so by election (*infra*, § 3), the disseised person may either have an action for the disseisin, or he may avail himself of any other remedy which the law gives him (*e. g.*, in the case of rent, by distraining).<sup>8</sup>

§ 2. Equitable disseisin is where a person is wrongfully deprived of the equitable seisin of land, *e. g.*, of the rents and profits.<sup>9</sup>

§ 3. Disseisin by election is where a person alleges or admits himself to be disseised when he has not really been so. In former days this was done by persons in order to avail themselves of the writ of assize, which was a convenient remedy available only by those who had been disseised of land.<sup>10</sup> Since the abolition of forms of action, the distinction between disseisin and other modes of wrongful dispossession of land is no longer of practical importance. Disseisin of incorporeal hereditaments cannot be an actual dispossession, being in general nothing more than a disturbance of the owner in the means of coming at or enjoying them. Disseisin of an incorporeal hereditament therefore only takes place at the election of the party injured, for the sake of more easily trying the right.<sup>11</sup> As the

<sup>1</sup> Litt. § 109; Co. Litt. 80 a.

<sup>2</sup> Skeat, Etym. Dict. s. v.

<sup>3</sup> Daniell's Ch. Pr. 43.

<sup>4</sup> Co. Litt. 277 a.

<sup>5</sup> *Ibid.* 153 b; Butler's note to 266 b.

<sup>6</sup> Litt. §§ 233 *et seq.* "There be three causes of disseisin of rent service, that is to say, rescous, replevin, and enclosure" (Litt.

§ 237); see those titles.

<sup>7</sup> Litt. § 279.

<sup>8</sup> *Ibid.* § 588.

<sup>9</sup> *Cholmondeley v. Clinton*, 2 Mer. 171; 2 J. & W. at p. 166.

<sup>10</sup> Butler's note (1) to Co. Litt. 239 a.

<sup>11</sup> Bl. Comm. iii. 169.

remedy for a disseisin has now no advantages over other kinds of actions, disseisin by election is practically obsolete.

See *Abatement; Action; De forcement; Disturbance; Intrusion; Possession; Seisin.*

**DISSOLUTION** is the act of putting an end to a legal relation.

- Partnership.** § 2. In the case of a partnership, dissolution takes place either by operation of law (*e. g.*, in ordinary cases on the death or bankruptcy of one of the partners), by agreement between the partners, by effluxion of time, or by the order of a Court in proceedings taken for the purpose. A state of things which entitles a partner to obtain an order of dissolution is called a ground of dissolution: such is the insanity or misconduct of one of the partners, the hopeless state of the business, or any other state of things which makes it impossible to continue the partnership.<sup>1</sup>
- Companies.** § 3. In the case of a company incorporated under the Companies Act, 1862, dissolution takes place when its affairs have been completely wound up and certain formalities have been gone through,<sup>2</sup> or where a company has ceased to carry on its business or operations.<sup>3</sup> § 4. A Friendly, Industrial or Provident Society is dissolved either by an order of the County Court, or by an instrument of dissolution setting forth the liabilities and assets of the society, signed by a certain majority of the members and registered.<sup>4</sup> A Friendly Society may also be dissolved by the award of the registrar.<sup>5</sup> § 5. Other corporations may be dissolved in various ways, *e. g.*, by surrender or forfeiture of a charter, &c.<sup>6</sup>
- Marriage.** § 6. The High Court, on proceedings taken in the Probate, Divorce and Admiralty Division (*q. v.*), has power to decree the dissolution of a marriage on the petition of the husband alleging adultery by the wife, or on the petition of the wife alleging that the husband has committed adultery and cruelty; or adultery and desertion or certain other offences.<sup>7</sup> (See *Adultery; Cruelty; Desertion; Divorce; Judicial Separation.*)
- Foreign divorce.** § 7. A divorce of a foreign Court dissolving an English marriage—that is, a marriage celebrated in England—will be recognized by the English Courts: (a) if it was pronounced for grounds on which the marriage was liable to be dissolved in England;<sup>8</sup> or (b) if the husband was at the time of the marriage domiciled in the foreign country.<sup>9</sup> (See *Domicile; Judgment.*)

**DISTRAIN—DISTREIN.**—To distrain or distrein is to seize goods by way of distress (*q. v.*).

**DISTRESS** is the act of taking moveable property out of the possession of a wrongdoer, to compel the performance of an obligation, or to

<sup>1</sup> Lindley, Partn. 234.

<sup>2</sup> Companies Act, 1862, ss. 111, 143; Lindley on Partn. 1489; *In re Pinto Silver Mining Co.*, 8 Ch. D. 273; *In re London and Cal. M. I. Co.*, 11 Ch. D. 140.

<sup>3</sup> Companies Act, 1880, s. 7.

<sup>4</sup> Industrial and Provident Societies Act, 1876, s. 17.

<sup>5</sup> Friendly Soc. Act, 1875, s. 25.

<sup>6</sup> Steph. Comm. iii. 30.

<sup>7</sup> 20 & 21 Vict. c. 85, s. 27; *Browne on Divorce*, 24; *Macqueen's Husband and Wife*, 203 *et seq.*

<sup>8</sup> *Solley's Case*, Russ. & Ry. 237.

<sup>9</sup> *Harvey v. Farnie*, 5 P. D. 153.

procure satisfaction for a wrong committed.<sup>1</sup> An ordinary distress is effected by seizing the goods and placing them in a pound (*q. v.*). Some goods are privileged or exempted from distress, such as things in personal use or occupation at the time, instruments of husbandry, and trade fixtures, things in the possession of a trader but belonging to his customers, things in the custody of the law (*e. g.*, goods seized under an execution), &c.

“Distress” also signifies the property distrained.

A. With reference to its origin, the right to distrain is either given by common law, or by statute, or created by reservation or agreement between the parties.

1. § 2. The principal kind of distress given by law is that used to compel payment of rent in arrear, especially by a landlord against his tenant.<sup>2</sup> (See *Rent*.) § 3. A right of distress (not often exercised) is given to every feudal lord (*e. g.*, the lord of a manor) to compel his tenants to perform their services.<sup>3</sup> § 4. A right of distress also exists to enforce payment of amercements (*q. v.*) in certain cases.<sup>4</sup> § 5. “Another injury for which distresses may be taken, is where a man finds beasts of a stranger wandering in his grounds, *damage-feasant*, that is, doing him hurt or damage, by treading down his grass or the like, in which case the owner of the soil may distrein them till satisfaction be made him for the injury he has thereby sustained.”<sup>5</sup> § 6. Distress also exists in name, though it is practically obsolete, as a mode of compelling obedience to the orders of courts of justice, *e. g.*, to compel the attendance of jurors. (See *Distringas*.)

Distress for rent,

— for services,

— on cattle damage-feasant.

2. § 7. A statutory or statute-distress is given as a remedy for several duties and penalties inflicted by special acts of parliament, such as assessments made by commissioners of sewers, or for the relief of the poor.<sup>6</sup> (See *Warrant*.)

Statutory distress.

3. § 8. A remedy by distress, analogous to the ordinary distress for rent, is sometimes created by agreement between the parties to secure the performance of an obligation: thus an annuity deed may include a conveyance of land to a trustee, with a power of distress whenever the annuity is in arrear.<sup>6</sup>

Power of distress (conventional).

B. With reference to the extent of the remedy, distresses are of three kinds: 1. § 9. Formerly every distress was a mere pledge or security, and this is still so in the case of distress of cattle damage-feasant, distress for services, &c., which merely entitle the distrainor to retain the property until satisfaction is made. (See *Lien*.) 2. § 10. Where the distress is for fealty or suit of Court, or to compel the attendance of jurors, and in

Simple distress.

Distress infinite.

<sup>1</sup> Bl. Comm. iii. 6; Steph. Comm. iii. 245.

<sup>2</sup> Co. Litt. 47a, 57b; Woodfall's Landlord and Tenant, 374. As to the protection of goods belonging to lodgers, see stat. 34 & 35 Vict. c. 79. See also the stat. 8 Anne, c. 14, which prevents a sheriff or execution creditor from removing goods from land occupied by the execution debtor without first paying the landlord all arrears of rent.

<sup>3</sup> “If an abbot or prior holds of his lord by a certain divine service . . . , as to sing a mass everie Friday in the weeke . . . , in this case, if such divine service be not done, the lord may distreigne.” Litt. § 137 (see *Tenure*). For other kinds of obsolete rights of distress, see Co. Litt. 169b.

<sup>4</sup> Bl. Comm. iii. 7.

<sup>5</sup> *Ibid.*

<sup>6</sup> Elphins. Conv.

Distress and sale.

Juridical nature of distress.

other cases where it is the only remedy and merely gives the right of detaining the goods, it is called a distress infinite, because it has no bounds with regard to its quantity and may be repeated from time to time, until the stubbornness of the party is conquered.<sup>1</sup> 3. § 11. In the case of distress for rent, for a crown debt and some other cases, if the amount is not paid within a certain time the distrainer may sell the property distrained and satisfy the debt out of the proceeds.<sup>2</sup>

§ 12. Distress is an extra-judicial remedy. (See *Remedy*.)

See *Replevin*; *Rescue*; *Levant and Couchant*.

**DISTRIBUTION.**—§ 1. By the stat. 22 & 23 Car. 2, c. 10, commonly called the Statute of Distributions, when the administrator of a deceased intestate has paid the expenses, debts, &c., he is directed to make “just and equal distribution of what remaineth clear amongst the wife and children or children’s children, if any such be, or otherwise to the next of kindred to the dead person in equal degree,” according to the rules contained in the statute; namely, if there is a widow and children, one-third is to go to the wife and the rest to the children in equal shares; if there are no children, then one-half is to go to the wife and the other half to the next of kin; and if there is no wife, then the whole property is divided among the children or next of kin.<sup>3</sup>

§ 2. Formerly customs of distribution prevailed in certain places (*e. g.*, the City of London), but they have been abolished.<sup>4</sup> (See *Next of Kin*; *Representation*; *Per Capita*.)

High Court.

**DISTRICT REGISTRIES.**—§ 1. By the Judicature Act, 1873, provision is made for the establishment of district registries of the High Court of Justice, and for the appointment of district registrars.<sup>5</sup> District registries have accordingly been established in the principal country towns of England and Wales.<sup>6</sup>

Proceedings in.

§ 2. An action in the High Court proceeds in a district registry when the plaintiff has issued the writ in that registry and all the defendants have appeared there. A defendant is only bound to appear in a district registry if he either resides or carries on business in the district; otherwise he has the option of appearing in London.<sup>7</sup> When an action proceeds in a district registry, all the proceedings in the action down to and including final judgment, and the subsequent proceedings necessary to enforce it (including the issue of writs of execution, garnishee and charging orders) are taken in the district registry.<sup>8</sup> The trial or hearing of the action must take place in the same way as if the action had been instituted in London, that is, before a judge of the High Court in

<sup>1</sup> 3 Bl. Comm. 231; Elton, Copyholds, 178.

<sup>2</sup> 3 Bl. Comm. 14.

<sup>3</sup> Williams on Executors, 1372.

<sup>4</sup> Stat. 19 & 20 Vict. c. 94; Williams, 1411.

<sup>5</sup> Sect. 60.

<sup>6</sup> Order in Council, August, 1875.

<sup>7</sup> Rules of Court, xii. 2 *et seq.* The defendant may, however, in certain cases, remove the action from the district registry into the High Court. Jud. Act, 1873, s. 65; Rules of Court, xxxv. 11.

<sup>8</sup> Jud. Act, 1873, s. 64; Rules of Court, xxxv. (including Amended Rules of June, 1876, April and May, 1880).

London or at the assizes, with or without a jury, according to the practice applicable to the particular case.<sup>1</sup> The district registrar may however enter judgment or make an order for an account under Order XV. either by consent of the parties or by reason of the defendant's default.<sup>2</sup>

§ 3. The district registrar exercises most of the functions of a judge at chambers; an appeal lies from him to a judge of the High Court sitting in chambers.<sup>3</sup> Jurisdiction of registrar.

§ 4. The district registries are therefore in effect local branches of the Central Office and Judges' Chambers of the High Court, and are under the control of the Court accordingly.<sup>4</sup>

§ 5. District registries for the registration of the title to land may be formed under the Land Transfer Act, 1875, s. 118. This part of the act does not seem to have been yet put in force. District land registries.

§ 6. As to the district registries of the Probate Division of the High Court, see *Registry* (sub-division *Probate and Divorce Registries*). Probate.

**DISTRINGAS** is a writ so called from its commanding the sheriff to distrain on a person for a certain purpose. The following are the principal instances in which it is used, the old *distringas* to compel appearance, the *distringas juratores*, and other varieties of the writ, having been abolished.<sup>5</sup>

§ 2. A judgment for the delivery of any property other than land or money (*e. g.*, a chattel) may be enforced by a writ which authorizes the sheriff to distrain the defendant by all his lands and chattels until he delivers it up.<sup>6</sup> Distringas for recovery of chattel.

§ 3. Where a writ of *fieri facias* has been sued out, and the sheriff, after returning that he has levied but that the goods remain in his hands for want of buyers, goes out of office, the execution creditor, instead of suing out a *venditioni exponas* (*q. v.*), may sue out a writ called a *distringas nuper vicecomitem* ("that you distrain the late sheriff"), directed to the present sheriff, commanding him to distrain the late sheriff to compel him to sell the goods.<sup>7</sup> Distringas nuper vicecomitem.

§ 4. A writ of *distringas*, directed to the coroner, may be issued against a sheriff if he neglects to execute a writ of *venditioni exponas*.<sup>8</sup> Distringas vice comitem.

§ 5. A judgment against a corporation may be enforced by writ of *distringas*, commanding the sheriff to distrain its lands and tenements, goods and chattels, so that it may not possess them until the Court shall make order to the contrary.<sup>9</sup> (See *Sequestration*.) Against corporation.

§ 6. *Distringas* is also applicable to compel a person, body of persons or corporation, against whom an indictment for misdemeanor or on a penal statute has been found, to appear and answer the charge.<sup>10</sup> To answer indictment.

<sup>1</sup> *Irlam v. Irlam*, 2 Ch. D. 608.

<sup>2</sup> Order xxxv. 1 a.

<sup>3</sup> *Ibid.* 4 *et seq.*

<sup>4</sup> *Ibid.* 9.

<sup>5</sup> Common Law Procedure Act, 1852.

<sup>6</sup> Rules of Court, xlix., adopting the former practice in actions of detinue;

Common Law Proc. Act. 1854, s. 78; Steph. Comm. iii. 582.

<sup>7</sup> Archbold's Pr. 585; Smith's Action, 197; Rules of April, 1880, form F. 12.

<sup>8</sup> Archbold, 584.

<sup>9</sup> Daniell's Ch. Pr. 931, 401.

<sup>10</sup> Archbold, Crim. Pl. 81.

Distringas on stock.

§ 7. The commonest species of distringas, however, was that formerly issued by the Court of Exchequer, then by the Court of Chancery, and lastly by the High Court of Justice, to prevent a public company (most commonly the Bank of England) from permitting the transfer of a sum of stock in their books, or from paying the dividends on it, without previously giving notice to the person who had obtained the writ or "put on the distringas." The proceedings were to a great extent of a fictitious character, and have been recently simplified. Under the present practice no writ is issued, and in lieu of it a notice is given to the Bank or other company to stop the transfer of stock or payment of dividends: this notice is filed in the Central Office, with an affidavit stating that the person giving it is beneficially interested in the stock; an office copy of the affidavit and a sealed copy of the notice are served on the Bank or company.<sup>1</sup> § 8. The proceeding is commonly used to prevent unauthorized or fraudulent dealings with stock by the person in whose name it is standing, *e.g.*, a trustee. As soon as the Bank receive a request from that person to permit a dealing with the stock, they give notice to the person who has served the distringas notice, and if he does not obtain an order or injunction from a Court to restrain the dealing within eight days from the stockholder's request, the Bank are compelled to allow the stockholder to deal with the stock. (See *Stop Order*; *Restraining Order*.)

**DISTURBANCE.**—I. § 1. In the law of incorporeal hereditaments, disturbance is where a man infringes a right of easement, common, profit à prendre, franchise or similar right; *e.g.*, by obstructing an ancient light.<sup>2</sup> The rights of the aggrieved person are the same as in a case of private nuisance, namely, either by abatement, action for damages, or injunction.<sup>3</sup> Where the disturbance consists in refusing to pay toll for a market, ferry, &c., or in wrongfully putting beasts on a common, the person injured also has a right of distress.<sup>4</sup>

Disturbance of patronage.

§ 2. To the same class of injuries belongs disturbance of patronage, or the wrongful hindering or obstruction of a patron in the presentation of his clerk to a benefice: for this an action of quare impedit lies against the disturber, who may be the bishop alone, or a pretended patron and his clerk, or all three.<sup>5</sup> (See *Usurpation*.)

Disturbance of tenure.

II. § 3. In the law of tenure, disturbance is where a stranger, by menaces, force, persuasion or otherwise, causes a tenant to leave his tenancy: this disturbance of tenure is an injury to the lord for which an action will lie.<sup>6</sup>

Public disturbances.

III. § 4. As to public disturbances, see *Affray*; *Brawling*; *Riot*; *Unlawful Assembly*; also stat. 24 & 25 Vict. c. 100, s. 36, *et seq.*

<sup>1</sup> Stat. 5 Vict. c. 5; Rules of Court, xlv. 2 a *et seq.* (April, 1880). In this rule the notice is simply called a "notice as to stock"; in practice, however, it is still called a distringas.

<sup>2</sup> Gale on Easements, 633 *et seq.*

<sup>3</sup> *Ibid.* 643.

<sup>4</sup> Steph. Comm. iii. 411.

<sup>5</sup> *Ibid.* 414; Phill. Eccl. Law, 445; see *Jus Patronatus*.

<sup>6</sup> Steph. Comm. iii. 414.

**DIVERSITY.** See *Collateral*, § 5.

**DIVES.**—In the practice of the Chancery Division, “dives costs” are costs on the ordinary scale, as opposed to the costs formerly allowed to a successful pauper suing or defending in *formâ pauperis*, and which consisted only of his costs out of pocket.<sup>1</sup> (See *In Formâ Pauperis*.)

ETYMOLOGY.]—Latin: *dives* = a rich man.

**DIVEST.**—To divest is to take away from a person an estate or interest which has already vested in him. The term is generally used with reference to gifts by will. Thus where a testator gives property to A. for life, and after his death to B., and then directs that on a certain event the property shall go to C., then B. takes a vested estate or interest subject to being divested on the happening of the event.<sup>2</sup> The rule is that if the substituted legatee or devisee (C.) cannot take, then the original estate becomes absolute. Thus where a testator gave property to A. for her life, and after her death to her heirs, &c.; but in case A. should marry and have no child, then the property to belong to B.; A. married and had no child, and B. died in her lifetime without issue: it was held that A.’s estate became absolute.<sup>3</sup> (See *Defeasible*.)

**DIVISION.** See *High Court of Justice*; *Court of Appeal*.

**DIVISIONAL COURTS** are Courts consisting of two or (in special cases) more judges of the High Court of Justice, sitting to transact certain kinds of business which cannot be disposed of by one judge. When the High Court was first formed it was intended that the Divisional Courts should take the place of the sittings in banc of the old Common Law Courts (see *Banc*);<sup>4</sup> but by the Appellate Jurisdiction Act, 1876, it was enacted that all proceedings in an action subsequent to the hearing or trial should, so far as is practicable and convenient, be taken before the judge before whom the trial or hearing took place. The business transacted before Divisional Courts consists principally of Crown, Revenue and Election Petition business, appeals from County Courts, appeals from chambers in the Common Law Divisions, and applications for a new trial in the same divisions where the action has been tried with a jury.<sup>5</sup>

§ 2. Divisional Courts must not be confounded with the Divisions of the High Court, which are quite different things. The present practice is for one Divisional Court to sit for business arising in all the three Common Law Divisions. Divisional Courts may also be held in the Chancery and Probate, Divorce and Admiralty Divisions,<sup>6</sup> but in practice this is never done.

<sup>1</sup> Daniell’s Ch. Pr. 43; Cons. Ord. xl. 5.

<sup>2</sup> *Whitter v. Bremridge*, L. R., 2 Eq. 736; see *In re Peek’s Trusts*, L. R., 16 Eq. 221.

<sup>3</sup> *Jackson v. Noble*, 2 Kee. 590; Jarman on Wills, 823.

<sup>4</sup> Jud. Act, 1873, s. 41.

<sup>5</sup> Rules of Court, lvii. a.

<sup>6</sup> Jud. Act, 1873, ss. 43, 44.

**DIVORCE** was a term used by the Ecclesiastical Courts to signify an interference by them with the relation of husband and wife. It was of two kinds,—a divorce *a mensâ et thoro* (“from bed and board”), granted in cases where the husband or wife had been guilty of such conduct as to make conjugal intercourse impossible (as in the case of adultery, cruelty, &c.);<sup>1</sup> and a divorce *a vinculo matrimonii* (“from the bond of marriage”), granted where the marriage was voidable or void ab initio (as in the case of the parties being within the prohibited degrees, or one of them having been already married, or being impotent).<sup>2</sup> The former is now represented by judicial separation, the latter by a decree of nullity of marriage (*q. v.*; and see *Disability*, § 4).

The term “divorce” is now applied both to decrees of nullity and decrees of dissolution of marriage. (See *Dissolution*, § 6.)

**DIVORCE COURT.** See *Court for Divorce and Matrimonial Causes*; *Probate, Divorce and Admiralty Division*.

**DOCK WARRANT** is a document issued by a dock company or dock owner stating that certain goods therein mentioned are deliverable to a person therein named or to his assigns by indorsement. Dock warrants in form resemble bills of lading (*q. v.*), but they differ from them in this, that when goods are at sea a purchaser who takes a bill of lading has done all that is possible to obtain possession of them, while a purchaser who takes a dock warrant can at any moment lodge it with the dock company and so take actual or constructive possession of the goods. It therefore seems that the indorsement of a dock warrant does not at common law pass the ownership in the goods, or divest the vendor's lien if the goods have not been paid for, but merely operates as a constructive delivery of them as between the indorser and indorsee, until the dock company has “attorned” to the indorsee by agreeing to hold the goods for him.<sup>3</sup> (See *Delivery Order*; *Document of Title*.) § 2. Dock warrants, however, are included in the Factors Acts among the “documents of title” the possession of which gives a factor power to confer a good title to the goods on persons dealing with him in good faith.<sup>4</sup> (See *Factors Acts*.)

**DOCKET**, or docquet (from *dock*, to cut), is an epitome or abstract of a judgment, decree, order, &c.

Enrolment.

§ 2. In Chancery practice, a docket was formerly used for the purpose of enrolling a decree or order of the Court (see *Enrolment*). It consisted of a statement of the filing of the bill, petition, &c. and the other pleadings or proceedings; a recital of the decree made on the hearing; and the adjudication or adjudicatory part (*q. v.*), which set forth the mandatory part of the decree. It was certified by the Clerk of Records and Writs, signed by the Lord Chancellor, engrossed on parchment in the form of a continuous roll, and deposited at the Public Record Office, when it became a record<sup>5</sup> (*q. v.*).

<sup>1</sup> Gibson's Codex, 445, n. (b); Browne on Divorce, 29.

<sup>2</sup> Gibson, 446, n. (c); Co. Litt. 235 a.

<sup>3</sup> Benjamin on Sales, 573, 674; *Atten-*

*borough v. L. & St. K. Docks Co.*, 3 C. P. D. 373, 450.

<sup>4</sup> Benjamin, 668.

<sup>5</sup> Daniell, Ch. Pr. 882; Braith. Pr. 446.



§ 3. By stat. 4 & 5 Will. & Mary, c. 20, an alphabetical index or docket of judgments was directed to be kept by the Clerk of the Dockets in each of the superior Courts of common law, in order to give notice to intending purchasers of land from judgment debtors, because the judgment bound the land of the debtor from its date, even if the land had been sold before execution was issued. These dockets were closed by stat. 2 & 3 Vict. c. 11, the provisions for registration of judgments (*q.v.*) having made them unnecessary.<sup>1</sup>

**DOCTORS COMMONS** is the popular name for the buildings in which the Ecclesiastical and Admiralty Courts, and the College of Advocates practising in those Courts, were formerly held. The Courts and College were built in 1567, and the College was incorporated in 1786, under the title of "The College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts," whence the popular name. (See *Advocate*.)

**DOCUMENT.**—§ 1. A document is any solid substance upon which matter has been expressed or described by conventional signs, with the intention of recording or transmitting that matter. Thus a piece of paper on which words are written, lithographed, printed or stamped, or expressed by arbitrary signs or ciphers, is a document; and so is a tally or piece of wood with notches to represent figures or amounts.<sup>3</sup>

§ 2. In the law of evidence, documents are either public or private. Public. A public document is one recording facts which have been inquired into or taken notice of for the benefit of the public by an agent authorized and accredited for the purpose. Such are acts of parliament, judgments and proceedings of Courts, records generally, registers of births, deaths and marriages, and other registers (*q.v.*).<sup>4</sup> § 3. Public documents are admissible as evidence of the truth of the facts stated in them without being verified on oath, some being conclusive on all the world, while others (and the greater number) merely afford *prima facie* evidence; that is, hold good until they are disproved.<sup>5</sup> Hence public documents are sometimes said to prove themselves.<sup>6</sup> It is, however, in many cases unnecessary to produce the original of a public document, many acts of parliament having provided for the proof of such documents by authenticated or official copies: thus a proclamation by the crown or privy council may be proved by the production of a copy of the *Gazette* containing it:<sup>7</sup> as to copies under stat. 14 & 15 Vict. c. 99, see *Certified Copy*; also *Copy*; *Exemplification*.

§ 4. Private documents include deeds, wills, agreements and the like. Private.

<sup>1</sup> Williams, R. P. 85.

<sup>2</sup> Phillimore, *Eccl. Law*, 1218.

<sup>3</sup> Best on Evidence, 300.

<sup>4</sup> *Ibid.* 304. "It should be a public inquiry, a public document, and made by a public officer. I do not think that 'public' . . . is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. . . . But it must be a public document, and it must be made

by a public officer. I understand a public document . . . to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire." Per Lord Blackburn, *Sturla v. Freccia*, 5 App. Ca. at p. 643.

<sup>5</sup> Best, 305.

<sup>6</sup> Daniell, Ch. Pr. 757.

<sup>7</sup> Documentary Evidence Act, 1868; Best, 622.

Of course when a will has been proved, it becomes a public document. (See *Probate*.) As to private documents which prove themselves, see *Ancient Documents*.

Document  
of title.

§ 5. A document of title is a document which enables the possessor to deal with the property described in it as if he were the owner. In this way a bill of lading represents the goods while they are at sea; and by it, when the goods arrive at the port of destination, the possession of the goods may be obtained,<sup>1</sup> either by the person to whom the bill of lading was originally given, or by a person to whom he has transferred it, which he may do absolutely or by way of charge, &c. Some documents of title (as in the case of a bill of lading) pass the ownership of the goods represented by them; while others, such as delivery orders and dock warrants (*q. v.*), are mere authorities to obtain delivery of them.<sup>2</sup> (See *Negotiable*.)

§ 6. As to the discovery and production of documents, see those titles.

**DODERIDGE.**—John Doderidge was born in 1555, was appointed justice of the King's Bench in 1612, and died in 1628.<sup>3</sup> The work on conveyancing, known as "*Sheppard's Touchstone of Common Assurances*," is generally attributed to him.<sup>4</sup>

**DOLE.**—§ 1. A dole is a share in waste or common land.

§ 2. Thus, open meadows are frequently divided into allotments called doles or lots, the ownership of which is shifted among the whole body of proprietors in yearly rotation, determined by lot or similar methods;<sup>5</sup> hence such fields are sometimes called dole-meadows. (See *Open Fields; Shack; Common*, § 7.)

§ 3. Sometimes the right to take the whole of the turf from a given piece of land is vested in a number of persons, who may either have "doles," *i. e.*, separate portions of turf-land allotted to them, or take the turf from any part of the land. Such a "dole," although similar to a common of turbary (see *Common*, § 13), is not a common, but an interest in land.<sup>6</sup>

§ 4. Under the customs of certain mining districts, wastes lands are frequently divided into doles (called "doles of lead," "doles of tin," &c.), each of which is worked by a separate miner<sup>7</sup> (see *Tinbounding*); these doles also are interests in land.<sup>8</sup>

**ETYMOLOGY.**—Anglo-Saxon: *dál, dæl*, a portion.<sup>9</sup>

**DOLUS DANS LOCUM CONTRACTUI**,—literally, "fraud or deceit giving occasion for the contract,"—is applied to a false representation (*q. v.*) when it is such as to induce the contract. The phrase is commonly used in expressing the rule that a contract is not voidable for misrepresentation unless the representation was *dans locum contractui*, that

<sup>1</sup> *Gunn v. Bolckow, Vaughan & Co.*, L. R., 10 Ch. at p. 502.

<sup>2</sup> See Benjamin on Sales, 673.

<sup>3</sup> Foss, Biog. Dict.

<sup>4</sup> Hilliard's Preface to the Touchstone.

<sup>5</sup> Elton, Comm. 31; Blount's Tenures; Blount, Dict. v. *Dole*.

<sup>6</sup> Elton, 103.

<sup>7</sup> Blount.

<sup>8</sup> Elton, 116.

<sup>9</sup> Skeat, Etym. Dict.

is, unless it induced the misled party to enter into the contract. Therefore if the person to whom the false representation was made did not rely on it, but made further inquiries, he could not afterwards make use of it to avoid the contract.<sup>1</sup>

**DOMAT.**—Jean Domat was born at Clermont in 1625 and died in Paris in 1695. His chief work is *Les Loix civiles dans leur ordre naturel*. He also wrote *Le Droit public* and *Legum Delectus*.<sup>2</sup>

**DOMICILE** is the legal home of a person, or that place where the law presumes that he has the intention of permanently residing, although he may be absent from it or even never have been there<sup>3</sup> (*infra*, § 4). § 2. The question where a person is domiciled may be important, because it is by the law of that place that his civil status, so far as it is independent of his voluntary acts, is regulated. Thus the question whether one person can contract a legal marriage with another is decided, not by the law of the country where he happens to go through the ceremony, but by the law of his domicile;<sup>4</sup> so the legitimacy and majority of a child (except with reference to his capacity of inheriting real estate<sup>5</sup>) depend on the law of its parents' domicile;<sup>6</sup> and the manner in which personal estate devolves on the death of the owner is regulated not by the law of the country where he dies, nor by that of the place where the property is, but by the law of his domicile.<sup>7</sup> Real estate is regulated by the *lex loci rei sitæ* (*q. v.*). Formerly, also, a will of personal estate had to be made according to the formalities required by the law of the country where the testator was domiciled at the time of his decease; but this rule has been abolished as to wills made after the 6th August, 1861, and it is now sufficient if a will made out of the United Kingdom by a British subject was made according to the forms required either by the law of the place where it was made, or by the law of his domicile at the time, or by the law of his domicile of origin.<sup>8</sup>

§ 3. Companies are also sometimes said to have domiciles when their Companies. operations are carried on in one country and their administration or direction in another: thus, a company formed in England to construct a railway in Germany, and having its principal seat of administration here, would be said to be domiciled in England.<sup>9</sup> (See *Resident*; *Non-Resident*.)

<sup>1</sup> *Attwood v. Small*, 6 Cl. & F. at p. 444.

<sup>2</sup> Holtz. Encycl.

<sup>3</sup> See Westlake's Priv. Int. Law, 28, and the various definitions of domicile quoted in Phillimore, ch. ii. They generally err in being applicable only to domicile of choice (*infra*, §§ 7, 13).

<sup>4</sup> *Sottomayer v. De Barros*, 3 P. D. 1; *Niboyet v. Niboyet*, 4 P. D. 1. But where the parties have different domiciles, see *Sottomayer v. De Barros*, 5 P. D. 94;

*Harvie v. Farnie*, 5 P. D. 153.

<sup>5</sup> *Doe d. Birtwhistle v. Vardell*, 5 B. & C. 438; see 2 Bl. Comm. 248, n. (11).

<sup>6</sup> See *Skottowe v. Young*, L. R., 11 Eq. 474; *In re Hellermann's Will*, L. R., 2 Eq. 363.

<sup>7</sup> Jarman on Wills, p. 2, vol. i. (4th ed.).

<sup>8</sup> Williams, P. P. 365; stat. 24 & 25 Vict. c. 114.

<sup>9</sup> See Savigny, Syst. viii. 65; *Buenos Ayres, &c. Rail. Co. v. Northern Rail. Co.* 2 Q. B. D. 210.

Domicile is of three kinds :—

Domicile of origin.

(i.) § 4. The domicile of origin or birth (natural domicile)<sup>1</sup> is that which a child receives from its parents at its birth. Every person preserves his domicile of origin until he acquires another domicile, and on his abandoning or losing an acquired domicile, his domicile of origin revives. Thus, if a husband and wife domiciled in England take a voyage to India, and a child is born to them on the voyage, or in India before they acquire a domicile there, its domicile is English;<sup>2</sup> if the child grows up and settles in India he acquires an Indian domicile (*infra*, § 8); if he leaves India with the intention of settling permanently in America, he loses his Indian domicile, and his English domicile revives, so that if he dies before reaching America the succession to his personal property will be regulated by English law.<sup>3</sup>

Necessary domicile.

(ii.) § 5. Domicile by operation of law (necessary domicile) is that which attaches to a person independently of his or her will, and without reference to birth, residence or other facts. § 6. Thus the domicile of an infant follows that of his father, so that if the father changes his domicile the infant's domicile ipso facto changes too.<sup>4</sup> So the domicile of a wife follows that of her husband.<sup>5</sup>

Domicile of choice.

(iii.) § 7. Domicile of choice arises where a person having the power of changing his domicile voluntarily abandons his existing domicile and settles in another country with the intention of permanently residing there (*animo manendi*).<sup>6</sup> Questions of change of domicile are proverbially difficult to determine, owing to the ambiguity of ordinary conduct: thus a person may have lived many years abroad without having acquired a foreign domicile if it appears that his reason for doing so was a desire to avoid his creditors or the like.<sup>7</sup> So an ambassador or other public officer does not acquire a domicile in the country where he resides as a matter of duty.

Principal domicile.

§ 8. Some writers affirm that a person may have two domiciles, one of them being called the principal domicile.<sup>8</sup> The doctrine seems contrary to the principles of English law,<sup>9</sup> except in this sense, that a person may be

<sup>1</sup> As to the phrase *domicilium originis*, see *infra*, § 9.

<sup>2</sup> *Somerville v. Somerville*, 5 Vesey, 749.

<sup>3</sup> *Udny v. Udny*, L. R., 1 Sc. App. 441.

<sup>4</sup> As to whether the mother or guardian of an infant whose father is dead can influence his domicile, see *Phillimore*, 37.

<sup>5</sup> As to the domicile of a wife deserted or judicially separated from her husband, see *Le Sueur v. Le Sueur*, 1 Prob. D. 139. As to the domicile of a widow, see *Phill.* 27.

<sup>6</sup> *Lord v. Colvin*, 4 Drew. 366. By stat. 24 & 25 Vict. c. 121, the crown is empowered to enter into conventions with any foreign state to prevent British subjects from acquiring a domicile in such state unless they have resided there for one year before their death, and have deposited a declaration of their intention to become domiciled there (*Williams*, P. P. 366). It is believed that no such convention has yet

been entered into, and that the act is therefore inoperative.

<sup>7</sup> "Although residence may be some small *prima facie* proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find that the party had any other residence in existence or in contemplation." *Bell v. Kennedy*, L. R., 1 Sc. App. p. 321.

<sup>8</sup> See *Phillimore*, ch. iii.

<sup>9</sup> See *Udny v. Udny*, *supra*. The error seems to have arisen partly from a misapprehension of the meaning of *domicilium* in Roman Law (*infra*, § 9), partly from a confusion between domicile and nationality (*q. v.*). For other points as to domicile, see *Platt v. A. G. of New South Wales*, 3 App. Ca. 336; *Hamilton v. Dallas*, L. R., 1 Ch. D. 257, where it was decided that the provisions of the Code Napoléon, § 13, requiring the authorization

domiciled in one place according to the law of one country, and domiciled in another place according to the law of another country. Thus the fact of a Frenchman having resided in England for a number of years may be sufficient to give him an English domicile according to English law, and yet not sufficient to divest him of his French domicile according to French law.

ETYMOLOGY AND HISTORY.]—§ 9. Latin: *domicilium*, from *domus*, a house or home, and *colere*, to inhabit. In Roman law there was no opportunity for questions of domicile (in our sense of the word) to arise, because there was one system of law for the whole of the civilized world. The empire was divided into municipalities or local self-governed districts (*civitates* or *respublicæ*), all subject to the *jus commune* or imperial law, but having peculiar constitutions, jurisdictions and legislatures. Every subject of the empire was a member of at least one of these municipalities, either by *origo*, which was the case when he had been born, adopted or manumitted in it, or by *domicilium*,<sup>1</sup> which was the case when he voluntarily chose the municipality as the chief place of his business and pleasure.<sup>2</sup> *Domicilium*, therefore, was merely a peculiar mode of becoming a member of a municipality, with its accompanying incidents of burdens and liabilities; consequently a person could at the same time have an *origo* in one municipality and a *domicilium* in another or in several others,<sup>3</sup> just as a person at the present day may be rated in respect of several parishes. Many modern writers seem to suppose that the Roman *domicilium* is exactly equivalent to our "domicile," and quote the definitions and principles of the Roman law as authorities on the subject.<sup>4</sup> The same ignorance has given rise to the barbarous expression *domicilium originis*, which purports to be the equivalent for "domicile of origin" in Roman law, where it would have been an impossible combination, *domicilium* and *origo* being opposed to one another.<sup>5</sup> (See *Nationality*; *Residence*; *Lex Loci*.)

**DOMINANT.** See *Easement*.

**DOMINIUM** is equivalent to ownership (*q. v.*). The term *dominium directum* (or direct dominion), *i. e.*, the nominal or bare right of ownership remaining in an owner who has granted the exclusive right of enjoyment and of limited or unlimited disposition over the thing to another person,

of the French government as the condition for the enjoyment of full civil rights by a foreigner resident in that country, do not prevent the acquisition, by simple residence cum animo manendi, of a "de facto domicile" governing the devolution of his personal property. By this seems to be meant, not that a person may have a domicile de facto in one country, and one de jure in another, but that he may acquire a domicile without thereby acquiring the enjoyment of all civil rights (in other words, an imperfect domicile) in one country, thus altogether losing his former domicile in another. The expression "de facto domicile," however, is used by French jurists to denote one of two domiciles. "Si l'on pouvoit avoir deux domiciles, ce seroit par rapport à des objets tout différens; ainsi l'un pourroit être un domicile de fait qui influeroit sur tout ce qui regarde directement la personne domiciliée; l'autre un domicile de droit et de volonté, qui décideroit du sort de la succession."

Cochin's argument in the case of the Marquis d'Hauteport, *Œuvres*, t. 3, p. 327, cited by Phillimore, *Domicil*, 15, n. (c).

See also *Le Sueur v. Le Sueur* (1 Prob. D. 139), where the expressions "bonâ fide domicil" and "matrimonial domicil" are used. What these expressions mean is not clear, but from the reference to *Manning v. Manning* (L. R., 2 P. & D. 223) it would seem that "domicil" is used in the sense of "residence" (*q. v.*).

<sup>1</sup> Cod. X. 39, 7; Dig. L. i. 1.

<sup>2</sup> *Ibid.* Dig. L. i. 27, § 1; L. 16, 203.

<sup>3</sup> The whole subject is exhaustively treated by Savigny, *System*, viii. §§ 350—359; Savigny on Priv. Inter. Law, 42 *et seq.*

<sup>4</sup> See especially Story, *Confli. of Laws*. The possibility of a Roman having several *domicilia* is quoted as an argument for the existence of the same rule in English law (*supra*, § 8).

<sup>5</sup> Savigny, viii. 105.

and *dominium utile* (or beneficial dominion), *i. e.*, the practical right of enjoyment and disposition thus vested in the grantee, were invented by the glossators to express the relation between the *dominus* and *emphyteuta* of the Roman law, which allowed the latter a so-called *utilis in rem actio*, while the *dominus* retained the *rei vindicatio directa*. The terms are also applied to the interests of the lord and the tenant under the feudal system<sup>1</sup> (*q. v.*), and to the legal and equitable interests in property recognized by the rules of common law and of equity respectively. (See *Estate; Interest*.)

**DOMINUS LITIS**—"master of the suit"—is a person who has control over an action or other judicial proceeding, and can dispose of it as he thinks fit. Thus, where one of several actions has been selected as a test action, the plaintiff in that action is nevertheless *dominus litis*, and can allow it to be dismissed, or judgment to go by default.<sup>2</sup> (See *Consolidation*, § 2.) A solicitor or counsel employed by a person to conduct a suit for him is sometimes said to be *dominus litis* for certain purposes, *e. g.*, to compromise, withdraw a jury, &c. without the client's instructions, and in some case even against them.<sup>3</sup>

**DONATIO MORTIS CAUSÂ** is a gift of personal property on a death-bed. It must be made in contemplation of the donor's death, to take effect on his death by his existing illness, and it must be completed by delivery of the thing at the time by the donor or by his direction to the donee. Hence things, the property of which does not pass by delivery (such as stock), cannot be the subject of a *donatio mortis causâ*. A *donatio mortis causâ* resembles a legacy in being subject to legacy duty and to the debts of the deceased.<sup>4</sup>

**DONATIVE** is an advowson or spiritual preferment, be it church, chapel, or vicarage, which is in the free gift of the patron by mere deed of gift or donation, without any presentation, institution or induction (*q. v.*). It seems that only advowsons created by the crown itself, or by a subject under express licence of the crown, exempting them from the necessity of presentation and visitation by the bishop, are properly called donative.<sup>5</sup> (See *Advowson*.)

**DONEE—DONOR.**—In the most general sense of the words, a donor is a person who gives property, and the donee is the person to whom it is given, as in the case of a *donatio mortis causâ* (*q. v.*). In their technical sense, "where a man giveth certaine lands or tenements

<sup>1</sup> Co. Litt. 1 b; Blackstone, ii. p. 1; Hayes, Conveyancing, I. i. ii. iii.; Holtz. Encyc. I. 308; Mackelday, § 296, n. (a).

<sup>2</sup> Robinson v. Chadwick, 7 Ch. D. 878.

<sup>3</sup> See Strauss v. Francis, L. R., 1 Q. B. 379, and the cases there cited.

<sup>4</sup> Williams on Executors, 725; Watson's Comp. Eq. 127; Ward v. Turner, 2 Ves. 431; White & Tudor's L. C. i. 816; In re Mead, 15 Ch. D. 651 (a case of deposit notes and bills of exchange).

<sup>5</sup> Co. Litt. 344 a; Phill. Eccl. Law, 318; Bl. Comm. ii. 23.

to another in taile, he which maketh the gift is called the donor, and he to whom the gift is made is called the donee."<sup>1</sup> (See *Gift*.)

**DORMANT.** See *Partnership*.

**DOUBLE.** See *Costs*, § 7; *Count*, § 1; *Duplicity*; *Double Damages*; *Portion*; *Probate*; *Proof*; *Vouch*.

**DOUBLE DAMAGES—DOUBLE RENT—DOUBLE VALUE.**—Double and treble damages are in some cases given by particular statutes. The most important instances are—(a) where a person has distrained for rent although no rent was owing, and the distress has been sold, the owner may recover double the value of the goods distrained;<sup>2</sup> (b) where a person is guilty of pound-breach or rescue of goods distrained for rent, the person grieved shall recover treble damages;<sup>3</sup> (c) where a tenant of land holds over (that is, retains possession of the land) after the determination of his tenancy (see *Holding Over*); (d) in some cases where the revenue has been defrauded by non-payment of customs, excise, or other duties, the person offending is liable to pay double or treble duty, or double or treble the value of the property. (See *Smuggling*.)

**DOWER** is "that portion of lands or tenements which the wife hath for terme of her life of the lands or tenements of her husband after his decease, for the sustenance of herself and the nurture and education of her children."<sup>4</sup> Dower was formerly of five kinds:—

I. § 2. At the common law, where a man was seised in deed or in law of land for an estate of inheritance (otherwise than as joint tenant),<sup>5</sup> and died leaving a widow, she was entitled to hold the third part of such lands and tenements as were her husband's at any time during the coverture, as tenant in dower for the term of her life,<sup>6</sup> and notwithstanding that the husband might have sold, mortgaged or devised the lands or part of them, unless in the case of a conveyance the wife joined to release her dower, or unless she had barred her right of dower by accepting a jointure (*q. v.*) in lieu of it. To prevent this inconvenience several methods were adopted to enable a person acquiring lands to aliene them at a future time without his wife's concurrence;<sup>7</sup> the most important of these methods was that of inserting "uses to bar dower" in the conveyance to the original purchaser. (See *Uses to bar Dower*.) § 3. But no such precaution is required in a conveyance to a man married since the 1st January, 1834, for by the Dower Act<sup>8</sup> no woman married since that day is entitled to dower out of any land which has been absolutely disposed of by her husband in his lifetime or by his will; and her right to dower is subject to all partial estates and interests created by him, and all debts, charges, encumbrances,

By common law.

Dower Act.

<sup>1</sup> Litt. § 57; Shepp. Touch. 228.

<sup>2</sup> Stat. 2 Will. & Mary (sess. 1), c. 5; Woodfall, L. & T. 488; Archbold's Pr. 408.

<sup>3</sup> Same statute; Woodfall, 443.

<sup>4</sup> Co. Litt. 30 b.

<sup>5</sup> Litt. § 45.

<sup>6</sup> *Ibid.* § 36.

<sup>7</sup> Williams, R. P. 225.

<sup>8</sup> Stat. 3 & 4 Will. 4, c. 105; Shelford's R. P. Stat. 417.

&c. to which his lands are liable. A husband may also wholly or partially deprive his wife of her dower by making a declaration to that effect by deed or will. So that now a widow can only claim dower as against her husband's heir-at-law, and she cannot even do that if her husband has executed a declaration to the contrary.<sup>1</sup> § 4. On the other hand, the act has granted widows a right of dower out of lands to which the husband had a mere right, without having had actual or legal seisin, and has extended the right of dower to equitable as well as legal estates in possession.<sup>2</sup>

Action of  
dower.

§ 5. An action by a widow to enforce her right to dower is brought in the Common Pleas Division or in the Chancery Division of the High Court of Justice<sup>3</sup> by writ of summons in the ordinary form endorsed with a claim for dower,<sup>4</sup> and the judgment is executed by the sheriff assigning and delivering a third part of the lands to the widow.<sup>5</sup>

By custom.

II. § 6. By the custom of some places a widow has the half, or a quarter, or the whole of her husband's lands: with or without special incidents. Thus, in gavelkind lands, the widow has the half for her dower so long as she remains unmarried and without child.<sup>6</sup>

The three following kinds of dower no longer exist:—

Ad ostium  
ecclesiæ.

III. § 7. Dower *ad ostium ecclesiæ*, or dower at the church door, "is where a man of full age seised in fee simple, who shall be married to a woman, and when he cometh to the church doore to be married, there, after affiance and troth plighted betweene them, he endoweth the woman of his whole land, or of the halfe, or other lesser part thereof, and there openly doth declare the quantity and the certainty of the land which she shall have for her dower. In this case the wife, after the death of her husband, may enter into the said quantity of land of which her husband endowed her without other assignment."<sup>7</sup>

Ex assensu  
patris.

IV. § 8. Dower *ex assensu patris*, or dower by assent of the father, "is where the father is seised of tenements in fee, and his sonne and heire apparent, when he is married, endoweth his wife at the monastery or church doore, of parcel of his father's lands or tenements with the assent of his father, and assignes [*i. e.* fixes] the quantity and parcels. In this case, after the death of the son, the wife shall enter into the same parcell without the assignment of any."<sup>8</sup>

De la plus  
beale.

V. § 9. Dower *de la plus beale* is "where a man is seised [*e. g.*] of forty acres of land, and he holdeth twenty acres of the said forty acres of one [lord] by knights service, and the other twenty acres of another in socage, and taketh wife, and hath issue a sonne, and dieth, his sonne being within the age of fourteene yeares, and the lord of whom the land is holden by knights service entreth into the twenty acres holden of him, and holdeth them as gardein in chivalrie during the nonage of the infant, and the mother of the infant entreth into the residue, and occupieth it as gardein in socage: if in this case the wife bringeth a writ of dower against the gardein in chivalry, to be endowed of the tenements holden by knights service, . . . the gardein in chivalry may pleade in such case all this matter, and shew how the wife is gardein in socage as aforesaid, and pray that it may be adjudged by the Court that the wife may endow her selfe *de la plus*

<sup>1</sup> Williams, R.P. 236; Watson's Comp. Eq. 349.

<sup>2</sup> Williams, 236.

<sup>3</sup> Common L. Proc. Act, 1860, s. 26; Judicature Act, 1873, s. 34; Williams, 238. As to the old kinds of "writ of dower unde nihil habet," and "writ of right of dower," abolished by the former act, see Bl. Comm. iii. 182.

<sup>4</sup> Jud. Act, 1875, Forms A. II. iv.

<sup>5</sup> Co. Litt. 34 b; Reg. Brev. 297, *De dote assignanda*.

<sup>6</sup> Litt. § 37; Co. Litt. 33 b.

<sup>7</sup> Litt. § 39. Abolished by stat. 3 & 4 Will. 4, c. 105, s. 13.

<sup>8</sup> Litt. § 40. Abolished by stat. 3 & 4 Will. 4, c. 105, s. 13.



*beale*, *i. e.*, of the most faire of the tenements which she hath as gardein in socage, after the value of the third part which she claimes by her writ of dower to have of<sup>1</sup> the tenements holden by knights service.”<sup>2</sup> “And note that after such a judgment given, the wife may take her neighbours and in their presence endow herself by metes and bounds of the fairest part of the tenements which she hath as gardein in socage, to have and to hold to her for terme of her life : and this dower is called *dower de la plus beale*.”<sup>3</sup>

ETYMOLOGY.]—Norman French: *doweyre*, *dowarrie*; from Low Latin *dotarium*, from Latin *dotare*, to endow; from *dos*, a marriage portion.

See *Estate*; *Freebench*; *Curtsey*; *Assignment*, § 6; *Metes and Bounds*.

**DRAFT.**—I. § 1. A draft is an order for the payment of money drawn by one person on (*i. e.*, directed to) another. Cheques and bills of exchange (*q. v.*) belong to the genus of drafts. In its technical sense a draft is an order drawn by one banker on another, but otherwise resembling an ordinary cheque.

II. § 2. Draft also signifies a document drawn up or framed for the purpose of discussion or consideration: *e. g.*, a draft agreement, will, lease, conveyance, statement of claim, affidavit, &c. When the document is engrossed or copied for execution or signature the draft from which the engrossment or copy is made is the original draft. (See *Engross*.)

**DRAFTSMAN** is anyone who draws or frames a legal document, *e. g.*, a will, conveyance, pleading, &c. (See *Draw*, § 2; *Conveyancer*.) § 2. Under the old practice in chancery, all bills, answers, &c. had to be signed, and were almost invariably drawn, by counsel. A barrister whose practice included the drafting of chancery pleadings was called an equity draftsman, the correlative term at common law being special pleader (*q. v.*).

**DRAIN—DRAINAGE.**—I. § 1. Under the Sanitary and Public Houses. Health Acts, “drain” means an underground channel or passage for carrying off water, soil, &c. from one building or premises within the same curtilage, into a cesspool or sewer (*q. v.*). Sanitary authorities have power to compel the effectual drainage of houses within their respective districts.<sup>4</sup> (See *Sanitary Authorities*.)

II. § 2. The drainage of land, that is, the construction of works for Land. taking off superfluous water from land for the purpose of improving it (as opposed to the drainage of houses, which is of a sanitary nature), is one of the works for which limited owners are empowered to borrow or advance money and charge it on the land with the sanction of the Enclosure Commissioners. (See *Improvement of Land Acts*.)

§ 3. The Enclosure Commissioners are also empowered to enable land-owners to obtain advances from the treasury for the improvement of land

Public money.  
Drainage  
Acts.

<sup>1</sup> “De les tenements” in the original. Coke’s translation omits the “of.”

<sup>2</sup> Litt. § 48.

<sup>3</sup> *Ibid.* § 49. This kind of dower was necessarily abolished with the military

tenures by stat. 12 Car. 2; Bl. Comm. ii. 132.

<sup>4</sup> Public Health Act, 1875; Metropolis Management Acts.

Compulsory  
powers.

by drainage,<sup>1</sup> and to authorize landowners to execute works required for the drainage of their land on land belonging to other persons, on making compensation to such persons for damage thereby occasioned.<sup>2</sup>

§ 4. Under the Settled Estates Act, 1877, the High Court may direct any part of a settled estate to be laid out for drains, and the expenses to be raised by sale, mortgage or charge of the estate.<sup>3</sup>

**DRAMATIC COPYRIGHT.** See *Right of Representation and Performance*.

**DRAW—DRAWEE—DRAWER.**—To draw a bill of exchange is to write (or cause it to be written) and sign it; and hence to draw on a person is to draw a bill of exchange for his acceptance. The person who draws it is called the drawer, and the person to whom it is directed or addressed the drawee. (See *Bill of Exchange*; *Draft*; *Draftsman*.)

**DROIT—DROITURAL.**—"Droit" is Norman French for "right" (Latin, *directum*). In the old books it signifies especially a right to land. Thus, if a tenant in fee simple was disseised of his land, his estate was said to be turned to a right, or a bare or naked right, meaning a right of ownership: the disseisor thereby acquired a mere possession (only good as against strangers), while the disseisee retained, in addition to his right of ownership, the right of possession as against the disseisor, which he could exercise either by entry or possessory action. If, however, the disseisee neglected to pursue his remedy within the time limited by law, or if he failed in a possessory action, the disseisor gained the right of possession as against him, so that the disseisee could only exercise his right of ownership by bringing a writ of right or droitural action. When a person had the actual possession, the right of possession, and the right of ownership, all at the same time, he was said to have *droit droit*, or *jus duplicatum*.<sup>4</sup> These distinctions were abolished when real actions were done away with. (See *Action*, § 22; *Descent cast*; *Right*; *Right of Entry*.)

**DROITS OF ADMIRALTY** are certain perquisites which originally belonged to the Lord High Admiral for the time being by virtue of his office, or, during a vacancy of the office, to the crown. The most important droit seems to have been property captured from an enemy during war, either by the army or navy, or by a subject of the crown acting without commission.<sup>5</sup> (See *Letters of Marque*.) It has, however, long been usual to grant captured property to the captors. (See *Capture*.) Under the present arrangement of the public revenue and civil list, all casual revenues arising from any droits of admiralty or droits of the crown are carried to the Consolidated Fund.<sup>6</sup> (See *Civil List*.)

Civil law.

**DRUNKENNESS.**—I. § 1. In civil law where a person at the time he enters into a contract is by reason of drunkenness incapable of

<sup>1</sup> Stats. 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 13 & 14 Vict. c. 31; 19 & 20 Vict. c. 9.

<sup>2</sup> Stat. 10 & 11 Vict. c. 38.

<sup>3</sup> Sects. 20, 21.

<sup>4</sup> Bl. Comm. ii. 195, iii. 190; Co. Litt.

158 b, 266 a, 345 a. There is some inconsistency between the statements in the old books on the subject.

<sup>5</sup> Steph. Comm. ii. 494.

<sup>6</sup> Stat. 1 & 2 Vict. c. 2, s. 2.

understanding its terms, the contract is voidable at his option, provided his condition was known to the other party at the time,<sup>1</sup>

§ 2. Under the Habitual Drunkards Act, 1879, the justices of the peace for a given district may license a retreat for the reception of habitual drunkards, and any habitual drunkard may, on his own application and on complying with certain formalities, be admitted into the retreat for a time mentioned in the application. He will not be allowed to leave the retreat during that time unless discharged by a justice, or unless he obtains a licence by a justice permitting him to leave the retreat for a time. Provision is made for the inspection of retreats.

Habitual drunkards.

II. § 3. In criminal law the wholesome theory of the old writers was, that as a drunkard is *voluntarius demon*, "he hath no privilege thereby, but what hurt or ill he doth his drunkenness doth aggravate it."<sup>2</sup> The modern principle however is, that if the existence of a specific intention is essential to make an act a crime, the fact that the offender was drunk when he did it should be taken into account by the jury in deciding whether he had that intention.<sup>3</sup>

Criminal law.

§ 4. Drunkenness is forbidden by stat. 4 Jac. 1, c. 5, and 21 Jac. 1, c. 7, s. 3, under the penalty of a fine. Drunkenness accompanied by riotous or indecent behaviour in certain towns is punishable by fine or imprisonment under stat. 10 & 11 Vict. c. 89, and under the Licensing Act, 1872, drunkenness in any highway or public place or building is punishable by fines and (in certain cases) by imprisonment.<sup>4</sup>

Punishment for drunkenness.

**DUCES TECUM.** See *Subpœna*.

**DUCHY OF CORNWALL.** See *Cornwall*.

**DUCHY OF LANCASTER** consists of those lands which formerly belonged to the dukes of Lancaster, and now belong to the crown in right of the duchy. The duchy is distinct from the county palatine of Lancaster, and includes not only the county but also much territory at a distance from it, especially the Savoy in London and some land near Westminster.<sup>5</sup> There are numerous local acts relating to the duchy, as to which see the Index to the Statutes published by the Statute Law Revision Commissioners. (See *County Palatine*.)

**DUCHY COURT OF LANCASTER**, also called the Court of the Duchy Chamber of Lancaster, is a Court held before the Chancellor of the Duchy or his deputy, concerning all matter of equity relating to lands holden of the king in right of the Duchy of Lancaster and also all matters of revenue relating to the duchy. It therefore resembles the old Court of Exchequer. It seems not to be a Court of Record and not to have exclusive jurisdiction.<sup>6</sup> Its jurisdiction appears to be rarely exer-

<sup>1</sup> Chitty on Contracts, 136; Pollock on Contract, 78.

<sup>2</sup> Co. Litt. 247 a.

<sup>3</sup> Steph. Crim. Dig. 17.

<sup>4</sup> Steph. Comm. iv. 281.

<sup>5</sup> Bl. Comm. iii. 78.

<sup>6</sup> *Ibid.* iii. 78, 428.

cised, if not obsolete. (See *Chancellor*, § 3; *County Palatine*; *Palatine Courts*.)

**DUE**, as applied to a sum of money, means either that it is owing or that it is payable: in other words, it may mean that the debt is payable at once or at a future time. Thus where a bill of exchange is payable at a future day, the amount is *debitum in presenti, solvendum in futuro*: when the time for payment has arrived, the amount is payable at once. It is a question of construction which of these two meanings the word "due" bears in a given case. Thus in sects. 6 and 15 of the Bankruptcy Act, 1869, the word "due" means "payable."<sup>1</sup> (See *Bill of Exchange*, § 7.)

ETYMOLOGY.—Old French, *deu*; Latin, *debitum*.

**DUEL.** See *Challenge to Fight*; *Trial*.

**DUM BENE SE GESSERIT.**—During good conduct. Applied to offices from which the holder cannot be removed at the mere will of the crown, as is the case in those held *durante bene placito*. Thus a judge of the High Court can only be removed on the address of both Houses of Parliament.<sup>2</sup>

**DUM FUIT INFRA ÆTATEM—DUM FUIT NON COMPOS MENTIS**—were writs which lay for the recovery of land which had been aliened by a person "while he was within age," or "while he was non compos mentis." The former could be brought by the alienor after he had attained majority, or by his heir; the latter could only be brought by the heir.<sup>3</sup>

**DUPLEX QUERELA** is a remedy which a clerk in holy orders has against the bishop if the latter refuses or delays to admit and institute him to a church to which he is presented. It is a monition addressed by a judge of the Ecclesiastical Court to the bishop, requiring him to admit the party complaining, with a citation requiring the bishop, in case he does not comply with the monition, to appear and show cause why the right of institution has not devolved on the judge. It sometimes also contains an inhibition commanding the bishop to do nothing pending the suit to the prejudice of the party complaining.<sup>4</sup> (See *Citation*.)

**DUPLICATE.**—Agreements, deeds and other documents are frequently executed in duplicate, in order that each party may have an original in his possession. In such cases each party as a rule only executes the part which is to be delivered to the other party. The part executed by the grantor, promisor or person receiving the pecuniary consideration is called the original, and the other the duplicate. A duplicate lease is called a counterpart. (See *Lease*; *Indenture*.)

<sup>1</sup> *Ex parte Sturt*, L. R., 13 Eq. 309; *Ex parte Kemp*, L. R., 9 Ch. 387; *In re Stockton, &c. Co.*, 2 Ch. D. 103.

<sup>2</sup> Bl. Comm. i. 267.

<sup>3</sup> Litt. § 406; Co. Litt. 247 b.

<sup>4</sup> Phillimore, Eccl. Law, 440; *Willis v. Bishop of Oxford*, 2 P. D. 192.

**DUPLICITY.**—A pleading is double, or open to the objection of duplicity, when it, or a portion of it, contains more claims, charges or defences than one. Formerly the general rule was that a pleading ought not to contain more than one claim, charge or defence, but it has gradually been relaxed, and now no longer applies to civil pleadings, except so far as they may be embarrassing or otherwise objectionable. The rule still applies in many cases of criminal charges, as to which see *Count*, § 1.<sup>1</sup>

**DURANTE BENE PLACITO.**—During the pleasure of the crown. (See *Dum bene se gesserit*.)

**DURANTE MINORE ÆTATE.** See *Grant*, § 8.

**DURESS** is where a man is compelled to do an act either by injury, beating or unlawful imprisonment (sometimes called duress in the strict sense), or by the threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned (sometimes called menace, or duress per minas). Duress also includes threatening, beating or imprisonment of the wife, parent or child of a person.<sup>2</sup>

§ 2. An act done under duress has not in general the legal effect which it would otherwise have. Thus if a man is compelled by duress to execute a deed or contract he may afterwards avoid it. (See *Undue Influence*.) So a person is excused from guilt if he is compelled by personal violence, or threats of death, or grievous bodily harm, to do what would otherwise be a crime.<sup>3</sup>

§ 3. Strictly speaking, there is no such thing as duress to the goods or property of a person. If, however, a person pays money to obtain the possession of property wrongfully detained, or if he pays, under protest, an excessive charge for the performance of a duty, he can recover it back.<sup>4</sup> Compulsion.

ETYMOLOGY.]—Old French, *duresce*; Latin, *duritia*, hardship.

**DURHAM.** See *County Palatine*.

**DUTY** is the correlative of right (*q.v.*). In practice, however, "duty" is usually applied to those acts which a person is bound to do by virtue of an office held by him, *e.g.*, as trustee, executor, director, &c., while the obligation created by a contract is called a debt or liability, according to its nature.

§ 2. As to duties of customs and excise, see those titles.

**DYING DECLARATIONS.** See *Declaration*, § 5.

<sup>1</sup> See also *Reg. v. Guthrie*, 1 C. C. R. 241.

<sup>2</sup> Pollock on Contract, 500; Chitty on Contracts, 186; Shepp. Touch. 61; Bl. Comm. i. 130.

<sup>3</sup> Steph. Crim. Dig. 18; not, however, if the crime consists in killing an innocent person; Steph. Comm. iv. 33.

<sup>4</sup> Pollock on Contract, 502.

## E.

**EARMARK.**—§ 1. Property is said to be earmarked when it can be identified or distinguished from other property of the same nature. The term is chiefly used in respect of money, which differs from most other things in being rarely capable of being earmarked. As a general rule “money has no earmark,”<sup>1</sup> and therefore if a sum is paid to a banker and is mixed by him in the ordinary course of business with other money in his custody, that particular sum is incapable of being distinguished from the rest. But if money is received by a person for a special purpose, and is kept separate from his other money or is invested in some property or security which can be identified, then the money is said to be earmarked, and can be “followed,” that is, claimed and recovered, by the person entitled to it. The question is of importance in cases where the receiver of the money has become insolvent, for unless it is earmarked the person entitled to it can only share in the general assets instead of recovering the whole sum. (See *Clayton's Case*.)

**EARNEST.**—Giving an earnest or earnest money is a mode of signifying assent to a contract of sale or the like, by giving to the vendor a nominal sum (*e. g.*, a shilling) as a token that the parties are in earnest or have made up their minds. The expression is chiefly of importance from the provisions of the Statute of Frauds making the giving of “something in earnest to bind the bargain” one mode of dispensing with a written contract for the sale of goods for the price of £10 or upwards.<sup>2</sup> It must be an actual payment.<sup>3</sup>

**EARNINGS.** See *Married Women's Property Acts*.

**EASEMENT.**—§ 1. When A., the owner of a piece of land, has the right of compelling B., the owner of an adjoining piece of land, either to refrain from doing something on his (B.'s) land, or to allow A. to do something on his (B.'s) land, then A. is said to have an easement over B.'s land: A. is called the dominant owner, and his land the dominant tenement; B. is called the servient tenant, and his land the servient tenement.<sup>4</sup> The two tenements may adjoin either horizontally,

Dominant and  
servient  
tenements.

<sup>1</sup> *Whitecomb v. Jacob*, 1 Salk. 161, cited *Ex parte Dale*; *In re West of England Bank*, 11 Ch. D. 772; *Re Hallett's Estate*, 13 Ch. D. 696, and see *Miller v. Race*, Smith's L. C. i. 526.

<sup>2</sup> 29 Car. 2, c. 3, s. 17; Smith's Merc. Law, 499.

<sup>3</sup> Chitty on Contracts, 373.

<sup>4</sup> Gale on Easements, 5; Goddard on Easements; Watson's Comp. Eq. 130. All modern cases and authors on the subject, from the *Termes de la Ley* downwards, state so distinctly that there cannot

be an easement in gross, that is, unattached to a dominant tenement, that the law may be considered as so settled. It is, however, to say the least, open to question whether in English law an easement might not at one time be created in gross. Thus Bracton says: “Si autem sic constituta fuerit servitus: tali et hæredibus suis, vel cui dare vel assignare voluerit, omnes tales per modum constitutionis sive donationis admittuntur ad usum successive” (f. 53 a). The cases and textbooks are equally unanimous in asserting that an easement is a

as in the majority of cases, or vertically, as in the case of the owner of stratum of minerals being entitled to work them in such a manner as to let down the surface of the land.<sup>1</sup>

§ 2. The following are the principal kinds of easements :—

- (1) In respect of water. (See *Water*; *Watercourse*.)
- (2) In respect of air. (See *Air*.)
- (3) In respect of light. (See *Light*.)
- (4) Rights of way. (See *Way*.)
- (5) Rights of support. (See *Support*.)
- (6) In respect of party-walls and fences (*q. v.*)

As to easements of recreation, see note below.

§ 3. Easements must be distinguished—(a) from rights of property or ownership (*q. v.*); (b) from profits à prendre (*q. v.*), which are rights to the produce or profit of land, while easements only relate to the user of land; (c) from natural rights (*q. v.*), such as the natural right to support (*q. v.*); (d) from licences (*q. v.*), which are personal, and confer no interest in the land.

§ 4. As regards the servient owner, an easement is always negative, the obligation on him being either to suffer or not to do something. As regards the dominant owner, easements are divisible into affirmative and negative.

§ 5. An easement is affirmative when it entitles the dominant owner to make active use of the servient tenement, or to do some act which, in the absence of an easement, would be a nuisance or a trespass. The principal affirmative easements are rights of way, the right to lead or discharge water over or on a neighbour's land, the right to use or affect the water of a natural stream in a manner not justified by natural right (see *Water*; *Watercourse*), and the right to carry on an offensive trade.<sup>2</sup>

§ 6. An easement is negative when it merely restrains the servient owner from exercising an ordinary right of ownership over his land; such are the rights of light and air (*q. v.*), and the acquired right of support<sup>3</sup> (*q. v.*).

§ 7. Continuous easements are those of which the enjoyment is or may be continual without the interference of the person entitled—as in the case of an artificial watercourse, or the right to light and air,—as opposed to discontinuous easements, such as rights of way.

§ 8. Apparent easements are those the existence of which appears from the construction or condition of one of the tenements, so as to be capable of being seen or known on inspection: such as a drain or artificial water-course.<sup>4</sup>

privilege which can only belong to an individual, and not to a class by virtue of a custom. (*Mounsey v. Ismay*, 3 H. & C. 497, cited in Gale, 5, n.) In *Gateward's Case* (6 Rep. 60 b), however, it was taken and agreed by the whole Court that “a custom that every inhabitant of such a town shall have a way over such land, either to the church or market, &c., that is good, for it is but an easement.” See also *Goodday v. Michell*, Cro. Eliz. 441; *Constable v. Nicholson*, 14 C. B., N. S.

230. Hence the right of the inhabitants of a place to walk, dance or hold lawful sports on the land of another is sometimes called an easement of recreation. See *Elton on Commons*, 283 *et seq.*

<sup>1</sup> Gale, 23.

<sup>2</sup> *Ibid.* 23; Shelford, R. P. Stat. 7. (See *Legalization*.)

<sup>3</sup> Gale, 24.

<sup>4</sup> *Ibid.* 25, 100; *Pyer v. Carter*, 1 H. & N. 922.

Easement of recreation.

Necessary.

§ 9. Easements of necessity are those which are absolutely necessary for the enjoyment of a piece of land or building.<sup>1</sup>

Disposition of owner of two tenements.

§ 10. The distinction between these classes of easements is of importance with reference to the rule that where the owner of a piece of land divides it, and conveys one part to a person without any stipulations on the subject, then the grantee becomes entitled by what is sometimes called "the disposition of the owner of two tenements"<sup>2</sup>—(1) to all continuous and apparent easements, that is, to such easements as will enable him to enjoy the property in the same way as it is evident, from its condition, that the owner enjoyed it, and (2) to all easements of necessity. Thus, where the owner of land on which were some cattle sheds, made an artificial watercourse through another part of the land to supply them with water, and afterwards conveyed the cattle sheds to another person, it was held that the grantee was entitled to the apparent and continuous easement of receiving water from the watercourse on the grantor's land.<sup>3</sup> So, if I have a field enclosed by my own land on all sides and I alien this field to another, he shall have a way to it over my land as an easement of necessity, for without it he could not have any benefit of the field.<sup>4</sup>

Secondary easements.

§ 11. In some cases an easement is accompanied by certain rights which are necessary for its enjoyment, in which case it is called the principal easement, and the accompanying rights are called secondary easements; thus a right of watercourse includes the secondary easement of going on the servient tenement to clean and repair the channel.<sup>5</sup>

Creation and extinguishment of easements.

§ 12. Easements may be created—(i) by express grant, as where A. grants B. a right of way over A.'s land; (ii) by implied grant, either on the principle of the disposition of the owner of two tenements (*supra*, § 10), or on the principle that a man cannot derogate from his own grant (see *Derogate*, § 1), and (iii) by prescription (*q. v.*) They may be extinguished—(i) by express release; (ii) by implied release, namely, (a) by merger or unity of possession, which occurs when the two tenements become united in the ownership of one person; (b) by necessity, as where the owner of the dominant tenement does, or authorizes the owner of the servient tenement to do, an act which necessarily prevents the future enjoyment of the easement; (c) by alteration of the dominant tenement, so as to make the easement inapplicable (see *Encroachment; Light*); (d) by non-user, evidencing an intention of abandoning the easement.<sup>6</sup>

Suspension of easement.

§ 13. In the case of a temporary or imperfect unity of possession, as where the owner of the dominant tenement acquires a lease of the

<sup>1</sup> Gale, 96.

<sup>2</sup> This phrase seems to have been invented by Mr. Gale (p. 97); it has been judicially adopted; see *Leech v. Schweder*, L. R., 9 Ch. at p. 472.

<sup>3</sup> *Watts v. Nelson*, L. R., 6 Ch. 166, approving *Pyer v. Carter*, 1 H. & N. 922. See also *Leech v. Schweder*, L. R., 9 Ch. 463. But there is, in general, no corre-

sponding implication in favour of the grantor except so far as easements of necessity are concerned; *Wheeldon v. Burrows*, 12 Ch. D. 31.

<sup>4</sup> Rolle, Abr. ii. *Graunt* Z. pl. 17, 18, cited Gale, 133.

<sup>5</sup> Bracton, 232 a, cited by Gale, 549; see *Pomfret v. Ricroft*, 1 Saund. 321.

<sup>6</sup> Gale, 578 *et seq.*



servient tenement, the easement is only suspended and not extinguished, and revives when the unity of possession ceases.<sup>1</sup>

§ 14. As to the protection of easements, see *Disturbance*, § 1.

ETYMOLOGY.]—Norman French: *aisement*,<sup>2</sup> from *aise*, convenience, accommodation; <sup>3</sup> Law Latin, *aisiamentum*.

**ECCLESIASTICAL COMMISSIONERS** are commissioners established by statute, principally for the purpose of preparing schemes for the improvement of our ecclesiastical system, especially as to the equalization of the revenues and duties of the various dioceses, and to provide for the cure of souls in parishes where assistance was required. Several of such schemes have been given effect to by orders in council. By later acts a fund has been vested in the commissioners to enable them to make provision for the cure of souls in populous districts, and provision is accordingly made for the creation of ecclesiastical districts and parishes, and the appointment of ministers therein.<sup>4</sup> (See *Parish*.)

**ECCLESIASTICAL COURTS** are Courts which have jurisdiction only in ecclesiastical matters. They are—(1) the two provincial Courts of Canterbury and York, and (2) the diocesan Courts of each diocese (see the titles). There are also various other Courts which are either obsolete or are not strictly judicial tribunals; such are the Courts of Audience, the Court of the Vicar-General, of the Master of the Faculties (see *Faculty*), &c.

The Privy Council is the supreme Court of Appeal in ecclesiastical matters.<sup>5</sup>

**ECCLESIASTICAL LAW** is that part of the law which relates to the ministrations and governments, rights and obligations, of the Church established in the State, that is, of the Church of England.<sup>6</sup> It is derived from constitutions of synods and councils of the Church, from canons of convocation, from usage, and from acts of parliament.<sup>7</sup>

Public ecclesiastical law determines the authority of the Church and those who govern it, and is both internal and external, the former being concerned with the constitution of the Church relatively to the members of it, and the latter with the relations of the Church to the State and religious bodies not directly connected with herself.<sup>8</sup> (See *Advowson*; *Appropriation*; *Bishop*; *Churchwarden*; *Diocese*; *Rector*; *Tithes*; *Title*; *Vicar*; *Visitation*.)

**EDUCATION ACTS.**—The principal acts on the subject of education are the Elementary Education Acts, 1870 and 1873, directed towards

<sup>1</sup> Gale, 581.

<sup>2</sup> Loysel, Inst. Cout. § 291.

<sup>3</sup> See *Godley v. Frith*, Yelv. 159.

<sup>4</sup> Phillimore, Eccl. Law, 2090; Stephen's Comm. ii. 748; stats. 6 & 7 Will. 4, c. 77; 13 & 14 Vict. c. 94; 29 & 30 Vict. c. 111, &c., &c.

<sup>5</sup> Phill. Eccl. Law, 1201; Steph. Comm. iii. 301; *Martin v. Mackonochie*, 4 Q. B. D. at pp. 760, 783.

<sup>6</sup> Phillimore, 12; Steph. Comm. ii. 659.

<sup>7</sup> Phillimore, 19.

<sup>8</sup> *Ibid.* 12.

the provision of public elementary schools in districts where there is insufficient accommodation for the purpose, and making attendance at school obligatory. These enactments are carried out (under the superintendence of the Education Department of the Privy Council) by school boards elected by the ratepayers of each district, and having the power of levying an education rate.<sup>1</sup> See also the Public Schools Act, 1868, and the Endowed Schools Acts, 1869 and 1873, which deal with higher education,<sup>2</sup> and the Reformatory Schools Act, 1866, and the Industrial Schools Act, 1866, for the reformation and useful training of juvenile offenders.<sup>3</sup>

**EGALITY** = "owelty" (*q. v.*).<sup>4</sup>

**EGRESS AND REGRESS.** See *Free Entry, Egress and Regress*.

**EI INCUMBIT PROBATIO QUI DICIT NON QUI NEGAT.**

—In the law of evidence the burden of proof lies on the party who asserts, not on the party who denies, for the reason that it is generally difficult, and sometimes impossible, to prove a negative. Thus if in an action on a promissory note the defendant denied that he made the note, the burden of proof would lie on the plaintiff. But if the defendant pleaded that he had paid the note, then the affirmative would be on him.<sup>5</sup>

**EIGNÉ.** See *Mulier*.

**EIRE.** See *Eyre*.

**EJECTMENT** is a judicial proceeding for recovering land from a person wrongfully in possession of it. Formerly, an action brought for this purpose in any of the Superior Courts of Common Law was called an action of ejectment (*infra*, § 3), but now it is called an action for the recovery of land, as to which see *Recovery*.

Ejectment in  
County Court.

§ 2. Where the yearly value or rent of the land to be recovered does not exceed 20*l.*, an action of ejectment may be brought in the County Court of the district,<sup>6</sup> unless it is a case in which an action lies under the County Courts Act, 1856.<sup>7</sup> (See *Recovery*.)

§ 3. Before the Common Law Procedure Act, 1852, the action of ejectment was a complicated proceeding, resting on several fictions. It was originally devised to escape from the still greater intricacies of real actions, which were the proper mode of trying questions of title to the *freehold* of land, while ejectment was available only for persons entitled to the possession of land under a lease or other chattel interest. To adapt the remedy to questions of freehold title two fictions were introduced—one, an imaginary lease by the real plaintiff (the freeholder) to an imaginary "John Doe" (the nominal plaintiff); and the other, an imaginary ouster of John Doe by "Richard Roe," the

<sup>1</sup> Steph. Comm. iii. 93 *et seq.*

<sup>2</sup> *Ibid.* 97 *et seq.*

<sup>3</sup> *Ibid.* 108 *et seq.*

<sup>4</sup> Co. Litt. 169 a.

<sup>5</sup> Smith's Action, 156; Best, Ev. 371.

<sup>6</sup> County Courts Act, 1867, s. 11 *et seq.*; Woodfall's L. & T. 777.

<sup>7</sup> County Courts Rules, 1877, xxxvii. 2, 25.

nominal defendant, commonly known as the "casual ejector." The person really in possession of the land was then allowed to defend the action on condition that he admitted the truth of these fictions and relied only on his title as a defence.<sup>1</sup>

§ 4. The C. L. P. Act, 1852, abolished these fictions, and made the action of ejectment similar to other actions, except that it had no pleadings.<sup>2</sup> (See *Habere facias Possessionem*; *Writ of Restitution*.)

See also *Landlord and Tenant*; *Deserted Premises*; *Writ of Possession*.

**ELECTION** is (i) the right, and (ii) the act, of choosing: the term is applied both to rights and liabilities. "If I give unto you one of my horses in my stable, there you shall have the election; for you shall be the first agent by taking or seizure of one of them."<sup>3</sup>

§ 2. The equitable doctrine of election is founded on the principle that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions and renouncing every right inconsistent with them.<sup>4</sup> Thus, suppose A. by will or deed gives to B. property belonging to C., and by the same instrument gives other property belonging to himself to C., a Court of Equity will hold C. to be entitled to the gift made to him by A., only upon the implied condition of renouncing his own property in favour of B. He is therefore put to his election whether he will take under the instrument, that is, take the property given him by A., and give up his own property to B., or against the instrument, that is, retain his own property, and either forfeit the property given him by A., or take it and make compensation to B. for the value of his (C.'s) own property which he has retained.<sup>5</sup>

Equitable doctrine of election.

§ 3. Election is also the operation of choosing a representative, officer, &c., such as a member of parliament,<sup>6</sup> director, or the like. So a bishop is elected by the chapter of the cathedral by virtue of a *congé d'élire*.<sup>7</sup> As to election of guardian by an infant, see *Guardian*.

**ELECTION PETITIONS** are petitions for inquiry into the validity of elections of members of parliament, when it is alleged that the return of a member is invalid for bribery or any other reason. These petitions are heard by a judge of one of the Common Law Divisions of the High Court.<sup>8</sup>

**ELEEMOSYNARY.** See *Charity*, § 2; *Corporation*, § 5.

**ELEGIT** is a writ of execution by which a judgment creditor may obtain possession of his debtor's chattels in satisfaction of the debt

<sup>1</sup> Adams on Ejectment, 1—16; First Rep. C. L. P. Comm. 54 *et seq.*

<sup>2</sup> Smith's Action (11th ed.), 405 *et seq.*

<sup>3</sup> Co. Litt. 145 a.

<sup>4</sup> White & Tudor's L. C. i. 311, notes to *Noy's v. Mordaunt*, 2 Vern. 581, and *Streetfield v. Streetfield*, Cas. t. Talbot, 176.

<sup>5</sup> White & Tudor, i. 312; Haynes' Equity, 293; Snell's Equity, 169; Watson's Comp. 156; *Pickersgill v. Rodger*,

5 Ch. D. p. 173.

<sup>6</sup> As to parliamentary elections, see Steph. Comm. ii. 370 *et seq.*; the Reform Act (2 Will. 4, c. 45); Representation of the People Act, 1867; the Ballot Act, 1872; Parliamentary Elections and Corrupt Practices Act, 1879; also titles *Bribery*, *Personation*, *Registration*.

<sup>7</sup> Bl. Comm. i. 377.

<sup>8</sup> Parliamentary Elections Act, 1868; Judicature Act, 1873, s. 38.

wholly or pro tanto; if they are not sufficient, he may also obtain possession of the debtor's land, and hold it until the debt is satisfied, either out of the rents and profits, or otherwise. By stat. West. 2 (13 Edw. 1), c. 18, where a debt is recovered or acknowledged in the King's Court or damages awarded, it shall be in the election of the plaintiff, either to have a fieri facias to the sheriff to levy the debt (see *Fieri facias*), or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of the plough), and the one half of his land, until the debt be levied upon a reasonable price or extent. From the election given to the plaintiff by this statute, and from the entry of the award of this execution on the roll, "*quod elegit sibi executionem*," the writ of elegit derives its name.<sup>1</sup> A creditor who has sued out the writ is called an elegit creditor. § 2. By stat. 1 & 2 Vict. c. 110, the remedy by writ of elegit was extended to the whole of the debtor's land, including copyholds and lands over which he has an absolute power of disposition (*e.g.*, by appointment). The Statute of Frauds had made it applicable to trust estates.

§ 3. In executing this writ, the sheriff first seizes the chattels and land, and then impanels a jury to inquire as to their respective values. If the chattels are sufficient to satisfy the debt, he delivers them to the execution creditor; if they are not sufficient, he also delivers legal (not actual) possession of the lands to the creditor; if the latter cannot otherwise obtain actual possession, he must bring an action of ejectment.<sup>2</sup> The writ must be registered in the Registry of Judgments.<sup>3</sup> (See *Registry*.) While the creditor holds the lands he is called tenant by elegit, and has a chattel interest in them<sup>4</sup> (see *Chattels*); he may obtain an order for the sale of the debtor's interest in them, by presenting a petition to the High Court in the Chancery Division.<sup>5</sup> (See *Inquisition*; *Possession*; *Extent*; *Scire facias*.)

§ 4. The writ of elegit is a clumsy and inconvenient remedy, and was formerly never used, except where the execution creditor desired to seize the debtor's land. Of late years the writ has come into use for seizing chattels, because suffering the execution of a writ of elegit is not an act of bankruptcy on the part of the debtor, as is the case with a writ of fi. fa., where the chattels are sold for 50*l.* or upwards.<sup>6</sup> (See *Act of Bankruptcy*.)

**ELISORS** or **ESLIORS** (from the French *élire*, to choose) are persons appointed to return a jury for the trial of an action when the jury returned by the sheriff and that returned by the coroner have been successively challenged to the array for partiality or default. (See *Challenge*.) No challenge to the array can be made against a jury returned by elisors. The proceeding, however, is practically obsolete.<sup>7</sup>

<sup>1</sup> Chitty, Pr. 683; Co. Litt. 289 b.

<sup>2</sup> Smith's Action, 199.

<sup>3</sup> Stat. 27 & 28 Vict. c. 112.

<sup>4</sup> Co. Litt. 42 a.

<sup>5</sup> Stat. 27 & 28 Vict. c. 112.

<sup>6</sup> *Ex parte Abbott*, 15 Ch. D. 447.

<sup>7</sup> Co. Litt. 158 a; Bl. Comm. iii. 354.

**ELOIGN** is to remove. See *Elongata* ; *Elongavit*.

**ELONGATA.**—Where goods taken in distress and replevied are directed to be returned to the distrainor by a writ of delivery or de retorno habendo, and the sheriff finds that they have been eloigned, that is, removed to places unknown, he makes a return to that effect, called a return of elongata. It is rare in practice.<sup>1</sup> (See *Replevin* ; *Capias in Withernam* ; *De Retorno habendo*.)

**ELONGAVIT.**—Where in a proceeding by foreign attachment the plaintiff has obtained judgment of appraisalment, but by reason of some act of the garnishee the goods cannot be appraised (as where he has removed them from the city, or has sold them, &c.), the serjeant-at-mace returns that the garnishee has eloigned them, *i. e.*, removed them out of the jurisdiction, and on this return (called an elongavit) judgment is given for the plaintiff that an inquiry be made of the goods eloigned : this inquiry is set down for trial and the assessment is made by a jury after the manner of ordinary issues.<sup>2</sup> The proceedings on the inquiry are also sometimes called the elongavit. (See *Foreign Attachment* ; *Judgment*.)

**EMBARGO** is the temporary or permanent sequestration of the property of individuals for the purposes of a government, *e. g.*, to obtain vessels for the transport of troops, the owners being reimbursed for this forced service.<sup>3</sup> § 2. In international law, where one State has received or anticipates injury from another State, it may lay an embargo on property within its territory belonging to subjects of the offending State as a means of securing redress. Such an embargo may be civil or hostile, according as it results in peace or war.<sup>4</sup> The term civil embargo is also sometimes used to describe the kind of embargo mentioned in § 1. (Spanish *embargar*, to hinder or detain.) (See *Reprisals*.)

**EMBARRASSING.** See *Amendment*, § 3.

**EMBEZZLE—EMBEZZLEMENT.**—When a clerk or servant commits theft by converting to his own use any chattel, money or valuable security received or taken into possession by him for or in the name or on account of his master or employer, his offence is called embezzlement.<sup>5</sup> If a clerk or servant commits theft by converting to his own use a chattel of which he has merely the custody (not the possession) as clerk or servant of the owner, his offence is larceny and not embezzlement.<sup>6</sup> As to the distinction between custody and possession, see *Custody*.

The punishment for embezzlement is the same as that for larceny (*q. v.*).

<sup>1</sup> Woodfall, L. & T. 481.

<sup>2</sup> Brandon, For. Attach. 124.

<sup>3</sup> Manning, Law of Nations, 143.

<sup>4</sup> *Ibid.* and 144, note.

<sup>5</sup> Stat. 24 & 25 Vict. c. 96 (applying also to servants of the crown) ; Stephen's

Crim. Dig. 220. See *Reg. v. Rogers*, 3 Q. B. D. 28.

<sup>6</sup> Stephen, 209, 224. As to the summary jurisdiction of justices in cases of embezzlement, see Stone's Justice of the Peace, 360.

**EMBLEMENTS.**—In certain cases where a tenant of land has sown corn, or set roots, or sown “hempe or flax, or any other annual profit,” and his estate is determined before the crop is ready to be gathered, he or his executors shall nevertheless have it, with the right of free entry, egress and regress on the land to take it and carry it away when it is ready. This is called the right to emblements. Thus if a tenant at will sows corn, and the lessor ousts him before it is ripe, he is entitled to go upon the land when it is ripe, and cut and carry it away, “because he knew not at what time the lessor would enter upon him.”<sup>1</sup> For a similar reason if a tenant for life sows corn and dies, his executors shall have the crop; or if he leases the land to an undertenant, who sows a crop, and then the tenant for life dies, the crop belongs to the undertenant.<sup>2</sup> But by a modern statute<sup>3</sup> it is provided that where a landlord entitled for his life, or any other uncertain interest has let land at a rackrent, and his estate determines by his death or otherwise, then the tenant instead of being entitled to emblements, shall continue to hold the land until the expiration of the current year of his tenancy.<sup>4</sup>

§ 2. From the nature of the right to emblements it is obvious that it does not exist in the case of labour which yields no immediate annual profit (as where a lessee at will plants young fruit-trees, &c.), nor in the case of the tenancy being determined by the tenant’s own act: thus where a woman holding land *durante viduitate* sows the ground and marries, the landlord shall have the emblements.<sup>5</sup>

**ETYMOLOGY.**—Norman French: *Emblavence de bled*, corn sprung up above ground.<sup>6</sup>

**EMBRACERY** is the misdemeanor committed by a person who by any means whatever, except the production of evidence and argument in open Court, attempts to corrupt, influence or instruct any jurymen.<sup>7</sup> It is a species of maintenance (*q. v.*).

**ENABLING.** See *Statute*.

**ENCLOSURE.** See *Inclosure*.

Land.

**ENCROACHMENT** is where a person attempts to extend a right possessed by him, as where a tenant of land takes in or adds to it other land adjoining or near to it, so as to make the added land appear to be part of his original holding. The general rule is that if the wrongful act is acquiesced in, the encroachment (that is, the land added) is considered as annexed to the original holding, and as having the same incidents as if it had originally formed part of it.<sup>8</sup> Therefore, if a lessee of land makes

<sup>1</sup> Litt. § 68; Co. Litt. 55 a; Woodfall’s L. & T. 703.

<sup>2</sup> Co. Litt. 55 b.

<sup>3</sup> 14 & 15 Vict. c. 25.

<sup>4</sup> Williams, R. P. 28.

<sup>5</sup> Co. Litt. 55 b.

<sup>6</sup> Woodfall, 703.

<sup>7</sup> Stephen’s Crim. Dig. 77; Russell on

Crimes, i. 360.

<sup>8</sup> See Woodfall’s L. & T. 696; *Kingsmill v. Millard*, 11 Ex. 313; *Earl of Lisburne v. Davies*, L. R., 1 C. P. 259; *Whitmore v. Humphries*, L. R., 7 C. P. 1; *A. G. v. Tomline*, 5 Ch. D. 750. As to whether the doctrine applies to copyhold land, see *A. G. v. Tomline*, 15 Ch. D. 150.

an encroachment on an adjoining waste, at the expiration of the tenancy the encroachment will as a general rule belong to the landlord and not to the tenant. (See *Approvement*.)

§ 2. In the law of easements, where the owner of an easement alters the dominant tenement, so as to impose an additional restriction or burden on the servient tenement, he is said to commit an encroachment. The principle seems to be that if the excess can be ascertained and separated, such excess alone is bad, and the original right remains, but that if the original right and the encroachment are so blended together that they cannot be separated, then the original right is lost or suspended so long as the dominant tenement remains in its altered form.<sup>1</sup>

**ENCUMBER—ENCUMBRANCE.**—To encumber land is to make it subject to a charge or liability, *e. g.*, by mortgaging it. Encumbrances include not only mortgages and other voluntary charges, but also liens, lites pendentes, registered judgments and writs of execution, &c. (See *Covenant*, § 8.)

**ENDOW—ENDOWMENT.** See *Charity*, § 3.

**ENFEOFF** is the technical and proper operative word of a feoffment<sup>2</sup> (*q. v.*; and see *Operative Words*).

**ENFRANCHISE—ENFRANCHISEMENT.**—§ 1. To enfranchise is to make free or to confer a liberty. Thus in the old books a man is said to be enfranchised when he is made a free man of a city, or burgess of a borough, or where an alien is made a denizen, or a villein is manumitted.<sup>3</sup> At the present day to enfranchise often means to confer on a man the franchise, or the liberty of voting at parliamentary elections.

§ 2. To enfranchise copyhold land is to free it from the customs of that tenure and to render it subject to the same law as freehold land.<sup>4</sup> The operation may take place either at common law or under a statute.

§ 3. Enfranchisement at common law is effected by the conveyance of the freehold to the copyholder, or by a release of all customs and services by the owner of the freehold.<sup>5</sup>

§ 4. Statutory enfranchisement takes place under the Copyhold Acts, and is either voluntary or compulsory. The provisions as to voluntary enfranchisement make it possible for persons to enfranchise who could not do so at common law; *e. g.*, persons having limited interests. Compulsory enfranchisement is effected by an award of the Copyhold Commissioners, made on the application of either lord or tenant; the amount of compensation payable to the lord in commutation of his rights to fines, heriots, &c. is settled by valuation. When the enfranchisement takes place on the application of the tenant, the compensation consists of a gross sum of money payable by the copyholder, or in some cases it may

Easement.

Copyholds.

At common law.

Statutory: voluntary, compulsory.

<sup>1</sup> Gale on Easements, 615.

<sup>2</sup> Davids. Conv. i. 72.

<sup>3</sup> Co. Litt. 137 b.

<sup>4</sup> See Copyhold Act, 1852, s. 34.

<sup>5</sup> Elton, Copyh. 288.

remain a first charge on the land for a period not exceeding ten years; when it takes place on the application of the lord, the compensation consists of an annual rent-charge.<sup>1</sup> On a statutory enfranchisement, the rights of the lord or tenant to any minerals under the land are not affected.<sup>2</sup>

**ENGAGEMENT**, in its most general sense, is any undertaking or promise, but in practice the term has been appropriated to denote a contract entered into by a married woman with the intention of binding or charging her separate estate, or, with stricter accuracy, a promise which in the case of a person *sui juris* would be a contract, but in the case of a married woman is not a contract, because she cannot bind herself personally, even in equity; her engagements therefore merely operate as dispositions or appointments *pro tanto* of her separate estate.

General  
engagements.

§ 2. The promises or debts of a married woman which are not expressly charged by her on her separate estate are sometimes called her general engagements, and do not bind her separate estate unless made with reference to and upon the faith and credit of that estate.<sup>3</sup> (See *Separate Estate; Limitation; Administration, supra*, p. 28, note (1).)

**ENGLISH BILL.** See *Bill of Complaint*, § 7.

**ENGRAVINGS.** See *Copyright*, § 3.

**ENGROSS—ENGROSSMENT.**—I. § 1. Formerly to engross a document was to write it in a peculiar hand (chiefly remarkable for its illegibility), derived from the court-hand in which records were anciently written. This engrossing hand was also used until recently in transcribing wills at the Probate Office, but has now given way to the ordinary round hand.

§ 2. At the present day, engrossing means copying a deed, agreement or the like with all words, dates and amounts written at length, and with the formal testatum and attestation clauses, so as to be ready for execution.

Criminal law.

II. § 3. In criminal law, engrossing was the offence of buying up large quantities of corn, &c. with intent to sell them again; it was abolished by stat. 7 & 8 Vict. c. 24.<sup>4</sup> (See *Regrating; Forestalling*.)

**ENITIA PARS** or **AEISNETIA**, which is derived of the French word *aîné*, for eldest (modern French *ainé*), and means the part of the eldest,<sup>5</sup> is used in the old books to denote the part or share taken by the eldest sister when several coparceners make partition of their land by agreement.<sup>6</sup>

<sup>1</sup> Act of 1852, s. 7.

<sup>2</sup> *Ibid.* s. 48.

<sup>3</sup> *Johnson v. Gallagher*, 3 D. F. & J. 513; *Shattock v. S.*, L. R., 2 Eq. 182; *London Chartered Bank v. Lemprière*, L. R., 4 P. C. at p. 593; *Flower v. Buller*,

15 Ch. D. 665; Pollock on Contract, 66 White & Tudor's L. C. i. 435.

<sup>4</sup> Steph. Comm. iv. 266, n. (p).

<sup>5</sup> Co. Litt. 166 b.

<sup>6</sup> Litt. § 245.



**ENJOYMENT** is the exercise of a right. It is to a right what possession is to a corporeal thing, and is therefore divisible, like possession, into simple, rightful, permissive, adverse, &c. Adverse enjoyment is more commonly known as "enjoyment as of right," and occurs where a person exercises a right which does not belong to him in the same manner as if he were entitled to it, and without the permission of the true owner. Enjoyment which is open, peaceable, continuous, and of right, resembles adverse possession in being a mode of acquiring by lapse of time the right so enjoyed.<sup>1</sup> (See *Prescription*.)

**ENLARGEMENT.**—When a tenant in tail has created a base fee in lands and it afterwards becomes united with the remainder or reversion in fee in the same lands in the same person, and there is no intermediate estate between them, then the base fee does not merge in the fee, but is ipso facto enlarged into as large an estate as a tenant in tail with the consent of the protector, if any, might have created by a disentailing assurance if the remainder or reversion had been vested in any other person.<sup>2</sup> Thus if land is settled upon A. for life, with remainder in tail to B., with remainder in fee to C., and B. executes a disentailing deed without the consent of A., the protector, B. acquires a base fee; if he subsequently purchases the reversion from C., his base fee is enlarged into a fee simple, because if he had executed a disentailing assurance with the consent of A., the protector, he would have created a fee simple. The object of the rule of law which produces an enlargement instead of (as in ordinary cases) a merger, is to prevent any mesne incumbrances from being let in or accelerated: thus, if in the above example C. had mortgaged his reversion before conveying it to B., the enlargement would destroy the incumbrance thus created, while a merger would have made it a charge on B.'s new fee simple. (See *Merger*.)

**ENQUIRY.** See *Inquiry*; *Writ of Inquiry*.

**ENROL—ENROLMENT.**—§ 1. To enrol is to enter (that is, copy) a document on an official record. Originally such records were kept in the shape of continuous rolls of parliament, but now most, if not all of them, are kept in books of the ordinary shape. (See *Roll*.) The principal documents which require enrolment at the present day are recognizances and disentailing assurances (*q. v.*). (See also *Bargain and Sale*, § 3.)

§ 2. The Enrolment Office was a department of the Court of Chancery and of the Chancery Division of the High Court, in which, as its name implies, the enrolment of documents was effected.<sup>3</sup> By the Judicature (Officers) Act, 1879, the Enrolment Office was amalgamated with the Central Office (*q. v.*). The office of Clerk of Enrolments is to be abolished on the next vacancy.<sup>4</sup>

Enrolment  
Office.

<sup>1</sup> Gale on Easements, 207.

<sup>2</sup> Fines and Recoveries Act, s. 39.

<sup>3</sup> Daniell, Ch. Pr. index, Enrolment;

Second Rep., Legal Dep. Comm. 43.

<sup>4</sup> Sects. 4 *et seq.*; Rules of Court, December, 1879; April, 1880.

Chancery  
decrees.

§ 3. Formerly in the practice of the Court of Chancery, its decrees were not unfrequently enrolled in order to prevent appeals or rehearings being brought from a judge of first instance to the Court of Appeal in Chancery. The effect was that an appeal could only be brought to the House of Lords, or by a bill of review. This rule has been abrogated by the new practice.<sup>1</sup> (See *Docket*.)

**ENTAIL.**—An entail exists when land, or money directed to be invested in the purchase of land,<sup>2</sup> is limited to a person and the heirs of his body, with or without prior estates. The land or the money, as the case may be, is then said to be entailed. (See *Estate Tail*; *Quasi Entail*.)

**ENTER** is used not only in the technical sense of going upon land (see *Entry*), but also in the sense of making in a book or record a note of a transaction or a transcript of a document. § 2. Thus, a defendant to an action, if he wishes to contest it, enters an appearance (*q. v.*). Every order or judgment pronounced by the Chancery Division is entered or copied into the registrar's book,<sup>3</sup> and until this is done the order or judgment is not complete and cannot be enforced. In the Queen's Bench Division, the operation of entering a judgment is usually called "signing judgment." (See *Pass*; *Minutes*.)

**ENTIRE.**—§ 1. A contract, claim, or the like, is said to be entire when each part is so connected with the rest that it cannot be separated into several distinct contracts or claims, as opposed to a severable or apportionable contract, &c. Thus, where a sailor was to be paid a certain sum for serving on a voyage and he died before the voyage was completed, it was held that his executor had no claim to any part of his wages; because the contract was to perform the complete voyage.<sup>4</sup> (See *Apportionment*, § 3; *Sever*.)

§ 2. As to entire hereditaments, see *Hereditament*, § 7.

**ENTIRETIES.**—If lands are given to A. and B., husband and wife, and their heirs, they are not joint tenants, because they are in law considered as one person, but they take by entireties; that is, neither can dispose of any part of the land without the concurrence of the other, and if they do not agree in making a disposition, the survivor takes the whole. During the coverture the husband is entitled to the rents and profits.<sup>5</sup> (See *Estate*, § 11.)

**ENTITLE.**—I. § 1. In its usual sense, to entitle is to give a right; therefore a person is said to be entitled to property when he has a right to it.<sup>6</sup> (See *Right*; *Title*.)

<sup>1</sup> Daniell, Ch. Pr. 879; *Hastie v. Hastie*,  
<sup>2</sup> Ch. D. 304.

<sup>3</sup> Fines and Recoveries Act, s. 71.

<sup>4</sup> Hunter's Suit, 87.

<sup>5</sup> Chitty on Contracts, 666, 667; Smith,  
L. C. ii. 1. As to entire chattels real, see

Co. Litt. 200 a.

<sup>6</sup> Williams, R. P. 228; Jickling's  
Analogy, 252.

<sup>6</sup> *Churchill v. Denny*, L. R., 20 Eq.  
534.

II. § 2. In ecclesiastical law, to entitle is to give a title for ordination as a minister.<sup>1</sup> (See *Title*.)

**ENTRY.**—§ 1. Entry is the act of going on land, or doing something equivalent, with the intention of asserting a right in the land. It may be made either in person or by a representative, such as a guardian, lessee, &c.

§ 2. Entry is actual when the person making it goes on the land itself; Actual, while an entry in law is a constructive or fictitious entry. Thus, where in law. "a man maketh a charter of feoffment, and delivers seisin within the view, [and] the feoffee dares not enter for feare of death, but claims the same, this shall vest the freehold and inheritance in him."<sup>2</sup> (See *Livery*; and *Free Entry*, *Egress and Regress*. As to forcible entry, see *Forcible Entry*.)

§ 3. The doctrine of entry is now of much less importance than formerly, owing to the abolition of most of the rules relating to seisin (*q. v.*); but entry is still a means of regaining possession of land from a person wrongfully in possession, being equivalent to recaption (*q. v.*) in the case of goods. It must be peaceable, and must be made within the period allowed by the statutes of limitation.<sup>3</sup> (See *Right of Entry*.)

§ 4. In the old books, "entry" often signifies a "right of entry" (*q. v.*).<sup>4</sup>

**ENURE** is to operate or take effect. Thus, where it is said that if an attornment be made by a tenant of land to one only of several grantees of the reversion, it shall enure to the rest,<sup>5</sup> it is meant that the attornment takes effect as if it had been made to all. (See *Attornment*.)

**EQUALITY** of Exchange or Partition. See *Owelly*.

**EQUITABLE** denotes—I., that which is fair (see *Equity*, § 1); II., that which arises from a liberal construction or application of a legal rule or remedy (see *Equity*, §§ 2 *et seq.*); III., that which is in accordance with, or regulated, recognized, or enforced by, the rules of equity, as opposed to those of the common law. Thus, an equitable right, estate, or interest, is one which was originally recognized and enforced only in Courts of Equity—*e. g.*, that of a cestui que trust, or of a mortgagor, after the day fixed for redemption had passed. So an equitable tenant for life is a person who is entitled for his life to the rents or income of property which is vested in trustees for his benefit.

Equitable fraud and equitable waste are wrongs which were originally recognized and restrained only in Courts of Equity. (See *Assets*; *Assignment*; *Estate*; *Fraud*; *Mortgage*; *Waste*.)

<sup>1</sup> Gibson's Codex, 141, n.

<sup>2</sup> Co. Litt. 48 b, 253 b. Coke also treats of several, general, and special entry; Co. Litt. 15 a.

<sup>3</sup> Steph. Comm. iii. 243.

<sup>4</sup> Co. Litt. 237 b.

<sup>5</sup> Shep. Touch. 265.

**EQUITY.**—I. § 1. In its primary sense equity is fairness, or that rule of conduct which in the opinion of a person or class ought to be followed by all other persons.

Equity in this sense is frequently opposed to law and legality, because that which is fair does not always constitute a legal claim or defence.<sup>1</sup> Hence—

II. § 2. When a legal rule or remedy is capable of two interpretations or applications, one literal or restrictive, and the other liberal (that is, calculated to make the rule or remedy operate fairly, and to extend its benefit to as many cases as possible), the latter is called the equitable construction or application.<sup>2</sup> It is in this sense that the right of stoppage in transitu (*q. v.*), the writ of auditâ querelâ (*q. v.*), and the old action of ejectment are said to be equitable remedies;<sup>3</sup> and the jurisdiction of the Common Law Courts, to set aside judgments obtained by default and confession, was called an equitable one.<sup>4</sup>

Equity of a statute.

§ 3. When a statute contains a provision which literally applies only to a particular class of cases, but it is clear from the nature of the provision that if another class of cases had been present to the mind of its framer it would have been extended to them, they are said to be within the equity of the statute: “and the reason hereof is, for that the lawmakers could not possibly set downe all cases in expresse terms.”<sup>5</sup> Thus an old statute literally applying only to executors was held to extend by equity to administrators, “because they are of the like kind.”<sup>7</sup>

“Equity” and “law.”

III. § 4. But the most important sense of the word equity is that in which it denotes a part of the general law of England, as opposed to what is called the common law (*q. v.*). The distinction is purely historical, and arose from the fact that in former times the common law Courts provided no remedy in many cases where one was required. Hence the custom grew up of applying for redress in such cases either to the king in parliament or to the king in council, who referred the matters to the chancellor. In later times petitions were presented to the chancellor direct. The chancellor, being an ecclesiastic, and keeper of the king’s conscience, did not feel bound to follow the rules of the common law, but gave such relief as he thought the petitioner or plaintiff entitled to “in equity and good conscience.”<sup>8</sup> (See *Chancellor*, § 2.) § 5. For a long time “equity” was an indefinite standard of right and wrong, and was regarded as having the function of mitigating the rigour and supplying the defects of the common law without any limitation except the personal opinions of each chancellor; but in more modern times equity became as fixed in its principles, and as incapable of introducing new remedies without the authority of parliament, as the common law itself.

§ 6. At the time of the passing of the Judicature Act, equity was to be

<sup>1</sup> See Calvinus, *Lex. Jur.*; Dirksen, *Man. Lat. v. Equitas*. In the same sense Coke speaks of the equity of the law; *Co. Litt.* 354 b.

<sup>2</sup> See Spence’s *Equity*, i. 321 *et seq.*, 412.

<sup>3</sup> *Clay v. Harrison*, 10 B. & C. 99.

<sup>4</sup> *Smith’s Action*, 163.

<sup>5</sup> Cf. *Dig.* xix. 5, 11.

<sup>6</sup> *Co. Litt.* 24 b, 70 a; 2 *Inst.* 199.

<sup>7</sup> *Termes de la Ley*, v. *Equity*, where instances are given of the use of the term as restricting the general words of an act. This use seems obsolete.

<sup>8</sup> See Spence’s *Equity*, i. 411.

regarded as part of the law of England, distinguished from the common law only by reason of its being, or having originally been, administered in different Courts (the principal of which was the Court of Chancery), and by a different procedure.<sup>1</sup> In many cases the chancery and common law Courts had concurrent jurisdiction (*e.g.*, in cases of ordinary fraud), while in other cases the same right gave rise to different remedies in law and in equity (see *Specific Performance*; *Injunction*), and in others the rules of law and equity were in direct conflict.

§ 7. The principal subjects on which the rules of equity either differed from or conflicted with those of the common law were trusts, administration, separate property of married women, mortgages, penalties and forfeitures, and the wrongs known as equitable fraud, equitable waste, &c. (see those titles); and as the doctrines of equity on these points were not recognized by the Courts of Common Law, it sometimes happened that a person had rights which the common law would have allowed and assisted him to enforce, but which a Court of Equity would not allow him to enforce, on the ground of the existence of an equitable right overriding or qualifying his legal rights. Thus, if A., the owner of an estate, stood by and allowed B. to expend money upon it in the belief that the estate belonged to himself, then if A. brought an action of ejectment against B. to recover possession of the estate, B. might file a bill in equity to restrain A. from ejecting him without compensation for his expenditure.<sup>2</sup> Various statutes were from time to time passed, giving the common law Courts jurisdiction to recognize and enforce equitable rights; and finally, by the Judicature Acts, 1873 and 1875, the superior Courts of Equity and Common Law were amalgamated, the rules of law and equity on certain points were assimilated, and on all other points where there is a difference or conflict between equity and common law, the rules of equity are to prevail.<sup>4</sup> Every division and judge of the Supreme Court of Judicature is now bound to recognize and give effect to all equitable rights and liabilities appearing incidentally in the course of any action or matter.<sup>5</sup> (See *Chancery*.)

Conflict of law and equity.

IV. § 8. Equity also signifies an equitable right, that is, a right enforceable in a Court of Equity; hence, a bill of complaint which did not show that the plaintiff had a right entitling him to relief was said to be demurrable for want of equity; and certain rights now recognized in all the divisions of the High Court, are still known as "equities" from having been originally recognized only in the Court of Chancery. (See *Equity of Redemption*; *Equity to a Settlement*.)

"Equity" = "equitable right."

V. § 9. Equity also denotes a right or obligation incident to a property Equities.

<sup>1</sup> Chute's Equity, 9.

<sup>2</sup> Day's C. L. P. Acts, 330; *Earl of Oxford's Case*, 1 Ch. R. 1; *White & Tudor's L. C.* ii. 548.

<sup>3</sup> See Common Law Procedure Act, 1854, ss. 83 *et seq.*; Day, 328 *et seq.*; Chitty on Contracts, 801 *et seq.*; 23 & 24 Vict. c. 126; Married Women's Property Act, 1870.

<sup>4</sup> Jud. Act, 1873, s. 25; Jud. Act, 1875.

<sup>5</sup> Jud. Act, 1873, s. 24. The student is recommended to read (1) Haynes's Outlines of Equity, (2) Snell's Principles of Equity, a useful book, consisting as it does of extracts, for the most part verbatim, from authoritative works, and (3) White & Tudor's Leading Cases. Watson's Comp. of Equity is useful for practitioners. Spence's Equity is a learned but discursive work.

or contract as between two persons, but not incident to the property or contract from its own nature. In this sense the word is generally used in the plural—"equities"—and is chiefly of importance with reference to assignments of choses in action, the rule being that where there is a chose in action, whether it is a debt or an obligation, or a trust fund, and it is assigned, the person who owes the debt or obligation, or has undertaken to hold the trust fund, has, as against the assignee, exactly the same equities that he would have as against the assignor;<sup>1</sup> or it may be expressed in the converse manner, that the assignee takes the chose in action subject to the same equities as those to which it was subject in the hands of the assignor. Thus, a debt is due from B. to A., but there is also a debt due from A. to B., which B. might set off in an action by A. In this state of things A. assigns the first debt to C., without telling him of the set-off. B. is entitled to the set-off as against C. Again, if B. has contracted to pay a sum of money to A., but the contract is voidable on the ground of fraud or misrepresentation, and A. assigns the contract to C., who does not know the circumstances that render it voidable, then B. may avoid the contract as against C.<sup>2</sup>

Bills of  
exchange.

§ 10. In the law of bills of exchange, a distinction is drawn between "equities attaching to the bill itself" (such as an agreement between the original parties to the bill that in certain events the acceptor shall not be held liable) and "collateral equities," such as set-off.<sup>3</sup> As a rule a bill of exchange in the hand of a bonâ fide holder for value is not subject to the equities between prior parties, but in the case of a bill negotiated when overdue, the holder takes it subject to the "equities attaching to the bill," though not to any collateral equities.<sup>4</sup> (See *Negotiable*.)

See *Chancery*, *Chancellor*, *Exchequer*.

ETYMOLOGY.]—From Latin *æquitas*, equality or fairness, from *æquus*, equal. See the uses of *æquitas* cited in Spence, i. 412.

**EQUITY DRAFTSMAN.** See *Draftsman*, § 2.

**EQUITY OF REDEMPTION** is that right which a mortgagor has to redeem the mortgaged property at any time until he has been foreclosed, or until his right is barred by the statutes of limitations, or until the property has been sold by the mortgagee under a power of sale. See further on this point under *Mortgage*; also *Equity*.

**EQUITY TO A SETTLEMENT.**—Where a husband becomes entitled in possession in right of his wife to property which before the Judicature Act he would have been unable to recover by an action at law (say a legacy left to his wife by the will of a testator, or a share of personality to which his wife has become entitled under a settlement), although primâ facie the husband is entitled to receive the property, so that upon

<sup>1</sup> *Phipps v. Lovegrove*, L. R., 16 Eq. p. 88.

<sup>2</sup> Pollock on Contract, 201, citing *Cavendish v. Graves*, 24 Beav. 163; *Graham v.*

*Johnson*, L. R., 8 Eq. 36.

<sup>3</sup> *Ex parte Swan*, L. R., 6 Eq. 344.

<sup>4</sup> Byles on Bills, 168.

the executor or trustee paying him the wife's legacy or share of personalty, the husband's receipt would be a good discharge; yet if the intervention of a Court exercising equitable jurisdiction be in any way called into action, whether by the husband to claim the property, or by the wife to enforce her equity, the Court only allows the husband to receive the property, subject to what is called the wife's right or equity to a settlement; that is to say, unless the wife expressly waives this right or equity, the Court will inquire into all the circumstances connected with the marriage (*e. g.*, whether the husband has made a settlement on his wife, how much of her property he has already received, what is his pecuniary position, whether the husband and wife are living together or apart), and will, upon a consideration of all the material facts, decide how much of the property (if any) shall be paid to the husband, and how much (if any) shall be settled on the wife.<sup>1</sup>

**ERASURE.** See *Alteration*.

**ERROR.**—§ 1. In the old common law practice in civil actions, error was some mistake in the foundation, proceeding, judgment or execution of an action in a Court of Record, requiring correction either by the Court in which it occurred (in case of error in fact), or by a superior Court or Court of Error (in case of error in law); to "bring error" was to apply for the rectification required.<sup>2</sup> Error in fact was some mistake in the process<sup>3</sup> (*e. g.*, where an infant appeared by attorney instead of by guardian), while error in law was a mistake in the judgment, such as might have formed the foundation for a demurrer, motion in arrest of judgment, &c.<sup>4</sup> Errors in law were either common (*e. g.*, that the judgment was given for the plaintiff instead of for the defendant), or special, which was where some matter appeared on the face of the record which showed the judgment to be erroneous.<sup>5</sup>

Proceedings in error in civil cases have been abolished, and a more simple mode of appeal substituted (see *Appeal*),<sup>6</sup> except in appeals to the High Court from inferior Courts proceeding according to the course of the common law, which are brought by writ of error, or writ of false judgment. In those cases the old practice still applies, and the plaintiff in error (the appellant), is therefore obliged to "assign errors," that is, specify the defects complained of in the judgment of the Court below; the defendant then delivers either a joinder in error, or a plea to the assignment of errors, or a demurrer, and so on until issue is joined, when the case is set down for argument.<sup>7</sup> This procedure seems to be very rare.

In fact.

In law.

Assignment of errors.

Joinder in error.

<sup>1</sup> Haynes' Equity, 114; Snell's Eq. 299; White & Tudor's L. C. i. 381 *et seq.* An infant feme covert cannot waive her equity to a settlement: *Shipway v. Ball*, 16 Ch. D. 376.

<sup>2</sup> Co. Litt. 288 b; Smith's Action (11th ed.), 220.

<sup>3</sup> Not in the facts of the case; for that the remedy was (and is) a new trial.

See *Trial*.

<sup>4</sup> Steph. Comm. iii. 578; for the practice on proceedings in error, see Archbold's Pr. 483 *et seq.*

<sup>5</sup> Archbold's Pr. 483.

<sup>6</sup> Rules of Court, lviii., lix.; and Rules of December, 1879.

<sup>7</sup> Archbold, 1424.

## Criminal.

§ 2. Appeals in criminal cases are also brought by proceedings in error, namely, by writ of error (*q. v.*) ; the plaintiff in error (that is, the prisoner or accused) assigns or indicates the errors of which he complains in the indictment.<sup>1</sup>

See *Writ of Error*; *Joinder*.

## Voluntary.

**ESCAPE.**—§ 1. Voluntary escape is the offence committed by a person who knowingly, and with intent to save him from trial or execution, permits any person in his lawful custody to regain his liberty otherwise than in due course of law. The degree of this offence varies with that of which the escaped prisoner was guilty.

## Negligent.

§ 2. Negligent escape is the misdemeanor committed by a person who by the neglect of any duty, or by ignorance of law, permits a person in his lawful custody to regain his liberty otherwise than in due course of law.<sup>2</sup> It is punishable by fine.<sup>3</sup> If a sheriff allows a person in custody under a *ca. sa.* to escape, he is liable to the plaintiff for the amount of the judgment debt.

## By prisoner.

§ 3. An escape by a prisoner himself is a misdemeanor, and assisting a prisoner to escape, or attempt to escape, is felony.<sup>4</sup>

See *Rescue*.

**ESCHEAT** takes place when by accident lands fall to the lord of whom they are holden,<sup>5</sup> or to the crown. It is derived from the feudal rule, that where an estate in fee simple comes to an end, the land reverts to the lord by whose ancestors or predecessors the estate was originally created.<sup>6</sup> At the present day, seignories in freehold land are of no practical value, and the evidence of them has generally been lost ; so that where an escheat takes place the land in almost all cases goes to the crown as the ultimate lord of all lands in England.<sup>7</sup>

## Propter defectum sanguinis.

§ 2. "An escheat doth happen two manner of wayes—*aut per defectum sanguinis, i. e.* for default of heir ; *aut per delictum tenentis, i. e.* for felony."<sup>8</sup> Escheat for default of heirs, as may be imagined, seldom occurs, almost the only case being where a bastard dies intestate without children or other issue.<sup>9</sup> Escheat propter delictum tenentis takes place where a person is outlawed for felony, upon which his blood is corrupted ; that is to say, he becomes incapable of holding land, or of inheriting it, and it therefore escheats to the lord. Formerly judgment of death for felony caused an escheat in the same manner as outlawry ; but this has recently been abolished<sup>10</sup> (see *Attainder*), as has also the rule that a person could not trace descent to land through an ancestor who has been attainted of treason or felony, so that the land escheated to the lord.<sup>11</sup>

## Propter delictum tenentis.

<sup>1</sup> Archbold's *Crim. Pl.* 203, where forms of assignment of errors are given.

<sup>2</sup> Stephen's *Crim. Dig.* 88.

<sup>3</sup> Steph. *Comm.* iv. 228.

<sup>4</sup> *Ibid.* 90 ; see also the stats. 1 & 2 Vict. c. 82 ; 5 & 6 Vict. c. 29 ; and 6 & 7 Vict. c. 26.

<sup>5</sup> *Co. Litt.* 13 a, 92 b.

<sup>6</sup> Williams, *R. P.* 126 ; except in the

case of high treason, when the land always escheated to the crown ; *Co. Litt.* 13 a.

<sup>7</sup> Williams, *R. P.* 128 ; *Co. Litt.* 1 a.

<sup>8</sup> *Co. Litt.* 13 a.

<sup>9</sup> Williams, *R. P.* 127. See stat. 22 & 23 Vict. c. 35, s. 19.

<sup>10</sup> Stat. 33 & 34 Vict. c. 23.

<sup>11</sup> Stat. 3 & 4 Will. 4, c. 106, s. 10 ; Steph. *Comm.* i. 445.



§ 3. Escheat is not properly a purchase in the technical sense of the word, for the land thus acquired by the lord descends as the seignory would have descended, into the place of which it comes.<sup>1</sup> (See *Purchase*.)

See *Seignory*; *Title*; *Inquest of Office*.

ETYMOLOGY.]—Norman French, *eschete*, from *escheoir*, to fall to (in the sense of a wind-fall); Latin, *cadere*.<sup>2</sup>

**ESCHEATOR**, “an ancient officer, so called because his office is properly to look to escheats, wardships, and other casualties belonging to the crowne.”<sup>3</sup> The office is now obsolete. (See *Inquest of Office*.)

**ESCROW** is a writing sealed and delivered to a stranger (*i. e.*, a person not a party to it) to be held by him until certain conditions be performed, and then to be delivered to take effect as a deed. It is said that, to make the writing an escrow, the word “escrow” must be used in delivering it; but whether this is so at the present day is doubtful.<sup>4</sup> (Apparently from Norman-French, *escrit*; <sup>5</sup> Latin, *scriptum*, a writing.)

**ESCUAGE**.—Tenure by escuage was one of the varieties of tenure by knight's service. It imposed on the tenant the duty of accompanying the king to war for forty days, or of sending a substitute, or of paying a sum of money, which was assessed by parliament after the expedition or “voyage royal.” § 2. This payment was also called escuage, or escuage uncertain, to distinguish it from escuage certain, which was one of the services of which socage tenure might consist. Thus if a man held land by the service of paying to his lord half a mark, or other fixed sum for escuage, this was escuage certain, and the tenure was socage and not knight's service.<sup>6</sup> (See *Tenure*.)

§ 3. Escuage was abolished by 12 Car. 2, c. 24, and had fallen into disuse long before, for there is no instance of parliament's assessing it since the reign of Edward II.

ETYMOLOGY.]—Norman French, *escuage* (late Latin, *scutagium*), from *escu*; Latin, *scutum*, a shield.<sup>8</sup>

**ESQUIRE**.—Strictly speaking, the only persons entitled to the description of esquire, are—(i) the eldest sons of knights, and their eldest sons in perpetual succession; (ii) the eldest sons of younger sons of peers in like succession; (iii) esquires created by the crown's letters-patent or other investiture, and their eldest sons; (iv.) esquires by virtue of their office, such as justices of the peace and barristers-at-law; (v) foreign peers. Every knight of the bath has the privilege of creating three esquires at his installation.<sup>9</sup>

**ESSENCE OF THE CONTRACT**.—A provision in a contract is said to be “of the essence of the contract” when compliance with it

<sup>1</sup> Burton's Comp. 325; Hargrave's note to Co. Litt. 18 b.

<sup>2</sup> Britton, 28 a; Litt. § 682; Littré, s. v.

<sup>3</sup> Co. Litt. 13 b; Cox's Inst. 685.

<sup>4</sup> Shep. Touch. 58; Co. Litt. 36 a.

<sup>5</sup> Britton, 98 b.

<sup>6</sup> Litt. §§ 95 *et seq.*, 120; Co. Litt. 68 b *et seq.*

<sup>7</sup> Co. Litt. 72 b, 74 b, n.

<sup>8</sup> Loysel, Gloss. s. v.

<sup>9</sup> Steph. Comm. ii. 616.

was known by both parties at the time of entering into the contract to be of such importance that performance of the contract without strict compliance with it may be of no avail; as where the subject-matter of the contract is required for immediate use, or is of a terminable or fluctuating character or value.<sup>1</sup> Where a contract limits a time for the performance of an act, the promisor has the right of performing it within a reasonable time after the date, unless it appears that performance within the time was intended to be of the essence of the contract; hence it is usual in such cases to insert an express condition to that effect.<sup>2</sup>

**ESSOIGN**, in the old books, means an excuse for not appearing in Court to defend an action, and as the first day of Term was the day for hearing such excuses it was called the *essoign-day*.<sup>3</sup>

**ESTABLISHMENT OF WILLS.**—Formerly where the validity of a will disposing of real estate was disputed, or likely to be disputed by the heir-at-law, or any other person, the only remedy open to the devisee was to bring a suit in equity against the person disputing the will, called a suit to establish the will, so as to prevent him from contesting it in future. In such a suit the execution of the will, and the other requisites to its validity, were proved (see *Devisavit vel non*). Now, however, probate in solemn form is conclusive as to the validity of the will as regards real estate;<sup>4</sup> and proceedings to establish wills in Chancery have consequently become obsolete.<sup>5</sup>

**ESTATE.**—I. § 1. In its widest sense, “estate” denotes the condition or circumstance of a person or a class of persons; hence its use in the expression “the three estates,” or estates of the realm; that is, the lords spiritual, the lords temporal, and the commons of England.<sup>6</sup> (See *Parliament*.)

II. § 2. More usually, however, “estate” signifies—(i) the condition or circumstance in which a person stands with regard to property in which he has an interest,<sup>7</sup> and, by extension, (ii) the interest itself. In this sense “estate” means certain varieties or modes of ownership, especially in land, the rule being that no person can be the absolute owner of land in England; in theory, he can only have an estate or limited interest in it.<sup>8</sup> (See *Tenure*.)

These limited interests are of the following kinds:—

(I.) § 3. Where a person has such an estate in property that he is entitled to the possession or enjoyment of it (either in present or in future) against all the world, or against all the world except one or more specified persons, he is said to have a legal estate in it, as opposed to

<sup>1</sup> Leake on Contracts, 448.

<sup>2</sup> As to time being of the essence of the contract in sales of realty, see *Parkin v. Thorold*, 16 Beav. 59; Chitty on Contracts, 283; Leake, 447.

<sup>3</sup> Tidd's Pr. 125.

<sup>4</sup> Stat. 20 & 21 Vict. c. 77, s. 66.

<sup>5</sup> Daniell, Ch. Pr. (4th edit.) 226, 812; Snell's Eq. 536.

<sup>6</sup> Bl. Comm. i. 153; Hallam, M. A. iii. 105; Block, Dict. v. *Etat*.

<sup>7</sup> Litt. § 347; Bl. Comm. ii. 103.

<sup>8</sup> Williams, R. P. 17.

an equitable or beneficial estate (*infra*, § 13). He may be entitled to it for his own benefit, or as trustee for some one else. (See *Trustee*.)

Legal estates are divisible as follows:—

(A) Estates in land of freehold tenure:<sup>1</sup>

*Estates in freehold land.*

§ 4. With reference to their quantity, or the extreme limit of their duration,<sup>2</sup> estates are either freehold (*q. v.*) or less than freehold. Estates of freehold again are either (a) estates of inheritance, which include estates in fee simple, estates tail, and estates in frankmarriage (see those titles); or (b) estates not of inheritance, which are either (α) conventional, *i. e.*, created by the act of the parties, including estates for life and estates pur autre vie (see *Tenant for Life*; *Quasi-tail*); or (β) legal, that is, created by construction or operation of law; to this class belong the estates of a “tenant in tail after possibility of issue extinct,” and of tenants by the curtesy, and in dower (*q. v.*). § 5. Estates less than freehold are either (a) certain, namely, estates for years (see *Tenant for Years*; *Term*), or (b) uncertain, namely, estates at will, by sufferance, statute merchant, statute staple and elegit, and a few other interests without specific names, *e. g.*, under a devise of land to executors to pay debts.<sup>3</sup> (See *Chattels*.)

Estates of freehold of inheritance, not of inheritance.

Less than freehold.

With reference to their qualities, estates are either absolute, determinable, or conditional. § 6. An estate is said to be absolute when nothing but its quantity is indicated; thus, a conveyance to a man and his heirs gives him a fee simple absolute. § 7. An estate is determinable when by the terms of its limitation it may either continue as long as if it were absolute, or determine before that period; thus, a conveyance to A. during her widowhood, gives her an estate for life determinable on her marrying again.<sup>3</sup> § 8. A conditional estate is one which has a condition annexed to it, which may defeat it before its natural termination; a familiar instance of a conditional estate is that created by the old-fashioned form of mortgage, and the estate of a lessee under an ordinary lease with a proviso for re-entry on non-payment of rent, &c.<sup>4</sup> As to the various kinds of conditions, see that title. Estates which depend for their creation on the performance of a condition precedent are not generally called conditional estates, but contingent remainders or executory interests (*q. v.*). Estates in fee are subject to a peculiar division with reference to conditions, as to which see *Fee*; *Limitation*.

Absolute, determinable, conditional.

§ 9. With reference to the time of their enjoyment, estates are either in possession or expectancy. An estate in possession (or an immediate estate) gives a present right of present enjoyment, while an estate in expectancy is one which cannot be enjoyed until a future time. An estate of freehold is said to be in possession, although it is subject to an existing prior chattel interest. Estates in expectancy include reversions, remainders and future interests (*q. v.*).<sup>5</sup> Every estate which precedes a

In possession, in expectancy.

Particular.

<sup>1</sup> “Freehold” in the sense of tenure must not be confounded with “freehold” in the sense of an estate of a certain quantity. (See *Freehold*.)

<sup>2</sup> Co. Litt. 18 a; Bl. Comm. ii. 103.

<sup>3</sup> Co. Litt. 42 a.

<sup>4</sup> Preston on Estates, 44; Leake, 214.

<sup>5</sup> Stephen's Comm. i. 313; Burton, Comp. § 833.

reversion or remainder is also called a particular estate;<sup>1</sup> thus, if land is granted to A. for life, with remainder to B. and his heirs, A. has a particular estate, and B. a reversionary estate.

Vested,  
in possession,  
in interest ;  
contingent.

§ 10. With regard to the certainty of their enjoyment, estates are either vested or contingent. An estate is said to be vested in possession when the tenant has a present right to the present enjoyment; vested in interest, when he has a present fixed right to the future enjoyment; and contingent, when his right of enjoyment is to accrue on an event which is uncertain; in other words, when he has an estate in expectancy, which may or may not take effect in possession.<sup>2</sup> (See *Remainder; Reversion; Executory Interest; Vest.*)

In severalty,  
in joint  
tenancy, &c.

§ 11. An estate held by one person alone is called an estate in severalty, or in sole tenancy; estates held by two or more persons together are of the following kinds: tenancy by entireties, coparcenary, joint-tenancy, and tenancy in common.<sup>3</sup> (See those titles.)

Customary  
estates.

(B) § 12. Customary estates are those which exist, by virtue of a custom, in land forming part of a manor, as in the case of copyholds and customary freeholds (*q. v.*). As a rule they are similar to estates in freeholds: thus a copyholder may have a customary fee simple, an estate for life, for a term of years, in joint-tenancy, &c.; and, if there is a special custom to that effect, a customary estate tail; if there is no such custom, then a gift of land to A. and the heirs of his body creates a customary fee simple conditional at the common law.<sup>4</sup> (See *Fee.*)

EQUITABLE  
ESTATES.

(II.) § 13. Equitable estates are those which were formerly recognized only in Courts of Equity.<sup>5</sup> (See *Equity; Equitable.*) The main differences between legal and equitable estates are that the latter can exist to a certain extent in personalty as well as realty, and that they are free from many of the restrictions and incidents attached by the common law to legal estates in land. Equitable estates may be divided as follows—(1) those which are analogous to legal estates, *e. g.*, equitable estates in fee simple, in tail, for life, in joint tenancy, &c. In these cases the legal estate in the property is vested in one person, and the beneficial or equitable estate in another; as where land or stock is given to trustees upon trust for A. and B. during their lives, and, after the death of the survivor, to C.; here A. and B. have an equitable joint life estate or interest, and C. has an equitable reversion or reversionary interest: (2) those having no corresponding estates at law, *e. g.*, equities of redemption.<sup>6</sup>

III. § 14. "Estate" also signifies "property": thus we speak of real and personal estate, of partnership estate, trust estate, a married woman's separate estate, &c., especially with reference to questions of administration, as in the case of the estate of a deceased person, a bankrupt, or a dissolved partnership. (See *Assets.*)

<sup>1</sup> Co. Litt. 22 b.

<sup>2</sup> Fearn, Cont. Rem. 1.

<sup>3</sup> To this head may also be referred those estates which are sometimes in one person or in one place, and *alternis vicibus* in another (Co. Litt. 4 a); they do not seem to occur at the present time, except

in the case of lot-mead or shifting severalties. (See *Inheritance*, § 5; *Severalty.*)

<sup>4</sup> Burton, § 1284; Elton, Copyh. 32.

<sup>5</sup> Burton, § 1358; see Jickling's *Analogy, passim.*

<sup>6</sup> Burton, § 1458.

§ 15. From its use in these cases, "estate" has acquired the sense of a juridical or fictitious person, as when we say that a debt is due to the estate of a bankrupt or deceased person, or speak of an estate being insolvent, or of its being a co-contractor in a business.<sup>1</sup> The idea is, that the estate represents or continues the *persona* of the individual to whom it belonged.

ETYMOLOGY.]—Norman French, *estat*;<sup>2</sup> from the Latin, *status*. "Estate" was formerly also a verb active, meaning to create, limit, or grant an estate.<sup>3</sup>

**ESTATE AT WILL—ESTATE FOR LIFE, &c.** See *Tenant at Will*; *Tenant for Life*, &c.

**ESTATE TAIL**, or an estate in fee tail, is an estate in lands or tenements, created by a conveyance or devise to a person and his descendants, or the "heirs of his body," as they are technically called (see *Heir*, § 9). Such an estate will, if left to itself, descend on the death of the first owner to his children, grandchildren and more remote descendants, but not to his ascendants or collateral heirs; so that if he dies without issue, or any of his descendants dies without issue, and there is no other descendant of the first owner living, the estate will, if left alone, come to an end, and the land will pass to the reversioner or remainderman. The owner for the time being of such an estate is called a tenant in tail.

§ 2. An estate tail may be either *general*, as where land is given to A. General, and the heirs of his body without more, in which case it descends to such of his heirs as are descended from him in the same manner as an estate in fee simple descends to the issue of the last purchaser: or *special*, when special. it is restrained to certain heirs of his body, as where land is given to B. and the heirs of his body by a particular wife; here none can inherit but such as are his children by that particular wife, or descended from his children by her.<sup>4</sup>

§ 3. Each of these kinds may also be either *in tail male*, where the land Tail male. is limited to the heirs male of the donee, so that it cannot descend to any but males who can trace their descent through male descendants from the donee (that is, to sons, sons of sons, and so on): or *in tail female*, where Tail female. it can only descend to females and female descendants of females (daughters, daughters of daughters, and so on). Accordingly, a man may have an estate in tail male special, that is, descendible only to his heirs male by a particular wife, or the like.<sup>5</sup>

§ 4. Where land is given to two persons and the heirs of their bodies, Gift in tail to then if they can by any possibility marry, either immediately or at a future two persons. time, they have an estate in special tail, limited to their own issue. If there is no possibility of their marrying, they have a joint estate for life and several inheritances in tail, that is, the land is divided on the death

<sup>1</sup> *McClellan v. Hennard*, L. R., 9 Ch.

336.

<sup>2</sup> Britton, 270 a.

<sup>3</sup> See Compl. Clerk, 366, 445.

<sup>4</sup> Litt. § 13; Co. Litt. 19 b.

<sup>5</sup> Bl. Comm. ii. 114.

of the survivor, one-half going to the issue of each tenant for life, and the issue are tenants in common in tail.<sup>1</sup>

Statute *De Donis*.

§ 5. Estates tail in freehold land are derived from the statute of Westminster the Second (13 Edw. 1), called *De Donis Conditionalibus*. Before this statute, a gift of land to a man and the heirs of his body operated to create an estate in fee conditional on his having issue; as soon as he performed the condition by having issue, his estate practically became an absolute estate in fee simple (see *Fee*). The statute *De Donis* enacted that in such cases the land should go to the issue of the donee, or, on failure of his issue, should revert to the donor.<sup>2</sup> The act only applies to lands and tenements, and, therefore, does not include such hereditaments as annuities, which are neither lands nor tenements. (See *Annuity*.)

Fines and recoveries.

In course of time modes were invented of barring estates tail by means of fictitious proceedings called fines and common recoveries (see those titles), so that the estate of a tenant in tail might be converted into a fee simple absolute not only against his issue, but also against the donor or reversioner in tail. By statutes passed in the reigns of Henry VIII. and subsequent sovereigns, estates tail were further assimilated to estates in fee simple, and now by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), every tenant in tail may, by a disentailing assurance (*q. v.*), bar the entail as against his own issue, and may, with the consent of the protector of the settlement (if any), bar it as against the reversioner in tail, and thus convert it into an estate in fee simple. (See *Enlargement*; *Protector*.) This act and the Settled Estates Act (*q. v.*) also contain provisions enabling tenants in tail to grant effectual leases at a rack-rent for certain terms.

Copyholds.

§ 6. The entail of copyholds depends upon the custom of each manor. In some manors there is no custom to entail, and in these manors a surrender of copyholds to the use of A. and the heirs of his body gives him a conditional customary fee, corresponding to a fee simple conditional at the common law (see *Fee*.) In some manors there is a custom to entail, so that a surrender to the use of A. and the heirs of his body gives him a customary estate tail, which may be barred by a simple surrender, the consent of the protector, if any, being entered on the Court Rolls.<sup>3</sup>

Equitable entail.

§ 7. An equitable entail is where lands or tenements are vested in trustees in trust for a person as tenant in tail. Such an entail may be barred in the same manner as an ordinary entail.<sup>4</sup> (See *Disentailing Deed*.)

Quasi entail.

§ 8. A quasi entail at law is where an estate *pur autre vie* is given to a man and the heirs of his body: as if land held during the life of A. is given to B. and the heirs of his body. In such a case, B. may bar the quasi entail by a simple deed of grant; if he dies in the lifetime of A. without having done so, the land descends to the heir of his body as special occupant.<sup>5</sup> (See *Occupant*.) A customary quasi estate tail in copyholds is similar.<sup>6</sup>

In equity.

§ 9. A quasi estate tail in equity is where land held on lease for lives

<sup>1</sup> Co. Litt. 20 b; 25 b; Litt. § 283.

<sup>2</sup> Co. Litt. 18 b; Steph. Comm. i. 240.

<sup>3</sup> William on Seisin, 164; R. P. 364.

<sup>4</sup> *Cooper v. Macdonald*, 7 Ch. D. 289; Williams, R. P. 165, 381.

<sup>5</sup> Williams on Seisin, 166.

<sup>6</sup> *Ibid.* 168.

with a covenant for perpetual renewal is given to a person and the heirs of his body: it may be barred by deed *inter vivos*.<sup>1</sup> A customary quasi estate tail in equity in copyholds is similar.<sup>2</sup>

§ 10. As an estate tail can now be barred or converted into an estate in fee simple by the owner, subject to certain restrictions, the object with which estates tail were invented, namely, "to preserve the inheritance in the blood of them to whom the gift was made,"<sup>3</sup> is not completely secured. The principal use of estates tail at the present day is to keep an estate in a family for two generations: thus, on the marriage of the owner of an estate, it is generally settled on him for life, with remainder in tail to the eldest son of the marriage; when a son is born, he is tenant in tail, subject to his father's life estate, and when he attains twenty-one, he is able, with the consent of his father as protector (*q. v.*), to bar the entail: the father usually gives his consent on the terms of the estate being re-settled on the son for life, with remainder in tail to his issue, and so on.<sup>4</sup> (See *Settlement*; *Frankmarriage*; *Formedon*; *Bar*; *Disentail*; *Fine*; *Recovery*; *Tenant in Tail after Possibility of Issue extinct*; *Descent*; *Tenant in Tail ex Provisione Viri*.)

Modern use  
of entails.

ETYMOLOGY AND HISTORY.]—Norman French, *fee taillé*, *taillé*;<sup>5</sup> low Latin, *feodum talliatum*, from *tailler*, *talliare*, to cut or "limit to some certaine inheritance."<sup>6</sup>

**ESTOPPEL** is an admission of so conclusive a nature that the party whom it affects is not permitted to aver against it or offer evidence to controvert it.<sup>7</sup>

Estoppels are generally divided into three kinds—by matter of record, by deed, and in pais.<sup>8</sup>

§ 2. Estoppel by matter of record is based on the principle that a record imports such absolute verity that no person against whom it is producible shall be permitted to aver against it.<sup>9</sup> The most important kind of estoppel by record occurs in the case of judgments (*q. v.*): thus, where A. wrongfully signed judgment against B., it was held that so long as the judgment stood B. could not dispute it, and that his remedy was to apply to the Court to set it aside.<sup>10</sup> Other instances of estoppel by record occur in the case of letters patent, fines and recoveries, &c.<sup>11</sup> (See *Record*.)

By record.

§ 3. Estoppel by deed or specialty is based on the rule that no man is allowed to dispute his own solemn deed:<sup>12</sup> hence, as a general rule, if a person executes a deed containing a recital or statement, he cannot afterwards deny the truth of it, or show it to be incorrect.

By deed.

§ 4. Estoppel by matter in pais occurs in the case of estoppel "by livery, by entry, by acceptance of rent, by partition and by acceptance

By matter in  
pais.

<sup>1</sup> Williams on Seisin, 167.

<sup>2</sup> *Ibid.* 168.

<sup>3</sup> Co. Litt. 19 a.

<sup>4</sup> Williams, R. P. 51.

<sup>5</sup> Britton, 216 b, 89 a.

<sup>6</sup> Litt. § 18.

<sup>7</sup> Smith's L. C. ii. 778 (notes to *Doe v. Oliver*, 5 M. & R. 202, and *The Duchess of Kingston's Case*).

<sup>8</sup> Co. Litt. 352 a.

<sup>9</sup> Co. Litt. 260 a; *R. v. Cartile*, 2 B. & Ad. 262, cited Smith's L. C. ii. 779.

<sup>10</sup> *Huffer v. Allen*, L. R., 2 Exch. 15.

<sup>11</sup> Co. Litt. 352 a. As to estoppel by decrees of the old Court of Chancery, see Smith's L. C. ii. 801.

<sup>12</sup> *Goodtitle v. Bailey*, Cowp. 601, cited in Smith's L. C. ii. 845; *General Finance, &c. Co. v. Liberator, &c. Society*, 10 Ch. D. 15.

of an estate."<sup>1</sup> The most important of these instances at the present day is the last, which occurs when a person has accepted a lease from one who has no title whatever to grant it; in such a case, neither the tenant nor anyone claiming under him can dispute the lessor's title; the tenant is therefore said to have an estate by estoppel, and the lessor a reversion in fee simple by estoppel, and if the lessor subsequently acquires an interest which, if he had had it before, would have enabled him to grant the lease validly, the interest is said to feed the estoppel, so that the lease is as effectual for all purposes as if the lessor had had a sufficient interest when he granted it.<sup>2</sup> § 5. A licensee of a patent, &c. is similarly estopped from denying the patentee's right to the patent.<sup>3</sup>

Estoppel by  
misrepresenta-  
tion and neg-  
ligence.

§ 6. There are also many modern rules which may be referred to the doctrine of estoppel in pais: such are those that the acceptor of a bill of exchange is precluded from denying the drawer's handwriting; that a bailee cannot question the title of his bailor, &c.,<sup>4</sup> the general rule being that where a man by his words or conduct wilfully or by negligence causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from denying the existence of that state of facts.<sup>5</sup> Thus, where a person draws a cheque in such a manner that the amount may be altered without difficulty, and it is altered by being increased, he cannot sue his banker for paying the increased amount, because he is estopped by his own negligence.<sup>6</sup>

Estoppel by  
negligence.

Equitable  
estoppel.

§ 7. Equitable estoppel, or estoppel by acquiescence, occurs where a person by tacitly representing his own position to be more favourable to another person than it really is, has induced that other to alter his position on the faith of the representation being true. Thus, if a stranger begins to build on land, supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, the Court will not afterwards allow the real owner to assert his title to the land.<sup>7</sup>

§ 8. A person who has a public or quasi public status (such as the vicar of a parish) cannot waive or divest himself of the rights incident to his office by conduct which, in the case of a private person, would amount to estoppel.<sup>8</sup>

**ESTOVERS.**—§ 1. Every tenant for life or years of freehold land, unless restrained by agreement, may of common right take upon the land a reasonable quantity of wood for fuel, repairs, &c. This is called estovers, or botes, which are sometimes divided into house-bote, for fuel

<sup>1</sup> Co. Litt. 352 a.

<sup>2</sup> Smith's L. C. i. 97, ii. 852; Woodfall's L. & T. 2, 196; *Crealock v. Heath*, L. R., 10 Ch. 22.

<sup>3</sup> *Clark v. Adie*, 2 App. Ca. at p. 435.

<sup>4</sup> Smith's L. C. ii. 866.

<sup>5</sup> *Pickard v. Sears*, 6 A. & E. 475; Smith, 868; Lindley on Partnership, 1303; *Carr v. London and North Western Rail. Co.*, L. R., 10 C. P. 307; Pollock on

Contract, 403; *Burkinshaw v. Nicolls*, 3 App. Ca. at p. 1026.

<sup>6</sup> *Guardians of Halifax v. Wheelwright*, L. R., 10 Ex. 183; *Arnold v. Cheque Bank*, 1 C. P. D. 578; *Baxendale v. Bennett*, 3 Q. B. D. 525.

<sup>7</sup> *Ramsden v. Dyson*, L. R., 1 H. L. 129; Pollock on Contract, 561.

<sup>8</sup> *Mac Allister v. Bishop of Rochester*, 5 C. P. D. 194.



and repairs of the house, plough-bote for making and repairing instruments of husbandry, and hay-bote for repairing fences<sup>1</sup> (Anglo-Saxon, *hegge*; Norman-French, *haye*,<sup>2</sup> a hedge or enclosure). § 2. Copyholders' rights of estovers are sometimes subject to customary restrictions.<sup>3</sup> § 3. As to common of estovers, see *Common*, § 11. (From the old French, *estevoir* or *estovoir*, that which is necessary.<sup>4</sup>)

**ESTRAYS** are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them; after they have been proclaimed and kept for a year and a day without the owner appearing, the law gives them to the crown; in most cases, however, they belong to the lord of the manor by special grant from the crown.<sup>5</sup> (See *Prerogative*.)

**ESTREAT**.—If the condition of a recognizance is broken, the recognizance is forfeited, and, on its being estreated, the cognizors become debtors to the crown for the sums in which they are bound. A recognizance is estreated (that is, extracted) by a copy being made from the original and sent to the proper authority to be enforced; thus, estreated recognizances in the superior Courts and Courts of Assize are sent into the Exchequer, while those before justices of the peace are sent to the sheriff, with writs of execution to enable him to levy the amounts.<sup>6</sup>

**EVICITION** is a popular term for turning a tenant of land out of possession, either by re-entry or by legal proceedings, such as an action of ejectment.

**EVIDENCE** is means employed for the purpose of proving an unknown or disputed fact, and is either judicial or extra-judicial. Judicial evidence is that which is used on trials or inquiries before Courts, judges, commissioners, referees, &c., while extra-judicial evidence is that which is used to satisfy private persons as to facts requiring proof. § 2. An important kind of extra-judicial evidence is that known as conveyancers' evidence, namely, that evidence which by the practice of conveyancers is required in the investigation of the title to property, in proof of facts on which the goodness of the vendor's title depends: such are original title deeds, probates of wills, certificates of births, deaths and marriages, statutory declarations, &c.<sup>7</sup> Evidence by statutory declaration is sometimes called declaratory evidence.

Judicial.

Extra-judicial.  
Conveyancers' evidence.

Declaratory.

Judicial evidence is of the following kinds:—

JUDICIAL EVIDENCE.

I. § 3. Evidence is direct where the fact proved by it (the evidentiary fact) is the fact in issue, or the fact required to be proved;<sup>8</sup> as where

Direct,

<sup>1</sup> Co. Litt. 41 b; Britton, 153.

<sup>2</sup> Britton, 184 a.

<sup>3</sup> Elton, Copyh. 209.

<sup>4</sup> Loysel, Inst. gl.; Termes de la Ley.

<sup>5</sup> Bl. Comm. i. 297; Steph. Comm. ii. 548.

<sup>6</sup> Stats. 3 & 4 Will. 4, s. 99; 3 Geo. 4, c. 46; 7 Geo. 4, c. 64; 16 & 17 Vict. c. 32;

Archbold's Crim. Pl. 92; Pritchard's Quar. Sess. 1108.

<sup>7</sup> See Coventry, Conv. Evid., *passim*. The old writers frequently describe title-deeds as "evidences;" "the evidences are, as it were, the sinewes of the land;" Co. Litt. 6 a, 213 a; Ducange, s. v. *Evidentiæ*.

<sup>8</sup> See Best on Evidence, 25.

indirect.	on a trial for murder a witness deposes that he saw the prisoner kill the deceased. § 4. Indirect evidence is where the existence of the fact in issue is inferred from the evidentiary fact. Such evidence is—(i) conclusive, when the existence of the fact in issue follows either by a necessary consequence of the laws of nature or from a rule of law (as where an alibi is proved, or the certificate of incorporation of a company is produced): or (ii) circumstantial or presumptive, where it only rests on a greater or less degree of probability; as where a person accused of a murder is proved to have in his possession the instrument by which the deceased was killed. <sup>1</sup> Evidence which shifts the burden of proof is called <i>primâ facie</i> evidence. <sup>2</sup> (See <i>Presumption</i> ; <i>Proof</i> .)
Conclusive,	
circumstantial, or presumptive.	
Primâ facie.	
Real,	II. § 5. Real evidence is that which is derived from any object belonging to the class of things: thus, footsteps in a field are real evidence that some one has been there; and the production of a mutilated document is real evidence of the mutilation. <sup>3</sup> § 6. Documentary evidence is that derived from conventional symbols (such as letters), by which ideas are represented on material substances. A written contract is documentary evidence. Documents are divided into those which prove themselves (such as the London Gazette, probates of wills, certificates by registrars and other officials, &c.; <sup>4</sup> and those which require personal evidence to prove them, such as agreements, deeds and other private documents. (See <i>Ancient Documents</i> .) § 7. Personal evidence is that which is afforded by human beings, either by words or by signs intended to convey ideas. It may be personal either as to its source, as where a person deposes to a fact which he has seen ( <i>e.g.</i> , an assault); or as to its instrument, that is, the means by which it is brought before the tribunal. The former class has some kinds with special names, of which opinion evidence, and its principal variety, expert or scientific evidence, are the most important. <sup>5</sup> § 8. The latter class (evidence personal by reason of its instrument), also called testimony, is either oral or written.
documentary,	
personal.	Oral evidence is that given by a witness <i>vivâ voce</i> before the tribunal. Written evidence is given either by affidavit or deposition ( <i>q. v.</i> ). In actions in the High Court, the evidence on the trial of the action is given orally in Court, unless the parties agree to have it taken by affidavit, and subject to the rule that the Court may order certain witnesses to be examined before an examiner or on a commission, or order a particular fact or facts to be proved by affidavit. <sup>6</sup>
Opinion.	
Oral, written.	
Original, primary, immediate.	III. § 9. Original evidence is that which comes from its source without passing through any intermediate channel; as where a witness deposes to a fact within his own knowledge, or where a thing or an original document is produced to the tribunal. Original documentary evidence is called primary evidence; original real evidence is sometimes called immediate real evidence. § 10. Derivative, unoriginal, transmitted,
Derivative,	

<sup>1</sup> Best, 25.<sup>2</sup> *Ibid.* 434.<sup>3</sup> The classification of real, personal and documentary evidence here given is not that given in the text books, where there

seems to be some confusion between sources and instruments of evidence.

<sup>4</sup> Powell on Evid. 360.<sup>5</sup> Best, 648.<sup>6</sup> Rules of Court, xxxvii.

second-hand or reported evidence, is that which is brought from its source through an intermediate channel, as where a witness offers to prove a fact of the existence of which he has been informed by another person, or describes the condition of a thing or the contents of a document not produced; so a copy of a document is derivative evidence of the contents of the original.<sup>1</sup> Derivative evidence is called—(i) hearsay or second-hand,<sup>2</sup> when a witness makes a statement on the authority of another person (see *Declaration*, § 5); (ii) secondary or parol, when the contents of a document are brought before the Court either orally or by means of a copy; and (iii) reported, when the original source is real, as where the appearance of a thing is described by a witness. § 11. The distinction between original and derivative evidence is important with reference to the rule that where two kinds of evidence are accessible, the best evidence must be given;<sup>3</sup> hence secondary evidence of the contents of a document is not admissible if the original can be produced.<sup>4</sup> (See *Notice to Produce*.)

IV. § 12. Substantive evidence is that adduced for the purpose of proving a fact in issue, as opposed to evidence given for the purpose of discrediting a witness (that is, showing that he is unworthy of belief) or of corroborating his testimony.<sup>5</sup> (See *Discredit*.)

V. § 13. Evidence may be either intrinsic [internal] or extrinsic. Intrinsic evidence is that which is derived from a document without anything to explain it, or, as it is said, “without going beyond the four corners of the document.” The terms “intrinsic” and “internal” are not common in practice. § 14. Extrinsic or parol evidence is evidence given to explain, vary or contradict a document, being derived from some other source than the document itself.<sup>6</sup> It is called (i) explanatory evidence, where it is used for the purpose of ascertaining the meaning of the words actually used in the document, and (ii) evidence to prove intention, where the object is to show what was intended to have been, but has not been, written. The principal varieties of explanatory evidence are (a) evidence of usage to show that certain words in the document were employed in a technical sense understood by the parties,<sup>7</sup> and (b) evidence of circumstances (tautologically, “surrounding” or “collateral” circumstances), as where evidence is given of the state of a testator’s family, in order to explain the provisions of his will.<sup>8</sup> Evidence of intention is as a rule only admissible to explain latent ambiguities: thus where a testator

<sup>1</sup> Best, 26.

<sup>2</sup> Roscoe’s *Crim. Ev.* 25.

<sup>3</sup> Best, 115; see, however, as to evidence of the condition of a chattel, &c., *R. v. Francis*, L. R., 2 C. C. R. 128; Roscoe, 2.

<sup>4</sup> Where, however, a document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, a copy of or extract from it is admissible in evidence if it is either proved to have been examined with the original, or purport to be certified as a true copy or extract by the officer having the

custody of the original; stat. 14 & 15 Vict. c. 99. (See *Certified Copy*; *Copy*.)

<sup>5</sup> Best, 803, 246, 773; Roscoe, 65, where “evidence in chief” is also used as equivalent to “substantive evidence;” “evidence in chief” is more commonly used in speaking of affidavit evidence, or of evidence given on an examination in chief. (See *Affidavit*; *Examination*.)

<sup>6</sup> Wigram, *Extrin. Ev. passim*; Watson’s *Comp. Eq.* 1208.

<sup>7</sup> Best, 319.

<sup>8</sup> *Charter v. Charter*, L. R., 7 H. L. 364.

hearsay,

secondary,  
(parol),

reported.

Intrinsic.

Extrinsic  
(parol).

Evidence in  
chief.

gives a legacy to William Smith, evidence is admissible to prove which William Smith he intended.<sup>1</sup> (See *Admission*; *Confession*; *Declaration*; *Estoppel*; *Examination*; *Fact*; *Notice*; *Presumption*; *Proof*; *Res gestæ*; *Voir dire*.)

**EX PARTE.**—§ 1. In its primary sense, “ex parte,” as applied to an application in a judicial proceeding, means that it is made by a person who is not a party to the proceeding, but has an interest in the matter which entitles him to make the application. Thus in a bankruptcy proceeding or an administration action, an application by A. B., a creditor or the like, would be described as made “ex parte A. B.,” that is, on the part of A. B. § 2. In its more usual sense, *ex parte* means that an application is made by one party to a proceeding in the absence of the other. Thus an ex parte injunction is one granted without the opposite party having had notice of the application. It would not be called ex parte if he had proper notice of it, and chose not to appear to oppose it.

**EX RELATIONE** = from a narrative or information.

A case decided in a Court of justice is said to be reported *ex relatione* (or *ex rel. amici*) when the reporter derives his knowledge of it not from having been present in Court, but from notes or information communicated to him by some one who heard the case argued and decided.<sup>2</sup>

**EXAMINATION** is the interrogation of a person on oath, and is either by written interrogatories (*q. v.*) or *vivâ voce*. § 2. The commonest instance of *vivâ voce* examination occurs in obtaining evidence from witnesses, who are examined in Court or before an officer of the Court or an examiner (*q. v.*). § 3. When the evidence of the witness is obtained by oral examination, this is called the examination-in-chief; when a witness has been so examined, or has made an affidavit on behalf of the party calling him, and is then examined on behalf of the opposite party in order to diminish the effect of his evidence, this is called cross-examination, and when he is again examined by the party calling him in order to give him an opportunity of explaining or contradicting any false impression produced by the cross-examination, this is called re-examination; it is necessarily confined to matters arising out of the cross-examination.<sup>3</sup> (See *Deposition*; *Interrogatory*; *Testimony*; *Voir dire*.)

As to debts.

§ 4. Sometimes an examination is in the nature of a cross-examination, as in the case of a judgment debtor being examined as to what debts are owing to him, with a view to their being attached.<sup>4</sup> (See *Attachment*, § 5; *Garnishee*.)

<sup>1</sup> Best, 314. Numerous other classifications of evidence will be found in Best and in Bentham's works on evidence; but they have not been adopted in practice.

<sup>2</sup> See an instance mentioned in *Shattock v. Shattock*, L. R., 2 Eq. at p. 191.

<sup>3</sup> Best on Evidence, 786; Roscoe, Crim. Ev. 140; Rules of Court, xxxvii. 2, xxxviii.

<sup>4</sup> Rules of Court, xlv.; *Republic of Costa Rica v. Strousberg*, 16 Ch. D. 8.

§ 5. In bankruptcy, every bankrupt must attend the first meeting of Bankrupts. creditors to be examined with reference to his affairs. He must also pass a public examination in Court within an appointed time after the first meeting, and may at any time be summoned by the Court to be examined. The examination is limited to inquiries as to his property and trade dealings (if any).<sup>1</sup>

§ 6. Persons desirous of being admitted solicitors of the Supreme Solicitors. Court are as a rule required to pass three examinations; namely, a preliminary examination in general knowledge (English, Latin, arithmetic, &c.) before being articulated; an intermediate examination in elementary law after half the time under articles has been served, in order to ascertain the progress made by the articulated clerk in acquiring the knowledge necessary for a solicitor; and a final examination to test the fitness of the candidate to transact the business of a solicitor. The examinations are conducted by the Incorporated Law Society.<sup>2</sup> (See *Articled Clerk; Barrister; Inns of Court.*)

**EXAMINER** is a person appointed by a Court to take the examination of witnesses in an action, that is, to take down the result of their interrogation by the parties or their counsel either by written interrogatories or *vivâ voce*. (See *Examination.*) An examiner is generally appointed where a witness is in a foreign country, or is too ill or infirm to attend before the Court, and is either an officer of the Court, or a person specially appointed for the purpose. (See *Commission, § 7; Deposition; Master.*)

§ 2. There is an examiner attached to the Chancery Division of the Chancery. High Court to take the examination of deponents or witnesses. In cases requiring expedition a special examiner is frequently appointed. Under the practice of the Court of Chancery before the Judicature Acts, the evidence to be used on the hearing of a cause was taken either by affidavit or deposition before the examiner; persons so giving evidence were subject to cross-examination and re-examination.<sup>3</sup> This practice has been abolished. (See *Evidence, § 7.*)

**EXCEPT—EXCEPTION.**—§ 1. In conveyancing, an exception is a Convey- clause in a deed whereby the feoffor, donor, grantor, lessor, &c. excepts ancing. something out of that which he had granted before by the deed, so that the thing excepted does not pass by the grant. An exception must be part of the thing granted, and must be in esse at the time of the grant, while a reservation (*q. v.*) must be of some new thing issuing out of the thing granted.<sup>4</sup>

§ 2. In procedure, to except to a thing is to object to or challenge it. Procedure. Thus to except to bail or sureties is to object to their sufficiency (see

<sup>1</sup> Robson's Bankruptcy, 539.

<sup>2</sup> See the Solicitors Act, 1877, and the acts recited in the preamble.

<sup>3</sup> Hunter's Suit, 72.

<sup>4</sup> Shepp. Touch. 78; Davids. Conv. i. 95.

*Bail*, § 10; *Justification*);<sup>1</sup> and in Chancery practice, to except to an answer to interrogatories or affidavit of documents is to object to its sufficiency, which is done by applying to the Court or judge on summons or motion to consider the sufficiency of the answer or affidavit.<sup>2</sup> Formerly if a defendant to a Chancery suit put in an insufficient answer to interrogatories, the plaintiff filed exceptions, that is, objections, to it, which were set down in the cause-list and argued in Court.<sup>3</sup>

§ 3. Where, on the trial of an action by a jury, the judge misdirects the jury as to the law, or admits or rejects evidence wrongly, the party aggrieved enters an exception upon the record, and thereupon makes a motion for a new trial. (See *Direction*; *Trial*.) This is a substitute for the old proceeding by bill of exceptions<sup>4</sup> (*q. v.*).

**EXCHANGE** in its widest sense is where A. transfers property to B. in consideration of B. transferring property to A.

Of land.

At common law.

I. Exchanges of Land. § 2. At common law an exchange is the mutual conveyance of equal interests in land or other hereditaments, corporeal or incorporeal; by equal interests is meant that the quantity of estate given and taken must be equal, *e. g.*, an estate in fee simple in exchange for an estate in fee simple.<sup>5</sup> Before the stat. 8 & 9 Vict. c. 106 an exchange was effected by the mere entry of each party on the land taken by him in exchange, without livery of seisin and without deed, except in the case of hereditaments lying in grant, or of lands situate in different counties; every exchange also implied a warranty, so that if one party was evicted from his newly-acquired land owing to a defect in the title, he could re-enter on the land originally held by him. But now by the stat. 8 & 9 Vict. c. 106, every exchange must be by deed, and the implied warranty

Modern exchange.

By Inclosure Commissioners.

has been abolished.<sup>6</sup> § 3. Exchanges at common law have long been practically obsolete, and at the present day an exchange is generally effected by mutual but separate conveyances in the form of ordinary deeds of grant.<sup>7</sup> § 4. By the act 8 & 9 Vict. c. 118, provision is made for exchanges of land under the direction of the Inclosure Commissioners in cases where they have satisfied themselves by inquiries that the proposed exchange will be beneficial to the owners of the respective lands, and that the terms are just and reasonable. They thereupon make an order of exchange, which carries the arrangement of the parties into effect. An application for an exchange can be made by the person in possession of the lands,<sup>8</sup> but it is not necessary that both parties should have estates equal in duration, for the effect of the exchange is simply to substitute one piece of land for another, so that if lands belong to A. for life, with remainder to B., A. can by obtaining an order of exchange, effect an exchange with C., a tenant of other lands in fee simple; then

<sup>1</sup> Smith's Action (11th ed.), 235.

<sup>2</sup> Rules of Court, xxxi. 9; Daniell, Ch. Pr. 1680.

<sup>3</sup> Hunter's Suit, 52.

<sup>4</sup> Rules of Court, lviii. 1; Jud. Act, 1875, s. 22.

<sup>5</sup> Co. Litt. 50 a; Shepp. Touch. 289.

<sup>6</sup> Williams, R. P. 446.

<sup>7</sup> Davids. Conv. (2), 77.

<sup>8</sup> Stats. 8 & 9 Vict. c. 118, ss. 16, 147; 17 & 18 Vict. c. 97, s. 5; Williams, R. P. 326, n. (m).

C.'s lands vest in A. for life, with remainder to B. If the lands are not of equal value, the difference in value may be compensated by a perpetual rentcharge on the land which is of lesser value.<sup>1</sup>

II. Goods. § 5. An exchange of goods is a transfer of goods from A. Of goods. to B. in exchange for a transfer of goods from B. to A. Such a transaction, which hardly differs from a sale (*q. v.*), is more commonly called barter.

See *Owelly of Exchange*.

**EXCHANGE, BILL OF.** See *Bill of Exchange*.

**EXCHEQUER** is a public office, and formerly consisted of two divisions—the receipt of the exchequer and the Court of the Exchequer. The former manages the royal revenue, that is, it receives and keeps the public money, and sees that none of it is paid out except on proper authority. (See *Treasury*.) Accordingly, all the principal revenues (*e. g.*, those arising from the customs, inland revenue, the post office, &c.) are paid into the Bank of England, to the credit of the exchequer; and payments for the public service are made out of the fund thus formed. By a recent act, the audit department (or office for auditing the public accounts) has been consolidated with the exchequer, and the two departments placed under the management of a comptroller and auditor general and subordinate officers.<sup>2</sup>

§ 2. The Court of Exchequer was originally a Court having jurisdiction only in matters concerning the public revenue, *e. g.*, in suits by the crown against its debtors; but it afterwards acquired (by the use of fictitious pleadings) jurisdiction in ordinary civil actions between subject and subject. It was formerly sub-divided into a Court of Common Law and a Court of Equity; but by stat. 5 Vict. c. 5, its equitable jurisdiction (except in revenue matters<sup>3</sup>) was transferred to the Court of Chancery. And by the Judicature Acts, 1873, 1875, the jurisdiction of the Court of Exchequer, as a Court of revenue as well as a common law Court, was transferred to the High Court of Justice; the judges of the Court of Exchequer, and their successors, continued to form a division of the High Court, called the Exchequer Division, to which all causes which would formerly have been within the exclusive cognizance of the Court of Exchequer were assigned,<sup>4</sup> until the three "common law" divisions of the High Court were merged into one. (See *High Court of Justice*; *Baron*.)

Court of  
Exchequer.

**ETYMOLOGY.**—Low Latin: *scaccarium*, from the chequered cloth, resembling a chess board, which covered the table on which, when certain of the king's accounts were made up, the sums were marked and scored with counters.<sup>5</sup> (See *Cheque*, etymology.)

<sup>1</sup> Stat. 20 & 21 Vict. c. 31, s. 6. As to the exchange of benefices, see *Phill. Eccl. Law*, 502.

<sup>2</sup> Exchequer and Audit Departments Act, 1866. For details see *Homersham Cox, Inst.* 678 *et seq.*; *Steph. Comm.* ii. 528. For the history of the exchequer, see

*Madox, Exch.*; and *Gilbert, Exch.*

<sup>3</sup> *Att.-Gen. v. Halling*, 15 M. & W. 687; see *Corporation of London v. Att.-Gen.*, 1 H. L. C. 440; *Att.-Gen. v. Metr. D. Railway Co.*, 5 Ex. D. 218. (See *Information*.)

<sup>4</sup> *Jud. Act*, 1873, ss. 16, 34.

<sup>5</sup> *Bl. Comm.* iii. 44.

**EXCHEQUER BILLS** are bills issued by government for the purpose of raising temporary loans, generally in anticipation of the supplies granted by parliament, and occasionally for carrying on public works, &c.; they entitle the bearer (or the person named in each bill, if the blank left for that purpose is filled up) to the sum for which they are issued, to be paid at a time to be fixed by advertisement, with interest in the meantime.<sup>1</sup> They are negotiable instruments.<sup>2</sup>

**EXCHEQUER CHAMBER.**—The Court of Exchequer Chamber was a Court of Error (that is, a Court of Appeal) from each of the three superior Courts of common law, and consisted of the judges of the two Courts other than that whose decision was being appealed against; that is, when error was brought from a judgment of the Queen's Bench, the Exchequer Chamber consisted of the judges of the Common Pleas and Exchequer, and so on. By the Judicature Acts the Exchequer Chamber was abolished and its jurisdiction was transferred to the Court of Appeal.<sup>3</sup>

**EXCISE** is properly a duty on certain commodities, charged in most cases on the manufacturer; such are duties on spirits, malt, tobacco, &c. There also duties which, though not properly in the nature of excise, are classed under this head; such as the licences which are required to be taken out annually by those who manufacture or deal in certain goods, or carry on certain employments;<sup>4</sup> and also what are more commonly known as assessed taxes, being those payable by persons who use male servants, horses, carriages and armorial bearings.<sup>2</sup> (See *Licence*.)

**EXCLUSIVE.** See *Appointment*, § 3; *Jurisdiction*; *Power*.

**EXCOMMENGEMENT** = Excommunication<sup>6</sup> (*q. v.*).

**EXCOMMUNICATION** is an ecclesiastical punishment, being a censure (*q. v.*), whereby the person against whom it is pronounced is for the time cast out of the communion of the Church.<sup>7</sup> It is said to be of two kinds—the lesser and the greater. § 2. The lesser excommunication deprives the offender of the use of the sacraments and divine worship: this sentence was formerly passed by judges ecclesiastical, on such persons as were guilty of obstinacy or disobedience in not appearing upon a citation, or not obeying the orders or decrees of the Court; but in these cases it is no longer applicable.<sup>8</sup> § 3. The greater excommunication is that whereby men are deprived, not only of the sacraments and the benefit of divine offices, but of the society and conversation of the faithful.<sup>7</sup> It can only be pronounced as a punishment or censure for an ecclesiastical offence. If the person does not submit within forty days after the sentence of excommunication, he may be arrested and imprisoned

Lesser.

Greater.

<sup>1</sup> *Hom. Cox, Eng. Gov.* 193; *Johnston on Exch. Bills*.

<sup>2</sup> *Wookey v. Pole*, 4 B. & A. 1.

<sup>3</sup> *Steph. Comm.* iii. 333; *Jud. Act*, 1873, s. 18; *Jud. Act*, 1875.

<sup>4</sup> *Steph. Comm.* ii. 565; *Inland Revenue*

*Act*, 1880.

<sup>5</sup> *Stat.* 32 & 33 *Vict.* c. 14, part v.

<sup>6</sup> *Co. Litt.* 134 a.

<sup>7</sup> *Phillimore, Eccl. Law*, 1400; *Co. Litt.* 133 b.

<sup>8</sup> *Stat.* 53 *Geo.* 3, c. 127, s. 1.



for any time not exceeding six months by the writ of *de excommunicato capiendo* (*q. v.* and see *Significavit*).<sup>1</sup>

§ 4. In some cases the Court has no discretion, but must pass sentence of excommunication if the offender is found guilty; as where a person in holy orders is found guilty of smiting another in a church. This is sometimes called excommunication *ipso facto*.<sup>2</sup> (See *Brawling*.)

§ 5. Excommunication, as a punishment for contempt of the decrees of Ecclesiastical Courts, has been abolished, and that of contumacy (*q. v.*) substituted.

**EXECUTE—EXECUTED—EXECUTION.**—§ 1. To execute is to complete or carry into effect; execution is the act of doing so. Thus, to execute a deed is to sign, seal and deliver it (see *Deed*); and the Statute of Uses is said to execute a use when a use is carried into effect by being converted into a legal estate. (See *Use*.) As to executed contracts and trusts, see *Contract*, § 13; *Trust*.

§ 2. When a person makes an appointment under a power, he is commonly said to execute it, though the term “exercise” is more appropriate. In general a power of appointment requires to be exercised with certain formalities, *e.g.*, by deed or by will; when there is an intention to exercise a power, but the formalities have not been complied with, the power is said to be defectively executed. In certain cases, and in favour of certain persons, the High Court (following the rules of the Court of Chancery) will aid or supply the defective execution of a power; that is, consider it as having been properly executed, notwithstanding a defect in the formalities, as where there is merely an agreement to execute it, or where it is executed by will instead of by deed; this is sometimes called an equitable execution.<sup>3</sup> See also stat. 7 Will. 4 & 1 Vict. c. 26, as to the exercise of powers by will, and stat. 22 & 23 Vict. c. 35, as to the exercise of powers by deed.

§ 3. To execute a judgment or order of a Court is to carry it into effect or enforce it. In actions in the High Court, judgments are principally enforced by writs called writs of execution, which direct the sheriff or other persons either to do what is required to perform the judgment (*e.g.*, to deliver possession of land to a successful plaintiff), or to compel the defendant or other person to do some act which he is required to do.<sup>4</sup> (See the titles *Fieri facias*; *Elegit*; *Distingas*; *Capias*; *Sequestration*; *Writ*; *Return*.) In ordinary parlance, “execution” means execution to recover a debt, that being the most important kind, and hence a creditor or debtor, by or against whom execution has been issued, is called an execution creditor or debtor. (See *Creditor*; *Debtor*.)

§ 4. Continuing execution is where the process continues until all

Execution of power.

Defective execution.

Execution of judgment.

Continuing execution.

<sup>1</sup> Stat. 53 Geo. 3, c. 127, s. 3.

<sup>2</sup> Stat. 5 & 6 Edw. 6, c. 4; Phill. 1401.

<sup>3</sup> Watson's Comp. Eq. 814; Sugden on

Powers; 530, 549.

<sup>4</sup> Rules of Court, xlii. *et seq.*; Co. Litt.

289 a.

that has been commanded to be levied is levied; as in the case of a *sequestrari facias*.<sup>1</sup>

Equitable execution.

§ 5. In some cases a judgment may be enforced by means formerly peculiar to Courts of Equity, and hence called equitable execution. Thus, if a judgment debtor has an equity of redemption in land (an interest which could not be taken in execution at common law), the Court will appoint a receiver of the rents, profits and surplus proceeds of sale of the property for the benefit of the creditor.<sup>2</sup>

Quasi-execution.

§ 6. There are also some other kinds of proceedings available to enforce or satisfy a judgment, which are hence usually treated of under the head of execution; such are charging orders, distringas on stock, attachment of debts, &c. (see those titles).

Railway stock and plant.

§ 7. The Railway Companies Act, 1867, enacts that the rolling stock and plant of a railway company shall not be liable to be taken in execution; but a judgment creditor of the company may obtain the appointment of a receiver or manager of the company's undertaking; and the net income of the company is then applied in payment of its debts.<sup>3</sup>

Criminal execution.

§ 8. In criminal proceedings, judgment against a prisoner is executed by the sheriff, who causes him to be imprisoned, sent to penal servitude, hanged, or otherwise dealt with according to the sentence. The term execution, however, is commonly applied to execution of judgment of death by hanging, which is now effected within the walls of the prison where the offender is confined.<sup>4</sup>

Execution of writ.

§ 9. To execute a writ is to obey the instructions contained in it: thus, a writ of *fi. fa.* is executed by seizing and selling the goods of the debtor. (See *Return*.) Writs are executed either personally, that is, by the persons to whom they are directed, or by a substitute appointed by warrant (*q. v.*).

**EXECUTOR.**—§ 1. An executor is the person to whom the execution of a will of personal estate, that is, the duty of carrying its provisions into effect, is confided by the testator. The duties of an executor are to bury the deceased, to collect the estate, and, if necessary, convert it into money; to pay the debts in their proper order, then to pay the legacies, and distribute the residue among the persons entitled. For these purposes he may bring actions against persons who are indebted to the testator, or are in possession of property belonging to the estate. Some of these things, however, can only be done by him after he has proved the will. (See *Probate*.) When several executors are appointed, and only some of them prove the will, these are called the proving or acting executors.<sup>5</sup>

§ 2. Married women and infants may be appointed and act as executors.

<sup>1</sup> Smith's *Action* (11th edit.), 398.

<sup>2</sup> *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Ex parte Evans*, 13 Ch. D. 252.

<sup>3</sup> As to when this power will be exercised, see *In re Manchester and Milford Railway Co.* 14 Ch. D. 645.

<sup>4</sup> Stats. 31 Vict. c. 24; 24 & 25 Vict. c. 100; Archbold, Cr. Pl. 649; Steph. Comm. iv. 478.

<sup>5</sup> Williams, Exec. 218; Bl. Comm. ii. 503; Browne, Prob. Pr. 207.

In the case of an infant, however, letters of administration *durante minore ætate* require to be taken out to carry on the administration of the estate until he attains majority. (See *Grant*.)

§ 3. An executor nominate is one appointed expressly by the word "executor;" an executor according to the tenor of the will is one appointed by inference; for if by any words the testator recommends or commits to a person the rights and duties which appertain to the office of executor (as where he says, "I commit all my goods to the disposition of A. B."), it is equivalent to an express appointment.<sup>1</sup>

Nominate,  
according to  
the tenor.

§ 4. An executor *de son tort* (*de son tort demesne*, of his own wrong) is one who, being neither executor nor administrator, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor. When a man has so acted, he renders himself liable, not only to an action by the rightful executor or administrator, but also to be sued by a creditor or legatee of the deceased.<sup>2</sup> He has all the liabilities, though none of the privileges, which belong to the character of executor.<sup>3</sup>

De son tort.

§ 5. An executor is allowed a year to realize the testator's estate before being bound to distribute it. Consequently interest does not begin to run on legacies until after the expiration of a year from the testator's death, unless the will contains some special directions on the subject.

Executor's  
year.

As to the payment of debts and distribution of the estate, see *Administration*, § 2; *Assets*. Strictly speaking, an executor is bound to satisfy all just claims on the estate before distributing it among the legatees and other beneficiaries, whether he has had notice of such claims or not, and also to provide for all future and contingent liabilities arising out of the testator's estate, such as calls on shares, rents and covenants under leases and the like. These responsibilities, however, have been considerably reduced by the modern statutes referred to, *infra*, §§ 8 *et seq.*

§ 6. Where a testator charges his real estate with the payment of his debts or legacies, and does not make any express provision for raising them, his executor may do so by sale or mortgage of the lands, unless the testator has devised them in such a manner that his whole estate and interest in them has become vested in trustees, in which case they are the persons to exercise the power of sale or mortgage.<sup>4</sup> No such implied or statutory power, nor an express power to sell real estate, can be exercised by an administrator, even if acting under letters of administration with the will annexed.<sup>5</sup>

Power to sell  
lands for pay-  
ment of debts  
and legacies.

§ 7. If an executor dies before the estate is completely administered, having by his will appointed an executor, the executor so appointed is also executor of the original testator. But if an executor dies without having appointed an executor, letters of administration *de bonis non* must

Transmission  
of office.

<sup>1</sup> Williams, 230; Browne, 133; *In the goods of Bell*, 4 P. D. 85.

<sup>2</sup> Williams, 247 *et seq.*

<sup>3</sup> *Ibid.* 255. As to the meaning of the obsolete expressions *executor a lege constitutus*, and *executor ab episcopo constitutus*, or *executor dativus*, see *ibid.* 218.

<sup>4</sup> Stat. 22 & 23 Vict. c. 35, ss. 14—16; and see stat. 23 & 24 Vict. c. 145. As to the implied power of executors to sell independently of the statute, see Williams, R. P. 221; Shelford, R. P. Stat.

<sup>5</sup> *In re Clay and Tetley*, 16 Ch. D. 3.

be taken out. (See *Grant*.) Frequently the office of trustee is combined with that of executor. (See *Trustee*.)

Statutory powers.

Numerous powers have been conferred on executors by modern acts of parliament, the principal of which are as follows.

§ 8. Under stat. 22 & 23 Vict. c. 35, s. 29, where an executor or administrator has given such or the like notices for creditors and others to send in to him their claims against the estate of the testator, as would have been given by the Chancery Division of the High Court in an action to administer the testator's estate, then the executor may, at the expiration of the time named in the notices, distribute the assets without being liable for any claims of which he has not received notice: but this provision does not affect the right of any creditor or claimant to follow the assets into the hands of any person who may have received them (*e.g.*, a legatee).<sup>1</sup> Notices to creditors under this section are given by advertisement in the London Gazette and the principal newspapers circulating in the places where the testator resided and carried on business.

Liabilities under leases, &c.

§ 9. Under stat. 22 & 23 Vict. c. 35, s. 27, where an executor or administrator has assigned to a purchaser a lease held by the testator, he is not bound to set aside a fund to answer future claims under the lease, unless it contains a covenant or agreement by the lessee to lay out a fixed sum on the property at some future time, in which case he is bound to set aside a sufficient fund for the purpose. But this provision does not affect the right of the lessor to follow the assets of the deceased into the hands of the persons among whom they have been distributed.<sup>2</sup>

Petition for opinion of the Court.

§ 10. Under sect. 29 of the same act, an executor, administrator or trustee may, without the institution of an action, apply by petition or summons to a judge of the Chancery Division, for the opinion, advice or direction of the Court on any question respecting the management or administration of the assets, and he is protected from responsibility if he acts upon the opinion, advice or direction thus given, provided it was obtained without misrepresentation or concealment.<sup>3</sup>

Power to compromise, &c.

§ 11. Under stat. 23 & 24 Vict. c. 145, s. 27, executors are empowered to pay debts or claims upon any evidence they think sufficient, and to accept any composition or security for any debts due to the deceased, and to allow time for payment of any debts, and also to compromise, compound or submit to arbitration all debts, accounts, claims, &c. relating to the estate of the deceased, without being responsible for any loss occasioned thereby.<sup>4</sup> (See *Will*; *Syndic*; *Renunciation*.)

§ 12. If notwithstanding these provisions an executor cannot safely administer an estate without the supervision of the Court, he may institute an action in the Chancery Division for the administration of the estate, in which he will act in accordance with the directions of the Court, and thus escape responsibility. (See *Action*, § 9, and the titles there referred to, and title *Discretion*.)

<sup>1</sup> Shelford, 720.

<sup>2</sup> *Ibid.* 718; sect. 28 contains a similar provision as to lands held by a testator in

fee simple subject to rent-charges or the like.

<sup>3</sup> Shelford, 721.

<sup>4</sup> *Ibid.* 740.

**EXECUTORY** is that which remains to be carried into effect, as opposed to executed (*q. v.*). (See *Bequest*, § 3; *Consideration*, § 5; *Contract*, § 13; *Devise*, § 3; *Executory Interests*; *Trust*.)

**EXECUTORY INTERESTS.**—§ 1. The term “executory interests” includes all future estates and interests in land or personalty, other than reversions and remainders.

§ 2. As to executory interests in land, they are created either under *In land*; the Statute of Uses or by will. Executory interests under the Statute *by way of use*, of Uses are created by springing or shifting uses, a common instance of which occurs in an ordinary marriage settlement. Thus, supposing A. to be the settlor, the lands are conveyed by him to the trustees B. and C. and their heirs, to the use of A. and his heirs until the intended marriage shall be solemnized, and immediately after the solemnization thereof to the use of D., the intended husband, for life, and so on. Until the marriage takes place, A. continues to be tenant in fee simple of the land, and D. has an executory interest; it is not a contingent remainder, for the estate which precedes it, that of A., is an estate in fee simple. As soon as the marriage takes place, the seisin of the land shifts away from A., and vests in D. for his life.<sup>1</sup>

§ 3. Executory interests in land created by will are called executory *by will*. devises. (See *Devise*, § 3.)

§ 4. Executory interests in personalty are created either by conveyance *In person-* *alty.* inter vivos or by will; in the latter case they are sometimes called executory bequests,<sup>2</sup> formerly executory devises.<sup>3</sup> In the wide sense of the word, “executory interest” includes interests in personal property analogous to remainders and reversions in land; but such interests are sometimes called remainders and reversions, as if they were estates in land. Thus, if stock is transferred or bequeathed to trustees in trust for A. for life, and after his death to B., the interest of B. might be called either a remainder or an executory interest.

§ 5. Executory interests must not transgress the rule against perpetuities, or the provisions of the Thellusson Act. (See those titles.)

**EXECUTRIX** is a female executor.

**EXEMPLARY.** See *Damages*, § 4.

**EXEMPLIFICATION** is an official copy of a document made under the seal of a Court or public functionary. Thus, an exemplification of a will or probate is a copy under the seal of the Probate Division of the High Court; an exemplification of letters-patent, or of a private act of parliament, is under the great seal. An exemplification is admissible evidence to prove the original document.<sup>1</sup> (See *Copy*; *Inspeximus*.)

<sup>1</sup> Wms. R. P. 279.

<sup>2</sup> Wms. P. P. 260.

<sup>3</sup> Fearn, Cont. Rem. 418.

<sup>4</sup> Co. Litt. 98 b, note, 225 b.

**EXEQUATUR** is a permission by a government to the consul of another State to enter upon the discharge of his functions in the country of the government giving the exequatur.<sup>1</sup>

**EXERCISE** is to make use of: thus, to exercise a right or power, is to do something which it enables me to do. A power of appointment is exercised by making an appointment under it. (See *Enjoyment*; *Execution*, § 2.)

**EXHIBIT.**—When it is wished to put a document or moveable thing in evidence by affidavit, a reference to it is made in the affidavit, as being marked in some way for identification, and as having been produced to the deponent at the time of his swearing the affidavit: the document is marked in the way mentioned in the affidavit, generally with some letter of the alphabet; a memorandum referring to the affidavit is also written on it, and signed by the commissioner or person before whom the affidavit is made. The document is thenceforth called an exhibit, from the Latin *exhibere*, “to produce or show.”<sup>2</sup> It is not filed with the affidavit.

**EXIGENT**, or **EXIGI FACIAS**, is a judicial writ used in obtaining the outlawry of a person; it requires the sheriff to exact the defendant, *i. e.*, to call on him at five successive sheriff’s County Courts (or, in the city of London, at five successive hustings) to appear and answer the plaintiff; if he makes default after being exacted five times, he is outlawed.<sup>3</sup> (See *Outlaw*.)

**EXONERATION** is where a person or estate is relieved from a liability, by the liability being thrown on another person or estate. The term is chiefly, if not exclusively, used with reference to questions arising in the administration of estates of deceased persons: thus, if a testator directs his debts to be paid primarily out of his real estate, this exonerates his personalty from liability to the debts.<sup>4</sup> So, if a married woman joins in mortgaging her land to secure money raised for the benefit of her husband, she is entitled on his death to be exonerated from the charge by causing the debt to be paid out of her husband’s estate.<sup>5</sup>

As to the exoneration of the personal estate of a deceased person from the liability to satisfy a mortgage debt charged on his real estate, see *Locke King’s Act*; also *Contribution*; *Marshalling*.

**EXONERETUR**, in an action in the Mayor’s Court, is an entry made on the recognizance of bail, when the action has been withdrawn

<sup>1</sup> Manning’s Law of Nations, 113.

<sup>2</sup> Hunter’s Suit, 80.

<sup>3</sup> Chitty, Pr. 1311.

<sup>4</sup> *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454; White & Tudor’s L. C. i. 564;

Watson’s Comp. Equity, 1321; *Forrest v. Prescott*, L. R., 10 Eq. 545.

<sup>5</sup> Fisher on Mortgage, ii. 682; White & Tudor’s L. C. ii. 919.

or settled,<sup>1</sup> and operates as a discharge of the bail from their liability. § 2. In the days when arrest on mesne process existed in ordinary actions in the superior Courts, an exoneretur was entered on the bail-piece or filacer's book, if the defendant was rendered to prison, because the bail were thereby discharged.<sup>2</sup> (*Exoneretur* = "Let him be discharged.")

**EXPATRIATION** takes place when a person loses his nationality, and renounces his allegiance to his native country by becoming the subject of a foreign State. Expatriation by a British subject has been made possible by the Naturalization Act, 1870.<sup>3</sup> (See *Exuere Patriam*; *Naturalization*; *Repatriation*.)

**EXPECTANT HEIR.**—An expectant heir, in the language of equity, is a person who, having a reversionary right or hope of succession to property, but little or no property immediately available, is exposed to the temptation of selling or mortgaging his right or expectation on unreasonable terms (*e. g.*, for much below its value, or at a usurious rate of interest), and is therefore considered as entitled to the protection of the Court against the enforcement of such "catching bargains," as they are called.<sup>4</sup> Thus, where a man twenty-six years of age entitled to a reversion of 600*l.*, but wholly without present means, applied to a money-lender, who advanced him 85*l.* on a mortgage of the reversion for 100*l.*, with a provision that if default should be made in payment of the 100*l.*, it should bear interest at 5 per cent. per month; it was held, that the mortgagor was entitled to a decree for redemption of his reversion on payment of the sum borrowed and simple interest at 5 per cent. per annum.<sup>5</sup> The term "expectant heir" is used, not in its literal meaning, but as including every one who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and everyone who has the hope of succession to the property of an ancestor, either by reason of his being the heir apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative.<sup>6</sup> (See *Reversionary*; *Undue Influence*; *Fraud*, § 8.)

**EXPOSING.** See *Abandonment*, § 3.

**EXPRESS.**—An act evidencing intention is said to be express when it is done with the direct object of communicating the intention, as opposed to implication (*q. v.*). The communication may be effected by speech, writing or gestures: thus a promise in these words, "I promise

<sup>1</sup> Brandon, For. Attach. 109.

<sup>2</sup> Tidd, Pr. 288.

<sup>3</sup> *Udny v. Udny*, L. R., 1 Sc. & D. App. 441.

<sup>4</sup> *Earl of Chesterfield v. Janssen*; White & Tudor, L.C. i. 483; Pollock on Contract,

529; *Earl of Aylesford v. Morris*, L. R.,

8 Ch. 484; *Nevill v. Snelling*, 15 Ch. D. 679.

<sup>5</sup> *Beynon v. Cook*, L. R., 10 Ch.

<sup>6</sup> *Ibid.*, 391, n. (1). See also *O'Rorke v. Bolingbroke*, 2 App. Ca. 814.

to pay you 50*l.*," is express, whether verbal or written; if A. signifies his assent to a proposal by nodding or other gestures, the communication is still express; therefore the acceptance of a bid by an auctioneer is express when it is evidenced by the fall of his hammer.<sup>1</sup> (See *Constructive Implication; Tacit.*)

**EXPROPRIATION** is compulsorily depriving a person of a right of property belonging to him in return for a compensation.<sup>2</sup> The term has been introduced from its use in foreign countries to denote a compulsory purchase of land, &c. for the purposes of a railway, canal, or the like ("expropriation pour cause d'utilité publique").<sup>3</sup>

**EXTEND—EXTENT.**—§ 1. To extend is to make a valuation of property by the oath of a jury, pursuant to a writ issued for that purpose. An extent is (1) the valuation thus made, which is embodied in an inquisition by the sheriff or other person executing the writ,—the most usual instance occurs under a writ of *elegit* (*q. v.*); (2) a writ of execution, sometimes also called a writ of *extendi facias* ("that you cause to be extended"), directing an extent to be made. Writs of extent are now rare; they were formerly issued either for the crown or a subject.<sup>4</sup>

I. Extents to recover debts due to the crown are of two kinds, in chief and in aid.

Extent in chief.

§ 2. An extent in chief is an adverse proceeding by the crown for the recovery of a debt of record due to it. It issues in the first place against the crown's immediate debtor, and directs the sheriff to extend and seize his real and personal property, including debts due to him by other persons, to enforce payment of which an "extent in the second degree" may be issued against them, and so on.<sup>5</sup>

Extent in aid.

§ 3. An extent in aid is one sued out at the instance and for the benefit of a debtor to the crown, for the recovery of a debt due to himself, the crown being merely the nominal plaintiff. To obtain an extent in aid, an extent *pro formâ* is first sued out against the debtor to the crown, and on the sheriff returning that another person is indebted to him, the extent in aid issues against the sub-debtor.<sup>6</sup>

Extent *pro formâ*.

Immediate extent.

§ 4. An immediate extent is one which issues in urgent cases without the usual preliminary of a *scire facias* (*q. v.*), on proof that the debt is in danger of being lost.<sup>7</sup> If there is any question as to the existence of the debt, or as to whether the property seized under the writ belongs to the debtor, it is raised by pleading either to the *scire facias*, or to the return of the writ of extent.<sup>8</sup> (See *Plea.*)

<sup>1</sup> See generally on the subject, Savigny, Syst. iii. 242 *et seq.*

<sup>2</sup> St. Bonnet, Dict. s. v.; Holtz. Encyc. s. v.

<sup>3</sup> *Ibid.*; *Mayor, &c. of Montreal v. Drummond*, 1 App. Cas. 384.

<sup>4</sup> Tidd's Pr. 1045; stat. 33 Hen. 8, c. 39; 13 Eliz. c. 4; Crown Suits Act, 1865, s. 48. See a modern instance of an

extent at the suit of the Postmaster-General, *In re Bonham*, 10 Ch. D. 595.

<sup>5</sup> Tidd's Pr. 1058.

<sup>6</sup> *Ibid.* 1063. See stat. 57 Geo. 3, c. 117, restricting the issue of extents in aid.

<sup>7</sup> Tidd's Pr. 1046; Crown Suits Act, 1865, s. 47.

<sup>8</sup> Manning's Exch. Pr. 97.



II. § 5. Extents, or writs in the nature of extents, were formerly issued as writs of execution for private persons, either (1) to obtain satisfaction of a debt due on a recognizance (*e. g.*, a statute merchant); or (2) to levy execution against lands descended to an heir under a judgment recovered against him on an obligation or bond entered into by his ancestor.<sup>1</sup> (See *Diem clausit extremum*; *Liberate*; *Venditioni exponas*; *Amoveas Manus*; *Quietus*.)

Extents on recognizances, &c.

**EXTERRITORIALITY.** See *Extraterritoriality*.

**EXTINGUISHMENT.**—A right or obligation is said to be extinguished when it ceases to exist. Thus, a debt is extinguished when it is paid, and an easement may be extinguished in several ways, as by release, abandonment, &c.; but the term extinguishment is applied especially to the case of an easement ceasing to exist from unity of possession—that is, where the dominant and the servient tenements become united in the same person for an estate in fee simple.<sup>2</sup> Compare *Suspension*; *Merger*.

**EXTORTION** is the misdemeanor committed by a public officer, who, under colour of his office, wrongfully takes from any person any money or valuable thing. It is punishable by fine and imprisonment, and removal from office.<sup>3</sup>

As to extortion of money, &c. by threats, see stat. 24 & 25 Vict. c. 96, ss. 44 *et seq.*<sup>4</sup>

See *Oppression*; *Duress*.

**EXTRADITION.**—§ 1. Where a person, who has committed a crime in one country, takes refuge in another, and is delivered up by the latter to the former for the purpose of being tried and punished, this delivery up or surrender is called extradition.

§ 2. At common law it seems clear that the English Courts had no jurisdiction over persons who had committed crimes in foreign countries, and that any person arrested on such an accusation was entitled to be discharged under a writ of habeas corpus. To remedy this, various acts have been passed, beginning with 6 & 7 Vict. cc. 75, 76, confirming or authorizing treaties of extradition between Great Britain and foreign countries. Such treaties contain reciprocal obligations on the part of each country to deliver up fugitive criminals. These acts have been repealed by the Extradition Act, 1870, and that act, as amended by the Extradition Act, 1873, contains the existing law on the subject. They provide for the application of the acts to foreign States with which arrangements have been made for the surrender of fugitive criminals, and

Common law.

Extradition Acts, 1870-3.

<sup>1</sup> Tidd's Pr. 1089. As to extents generally, see also Manning's Exchequer; 3 Wms. Saund. ii. 220; West on Extents, *passim*.

<sup>2</sup> Gale on Easements, 581.

<sup>3</sup> Russell on Crimes, i. 303, 307; Stephen's Crim. Dig. 71.

<sup>4</sup> Stephen, 227.

define the offences for which they may be surrendered. They also provide that no criminal shall be surrendered for a political offence, or for the purpose of being tried for any other than the "extradition offence," that is, the offence for which he is surrendered.

**Procedure.**

§ 3. To obtain the extradition of a fugitive criminal in England, a requisition is made to a Secretary of State by a diplomatic representative of the State requiring the surrender. The Secretary of State signifies this requisition to a police magistrate, who, after hearing *prima facie* evidence in support of the application, issues a warrant for the apprehension of the accused. If, on the hearing of the case, sufficient evidence is produced (such evidence, namely, as would justify the committal for trial of an offender against the English law), the magistrate commits the accused to prison. A period of fifteen days is allowed to elapse, to enable the prisoner to apply for a writ of habeas corpus, if he is so advised. If no such application is made, or, if made, is unsuccessful, the Secretary of State makes out a warrant on which the criminal is surrendered to the foreign State.<sup>1</sup>

**EXTRATERRITORIALITY.**—The fiction of extraterritoriality is that by which the persons and residences of ambassadors and sovereigns, when abroad, are treated as being within their own territory, and outside of (*extra*) the territory where they actually are. The fiction is not now of much importance except with reference to the exemption of ambassadors from process, &c.<sup>2</sup>

**EXTRAJUDICIAL** means (1) something which is done without judicial proceedings—as, when we speak of extrajudicial evidence (see *Evidence*, § 1), or say that a distress is an extrajudicial remedy (see *Remedy*); (2) something which is said by a judge or judicial officer in a judicial proceeding, but beyond its scope. Thus, a dictum (*q. v.*) is an extrajudicial opinion.

**EXTRAORDINARY.**—The writs of mandamus, quo warranto, habeas corpus, and some others, are sometimes called extraordinary remedies, in contradistinction to the ordinary remedy by action.

As to extraordinary resolutions, see *Resolution*. As to the extraordinary jurisdiction of the County Courts, see *County Court*, §§ 2, 5.

**EXTRAVAGANTES.** See *Canon Law*.

**EXTRINSIC.** See *Evidence*, § 13.

**EXUERE PATRIAM** is to cast off one's nationality, to expatriate oneself.<sup>3</sup> (See *Expatriation*.)

<sup>1</sup> Clarke on Extradition, *passim*.

<sup>2</sup> See Westlake, *Priv. Int. Law*, 114. In the new edition of his book, Mr. Westlake calls it *extraterritoriality*. Wheaton,

*Intern. Law*, § 95.

<sup>3</sup> *Udny v. Udny*, L. R., 1 Sc. & D. App. 441; *Moorhouse v. Lord*, 10 H. L. C. 272.

**EYRE**, or **EIRE** (from the Latin *iter*, a journey), signified the Court of the justices itinerant or justices in eyre, who were regularly established, if not first appointed, by the parliament of Northampton, 1176, in the twenty-second year of Henry the Second, with a delegated power from the king's great Court or *Aula Regia*, being looked upon as members thereof; and they made their circuit round the kingdom once in seven years, for the purpose of trying causes. They were afterwards directed by Magna Charta to be sent into every county once a year; but "as the power of the justices of assize, by many acts of parliament and other commissions increased, so these justices itinerant by little and little vanished away."<sup>1</sup> (See *Assize*, § 3.)

## F.

**FACT.**—§ 1. The existence of every right and liability depends on two questions: first, whether there is a rule of English law that in certain circumstances that right or liability shall arise; and secondly, whether those circumstances exist in the particular case under discussion. The former is called a question of law, the latter a question of fact. Thus the right of C. B., the eldest son of A. B., to succeed to the land of his deceased father, depends first on the rule of law that, unless it is subject to a peculiar rule of descent (*e.g.*, gavelkind, borough-English, or the like), the land of an intestate person descends to his eldest son; and secondly, on various questions of fact, such as whether the land is situated in a district subject to a peculiar rule of descent, whether A. B. died intestate as to that land, and whether C. B. is his eldest legitimate son, which again involves other questions of fact or law, or both.<sup>2</sup>

§ 2. Questions of foreign law (including Scotch, Irish, and colonial Foreign law.) are questions of fact in the English Courts, requiring to be proved by the evidence of persons professionally familiar with the system of law in which the question arises, or by the opinion of a Court administering that law, given on a case submitted to it under the stat. 22 & 23 Vict. c. 63, or 24 Vict. c. 11. (See *Case*, § 2.)

§ 3. The distinction between questions of fact and law is of im- Pleading. portance in the law of pleading, because a party is bound to state the material facts upon which he relies (but not the evidence in support of them), while questions of law need not and must not be pleaded.<sup>3</sup> Questions of law may be raised by demurrer, special case, or on motion for judgment (see those titles). When a question of law is raised at the trial of an action by a jury, it is decided by the judge, and the questions of fact are decided by the jury, the rule being that "ad quæstionem facti non respondent iudices; ad quæstionem juris non respondent juratores." It not unfrequently happens that the pleadings raise a mixed question of law and fact (*e.g.*, whether the defendant has Mixed ques- tion of law and fact.

<sup>1</sup> Co. Litt. 293 a; Steph. Comm. iii. 349.

<sup>2</sup> See per Jessel, M.R., in *Eaglesfield v. Marquis of Londonderry*, 4 Ch. D. 702;

*Bolton v. London School Board*, 7 Ch. D. 766.

<sup>3</sup> Rules of Court, xix.; *Stokes v. Grant*, 4 C. P. D. 25.

libelled the plaintiff), and then either the judge directs the jury as to the law, leaving them to give their verdict for one party or the other on the facts as proved, subject to the direction so given, or the jury may bring in a special verdict finding the facts of the case, on which judgment is given by the Court for one party or the other, according to the law applicable to the facts so found.<sup>1</sup> (See *Further Consideration*, § 3; *Verdict*.)

## Evidence.

§ 4. In the law of evidence, facts are sometimes divided into (i) facts in issue (also called principal facts, *facta probanda*), or those facts which are required to be proved, and (ii) evidentiary facts (*facta probantia*), or those facts which are given in evidence with the view of proving the former. Where the fact given in evidence is the same as the fact in issue, the evidence is said to be direct; as where a witness on a trial for murder proves that he saw the prisoner kill the deceased.<sup>2</sup> (See *Evidence*, § 3.)

Juridical,  
non-juridical.  
Investitive,  
divestitive,  
translative.

§ 5. In jurisprudence, facts are variously divided into juridical and non-juridical, according as they do or do not give rise to or affect legal rights and duties;<sup>3</sup> and, by the Benthamite school, into investitive facts (those by means of which a right comes into existence), divestitive facts (those by which it terminates), and translative (those by means of which it passes from one person to another).<sup>4</sup>

**FACTOR.**—§ 1. A factor is an agent to whom goods are consigned or delivered for sale by or for a merchant or other person, and who in return for his trouble receives a compensation called factorage or commission.<sup>5</sup> He has a lien for this remuneration on all the goods entrusted to him by his principal. (See *Lien*.) “Factor” is also sometimes used (especially in the old books) to denote an agent for the purchase of goods; but at the present day this kind of agent seems to be more commonly called a commission agent or commission merchant. (See *Agent*, § 5.) § 2. The general rule (independently of the Factors Acts, and the doctrine of market overt (*q. v.*)) seems to be that a factor is a general agent; and therefore if goods are entrusted to him as factor, and he sells them, such a sale will bind the principal, whatever his private instructions may have been, unless the purchaser knew of them at the time.<sup>6</sup> (See *Agent*, § 6.)

**FACTORS ACTS** are various statutes<sup>7</sup> passed for the purpose of enabling a person in the possession of goods, or documents of title to goods, to validly sell or pledge the same, notwithstanding they may have been entrusted to him for a different purpose, or may have been already

<sup>1</sup> Best on Evidence, 103; Powell on Evid. 10.

<sup>2</sup> Best on Evidence, 9.

<sup>3</sup> Savigny, Syst. iii. 3; Ahrens, Jur. Encycl. i. 345.

<sup>4</sup> Bentham, iii. 189; and see the remarks of Austin and Holland on the subject. Also the various attempts (more or less unsuccessful) which have been made to define and classify facts; *e. g.*, Bentham,

vi. 214; Steph. Evid. Dig. 1; Steph. Indian Evid. Act, 14; Holland's Jurisp. 71.

<sup>5</sup> Russell's Merc. Agency, 1; Chitty on Contracts, 189.

<sup>6</sup> Russell, 64.

<sup>7</sup> Stats. 40 & 41 Vict. c. 39; 5 & 6 Vict. c. 39; 6 Geo. 4, c. 94; 4 Geo. 4, c. 83; Chitty on Contracts, 199; Smith, Merc. Law, 133.

sold by him to someone else, or may be subject to a lien in favour of the person from whom he has bought them, or that his agency may have been revoked—the object being to protect persons having *bonâ fide* dealings with a factor or agent, without notice of the limitation on his power to deal with the goods.

**FACTORIES.**—The Factory and Workshop Act, 1878, contains provisions for protecting the health and lives of persons employed in such establishments, for regulating the employment of children, young persons and women, and for the inspection of factories and workshops. (See *Fence*, § 3.)

**FACTUM PROBANDUM—FACTUM PROBANS.** See *Fact*, § 4.

**FACULTY**, in ecclesiastical law, is a licence to do some act, granted by the ordinary of the diocese or his deputy. Strictly speaking, a monument cannot be erected in a church or churchyard without a faculty, though it is not in practice often applied for.<sup>1</sup> A notary public is appointed by faculty.<sup>2</sup>

The Archbishop of Canterbury has a Court called the Court of Faculties, and an officer called the Master of the Faculties, who deals with applications for the admission and removal of notaries.<sup>3</sup> The judge of the Provincial Courts of Canterbury and York is now *ex officio* Master of the Faculties.<sup>4</sup>

**FAINT.** See *Action*, § 23.

**FAIR.**—The right to hold a fair is a franchise (*q. v.*),<sup>5</sup> and is analogous to the right of holding a market (*q. v.*).

**FALDAGE** is the same as foldage and free-fold (*q. v.*).<sup>6</sup>

**FALSE CHARACTER.**—Personating the master or mistress of a servant, or any representative of such master or mistress, and giving a false character to the servant, is an offence punishable with a fine of 20*l.*<sup>7</sup>

**FALSE IMPRISONMENT** is where a total restraint for some period, however short, is put upon the liberty of a person without sufficient legal authority. Thus, if a constable arrests a man for felony

<sup>1</sup> Phillimore, *Eccl. Law*, 882. As to faculties for pulling down churches, see the Church Building Act, 1845, s. 1; stat. 32 & 33 Vict. c. 94, s. 8.

<sup>2</sup> *Ibid.* 1232.

<sup>3</sup> *Ibid.*; Third Inst. 337.

<sup>4</sup> Public Worship Regulation Act, 1874, s. 7.

<sup>5</sup> Bl. Comm. ii. 38; Markets and Fairs Clauses Act, 1847; Fairs Act, 1871, giving the Secretary of State power to abolish fairs.

<sup>6</sup> Elton on Commons, 45, 46; Co. Litt. 6a, n. (1).

<sup>7</sup> Stat. 32 Geo. 3, c. 56.

without warrant and without reasonable cause for suspecting him, he is liable to an action of damages for false imprisonment.<sup>1</sup> (See *Tort*.)

**FALSE JUDGMENT.** See *Writ of False Judgment*.

**FALSE LIGHTS AND SIGNALS.**—Exhibiting false lights or signals, with intent to bring any ship into danger, is felony, punishable with penal servitude for life (maximum).<sup>2</sup>

**FALSE NEWS.**—Spreading false news, whereby discord may grow between the Queen and her people, or the great men of the realm, or which may produce other mischiefs, still seems to be a misdemeanor under stat. 3 Edw. I, c. 34.<sup>3</sup>

**FALSE PRETENCE,** in criminal law, is a false representation that some fact exists or has existed. Obtaining goods, money, &c. by false pretences with intent to defraud is a misdemeanor, the maximum punishment for which is five years' penal servitude.<sup>4</sup> Obtaining credit by false pretences is also a misdemeanor punishable with twelve months' imprisonment.<sup>5</sup>

**FALSE RETURN.**—An action of damages lies against a person who makes a false return to a writ, whether a sheriff acting under an ordinary writ of execution, or a person to whom a special writ, such as a mandamus, is directed. A false return may consist in a suppressio veri, as well as an allegatio falsi.<sup>6</sup>

**FALSE SWEARING** is the misdemeanor committed by a person who swears falsely before any person authorized to administer an oath upon a matter of public concern, under such circumstances that the false swearing would have amounted to perjury if committed in a judicial proceeding; as where a person makes a false affidavit under the Bills of Sale Acts.<sup>7</sup>

**FALSIFY.**—§ 1. Where an account is being investigated in the Chancery Division, and the party at whose instance it is taken shows that an item of payment or discharge contained in it is false or erroneous, he is said to falsify it.

If an account has been stated or settled between the parties and one of them afterwards impugns it, the Court may either re-open the whole account, or merely give liberty to "surcharge and falsify." In the former case the accounting party has the onus of showing that the account is

<sup>1</sup> Underhill on Torts, 105; Broom, C. C. L. 722. As to the protection of justices of the peace see stat. 11 & 12 Vict. c. 44.

<sup>2</sup> Stat. 24 & 25 Vict. c. 97, s. 47.

<sup>3</sup> Steph. Crim. Dig. § 95.

<sup>4</sup> Stephen's Crim. Dig. 246; stat. 24 & 25 Vict. c. 96, s. 88.

<sup>5</sup> Debtors Act, 1869, s. 13.

<sup>6</sup> *Howden v. Standish*, 6 C. B. 504; *Rex v. Mayor of Lyme Regis*, 1 Doug. 149.

<sup>7</sup> Stephen's Crim. Dig. 84.

full and correct, while in the latter case the onus lies on the party impugning the account, and if he objects to any omissions or errors in the account, he must allege them specifically and substantiate them by evidence. The grounds on which the Court allows a settled account to be re-opened are: fraud in the settlement of the account, want of good faith on the part of a person in a fiduciary relation (*e. g.*, a trustee or solicitor), or the like. Where, however, it is merely a question of mistake and not of fraud, then liberty to surcharge and falsify will alone be given.<sup>1</sup> (See *Surcharge*; *Account*.)

§ 2. In the old books, falsify is used in the sense of defeating or avoiding,<sup>2</sup> but this sense is obsolete.

**FEALTY** is a service which every free tenant (except tenant in frankalmoign) is in theory bound to perform to his feudal lord.<sup>3</sup> It is therefore an incident to every seignory (*q. v.*), and is due on every change of the tenancy or the seignory;<sup>4</sup> but it is in practice completely obsolete.<sup>5</sup> The ceremony of fealty consisted in the tenant taking an oath of fidelity to the lord.<sup>6</sup>

§ 2. Fealty is also one of the incidents of tenure due from every copyhold tenant to the lord of the manor in respect of his customary tenement. It consists in swearing to be faithful in performing the services of the tenancy, and may be required on every change of the lord or tenant; but in practice it is always respited.<sup>7</sup> (See *Allegiance*; *Subtraction*; *Service*.)

ETYMOLOGY.]—Norman French:—From Latin *fidelitas*, faithfulness.

**FEAR.** See *Duress*.

**FEASANCE** means “doing.” See *Malfeasance*; *Misfeasance*; *Nonfeasance*; *Service*.

**FEE** is applied to property to denote that it has the quality of descending to the heirs of the owner for the time being if he does not dispose of it during his life or by his will, supposing he has power to do so. Thus an office or annuity in fee is one which descends to the heir of the holder for the time being on his death intestate. (See *Annuity*; *Office*.) The term is however chiefly of importance as applied to land, estates of inheritance in land being called estates in fee.<sup>8</sup>

Fees are of two principal classes, fee simple and fee tail.

§ 2. An estate in fee simple is the greatest estate or interest which the law of England allows any person to possess in landed property.<sup>9</sup> The owner of an estate in fee simple is practically absolute owner of the land or other realty; he may put it to any use, lease it, mortgage it, sell it or give it away; if he dies without having disposed of it during his lifetime or by his will it descends to his heir according to the rules of descent (*q. v.*).

§ 3. An estate in fee simple is properly created by the words “and his heirs” following the name of the grantee: thus a conveyance of land

<sup>1</sup> Daniell, Ch. Pr. 577.

<sup>2</sup> Litt. §§ 149, 688.

<sup>3</sup> Co. Litt. 67 b; Litt. § 131.

<sup>4</sup> Litt. §§ 148, 149.

<sup>5</sup> Williams on Seisin, 12.

<sup>6</sup> See the ceremony described in Litt.

§ 91: Co. Litt. 68 a.

<sup>7</sup> Elton, Copyh. 178; Litt. § 132.

<sup>8</sup> Litt. § 1.

<sup>9</sup> *Ibid.* § 11.

to "A. and his heirs" gives A. an estate in fee simple. A conveyance to "A." without more, or "to A. for ever," or to "A. and his assigns," or the like, without the word "heirs," gives A. only an estate for life. In a devise by will, however, the word "heirs" is not required, as a gift of land by will to A. without more vests in A. all the estate which the testator had, whether a fee simple or a less estate.<sup>1</sup> In a conveyance to a corporation sole the word "successors" is substituted for "heirs." The word is not required in a conveyance to a corporation aggregate, but it is not uncommonly so used.

**Absolute.** § 4. An estate in fee simple may be either *absolute*, as where land is given to a man and his heirs, without more, or *determinable*, where some words are added which may put an end to it on the happening of a certain event. This may be (1) where a condition is added: thus, if an annuity is granted to a man and the heirs of his body, he has a fee simple conditional on his having issue;<sup>2</sup> if he has issue, the condition is performed, so that he can alien or charge the annuity; but if he does not alien it, it descends to his eldest son, subject to the same condition: (2) by limitation, as where land is granted to A. to hold to him and his heirs so long as C. has heirs of his body; this is a fee simple qualified (formerly also called a base fee):<sup>3</sup> (3) by construction of law, as where a person seised of an estate tail grants the land to A. and his heirs. A. has an estate in fee simple so long as the tenant in tail has heirs of his body, but as soon as those heirs fail, A.'s estate comes to an end. This, though sometimes called a fee simple qualified or determinable, is more properly called a base fee.<sup>4</sup> (See *Enlargement*.)

**Fee tail.** § 5. As to estates in fee tail, see *Estate Tail*.

**Knight's fee.** II. § 6. Formerly "fee" also signified the land itself. Thus, a "knight's fee" was the quantity of land which "goeth to the livelihood of a knight," and seems to have consisted of lands worth 20*l.* a year.<sup>5</sup>

**ETYMOLOGY.**—Norman French, *fee*, *fé*, *fié*; low Latin, *feodum*; from Gothic, *faihu*, property (modern German *vieh*, cattle). *Feodum* originally meant land granted in consideration of services to be rendered, as opposed to *allodium*, or land held absolutely.<sup>6</sup>

**FEE FARM—FEE FARM RENTS.**—Fee farms "are lands held in fee by rendering for them yearly the true value, or more or less,"<sup>7</sup> which rent is called a fee farm rent, or simply a fee farm.<sup>8</sup> A tenant in fee farm owes no service not expressly reserved, except fealty.<sup>9</sup> Fee farm rents granted before the stat. *Quia Emptores* are rents service; those granted since are rent charges or rents seck, because since that statute

<sup>1</sup> Wills Act, s. 28; Williams, R. P. 216.

<sup>2</sup> He has not an estate tail as he would have if the thing granted were freehold land, because an annuity is not a tenement and therefore not within the statute *De Donis (q. v.)*; Preston, *Estates*, 139; Co. Litt. 19 a; Bl. Comm. ii. 113. Before the statute such an estate in freehold land was called a "fee simple conditional at the common law." As to a customary fee simple conditional, see *Estate*, § 12.

<sup>3</sup> *Seymour's Case*, 10 Co. 97 b; Co. Litt.

1 b; 341 a; Preston, 117, 122, where another sense is given to "qualified fee."

<sup>4</sup> 10 Co. 97 b; Co. Litt. 1 b; 3 & 4 Will. 4, c. 74, ss. 1, 19.

<sup>5</sup> Litt. § 95; Co. Litt. 69 a.

<sup>6</sup> Littré, *Dict. s. v. Fief*; Diez, *Wörterb. s. v. Fio*; Digby's *Hist. R. P.* 59, n. (9).

<sup>7</sup> Britton, 164 b. Coke says it must not be less than one-fourth of the value (Co. Litt. 143 b).

<sup>8</sup> Co. Litt. 143 b.

<sup>9</sup> Britton, 164 b; *Termes de la Ley*.



no one can grant land to be held of himself in fee simple.<sup>1</sup> (See *Rent; Quia Emptores; Subinfeudation; Tenure.*) It is, however, a question whether the term fee farm rent is properly applicable to rents created since the statute.

**FEED.** See *Estoppel*, § 4.

**FEIGNED ISSUE.**—Formerly, in common law actions, when a question was raised on motion, and the Court thought it too important to be disposed of summarily on affidavits, they might order it to be tried before a jury on a feigned issue, that is, in the same way as if the parties had joined issue on the question in their pleadings. Questions arising in the Court of Chancery were also sometimes tried before a jury in a common law Court in this way before stat. 25 & 26 Vict. c. 42.<sup>2</sup>

Feigned issues have long been rare in practice, but they do not seem to have been abolished by the new Rules (see *Issue*).

**FEINT**, or “feint in law.” See *Action*, § 23.

**FELLOW-SERVANTS.** See *Common Employment*.

**FELO DE SE** is a person who murders himself.<sup>3</sup> See *Murder*, § 3.

**FELONY.**—§ 1. At common law, every species of crime, a conviction for which occasioned the forfeiture of the lands or goods of the offender, and to which a punishment might be added according to the degree of guilt, was called felony.<sup>4</sup> Forfeiture for conviction, however, has been abolished<sup>5</sup> (see *Forfeiture*), and several offences have been made felonies by statute which were not felonies at common law.

§ 2. Felony is punishable in various modes, as by death or penal servitude, many felonies having special punishments attached to them (see the titles dealing with the varieties of felony mentioned *infra*, § 3). Where no punishment is specially provided, felony is punishable by penal servitude for seven years, or imprisonment for two years, with or without hard labour, whipping, and solitary confinement.<sup>6</sup> (See *Recognizance*.) A felon is also in general incapacitated from holding certain offices.<sup>7</sup>

§ 3. “Felony,” strictly speaking, includes treason (*q. v.*), although the terms are generally used as opposed to one another. Instances of felony in the more usual sense of the word are: piracy, murder, manslaughter,

<sup>1</sup> Co. Litt. 143 b; Hargrave's note (5); Steph. Comm. i. 677.

<sup>2</sup> Chitty's Pr. 902; stat. 8 & 9 Vict. c. 109, s. 19.

<sup>3</sup> Russell on Crimes, i. 647.

<sup>4</sup> Bl. Comm. iv. 94; Co. Litt. 391 a.

<sup>5</sup> Stat. 33 & 34 Vict. c. 23.

<sup>6</sup> Stat. 7 & 8 Geo. 4, c. 28; Russell on Crimes, 65, 186.

<sup>7</sup> Stat. 33 & 34 Vict. c. 23. As to the other consequences and peculiarities of felony see Stephen's Crim. Dig. 8; Harris, Crim. Law, 10.

rape, larceny, robbery, burglary, arson, some kinds of assault, and certain acts resembling treason.<sup>1</sup>

See *Misdemeanor*.

ETYMOLOGY.]—Old French, *felun*, *felon*, from low Latin, *felo*, = a vassal guilty of disobedience or breach of fidelity towards his lord; the ultimate derivation is unknown.<sup>2</sup>

**FEME COVERT** is a married woman. As to the status and disabilities of a married woman, see *Marriage*; *Couverture*; *Separate Estate*; *Engagement*.

**FEME SOLE** is an unmarried woman, whether a spinster or a widow.

Fences to  
land.

**FENCE**.—§ 1. The obligation on the owner of land to keep it fenced may exist either at common law, or by virtue of a special obligation, or by statute. At common law a proprietor of land is only bound to keep up fences round his land if they are required to prevent his cattle from trespassing on the land of his neighbours.<sup>3</sup> An owner of land may however be subject to a prescriptive obligation to keep the fence between his and his neighbour's land in repair.<sup>4</sup> (See *Quasi-Easement*.)

§ 2. A railway company subject to the provisions of the Railways Clauses Act, 1845 (ss. 68 *et seq.*), is bound to construct and maintain fences between its line and the adjoining lands.

See further as to fences under titles *Boundaries*; *Party Wall*.

Fencing ma-  
chinery, and  
mines, &c.

§ 3. Under various Acts of Parliament the duty is cast on owners of mines and machinery to keep them fenced, so as to prevent injury to persons coming near them. The most important provisions as to mines and mining machinery are contained in the Coal Mines Regulation Act, 1872, s. 51, §§ 4, 13, 14, 24, and the Metalliferous Mines Regulation Act, 1872, s. 23, §§ 6, 7, 17. The Factory and Workshop Act, 1878 (ss. 5 *et seq.*), contains provisions as to the fencing of machinery in factories, &c.

Criminal law.

§ 4. Stealing or maliciously injuring or destroying fences is an offence punishable on summary conviction.<sup>5</sup>

**FEOFFMENT—FEOFFOR—FEOFFEE**.—§ 1. A feoffment is a mode of conveying a freehold estate in possession in land from one person (the feoffor) to another (the feoffee). It was at one time almost the only mode of conveying freehold land in possession, but it is now practically obsolete, because the same object can, in most cases, be obtained by simpler means. Almost the only case in which a feoffment is now specially required is where an infant tenant of gavelkind land

<sup>1</sup> Stat. 11 Vict. c. 12; Stephen's *Crim. Dig.* 36.

<sup>2</sup> See the various conjectures in Littré, s. v. and Blackstone, iv. 95.

<sup>3</sup> Gale on *Easements*, 515.

<sup>4</sup> *Laurence v. Jenkins*, L. R., 8 Q. B. 274; Gale, 516; see further as to quasi-easements of repair, *ibid.* pp. 530 *et seq.*

<sup>5</sup> Stats. 24 & 25 Vict. c. 97, s. 25; c. 96, ss. 15, 34.

wishes to dispose of his estate : this he can do by feoffment at the age of fifteen.<sup>1</sup>

§ 2. Originally a feoffment was merely the overt or public delivery of the possession of land by the owner (the feoffor) to the grantee or purchaser (the feoffee), and consisted of the ceremony called livery of seisin (*q. v.*). But, for the sake of convenience, it became usual to put the terms of the conveyance in writing, as a record of the transaction : this writing was called the charter or deed of feoffment. The Statute of Frauds (*q. v.*) made a writing necessary in every case ; and now, by the stat. 8 & 9 Vict. c. 106, every feoffment (except one made under a custom by an infant) is void at law unless made by deed. The livery of seisin is of course still necessary.<sup>2</sup>

§ 3. Formerly a feoffment was an assurance of great power, for it not only cleared (that is, destroyed) all disseisins, abatements, intrusions and other wrongful or defeasible estates, where the livery of seisin by the feoffor was lawful,<sup>3</sup> but also operated by wrong, or tortiously, where the feoffor granted a greater estate than he was entitled to, so as to confer on the feoffee the whole estate purported to be granted. Thus, if a tenant for his own life made a feoffment of the land in fee simple, the feoffee became seised of an estate in fee simple by wrong, which was good against everyone except the reversioner : as regards him, the feoffment, being unauthorized, operated as a forfeiture of the tenant for life's estate, and entitled him to re-enter and take possession of the land.<sup>4</sup> But by the stat. 8 & 9 Vict. c. 106, the tortious operation of a feoffment is abolished.<sup>5</sup>

See *Conveyance ; Grant ; Operative Words ; Uses.*

ETYMOLOGY.]—Norman French: *feoffament*,<sup>6</sup> from *feoffer*, to grant a fee or feudal estate.<sup>7</sup> (See *Fee*.)

**FERÆ NATURÆ.** See *Animals Feræ Naturæ.*

**FERRY.**—The right to keep a boat for ferrying passengers, to charge tolls for so doing, and to prevent other persons from setting up another ferry so near as to diminish the custom, is a franchise (*q. v.*).<sup>8</sup>

**FEUD**, in the middle ages, was a grant of land by a feudal superior or lord, to be held by the grantee (the feudal inferior or tenant) in return for services to be rendered by him. The word is used to signify the interest of the tenant,<sup>9</sup> and also the land itself. (See *Fee*.)

ETYMOLOGY.]—Gothic, *faihu* ; Anglo-Saxon, *feoh*, = property.<sup>10</sup>

<sup>1</sup> Williams, R. P. 129. For a form of feoffment for the purpose see Davidson, Conv. ii. 244, 177. As to feoffments generally see Elphins. Conv. 98 ; Shepp. Touch. 203 ; Bythewood & Jarman, iv. 37 *et seq.*

<sup>2</sup> But if livery be omitted the charter of feoffment will, in ordinary cases, take effect as a grant under the stat. 8 & 9 Vict. c. 106.

<sup>3</sup> Co. Litt. 9 a, 49 a.

<sup>4</sup> Butler's note to Co. Litt. 330 b. As to the mode in which this operation of a feoffment was made use of see Bythewood & Jarman, iv. 44 *et seq.*

<sup>5</sup> Williams, R. P. 142.

<sup>6</sup> Britton, 209 b.

<sup>7</sup> Loysel, Inst. gloss. v. *Féoffer*.

<sup>8</sup> Bl. Comm. ii. 38.

<sup>9</sup> Spelman on Feuds, 2.

<sup>10</sup> Stubbs, Hist. i. 251, n. (1.)

**FEUDAL SYSTEM** is the name given to certain institutions which prevailed in the principal states of Europe during the Middle Ages, and regulated both the tenure of land and the political and social system in each state. § 2. As to the land, the peculiarity of the feudal system was the division of the ownership. The absolute or nominal ownership (*dominium directum*) was in one person, the lord or feudal superior; while the occupation, use and benefit of the land (*dominium utile*) was in another person, the tenant or feudal inferior. In consideration of having the use of the land the tenant rendered his lord certain services (*q. v.*), which in the feudal system proper were principally of a military nature, and the lord was further entitled to certain incidents or casual profits. (See *Incidents*.) § 3. With regard to the social and political system, the relation of landlord and tenant was a mutually protective one: that is, each was bound to assist and protect the other in case of danger (see *Faalty*); and it was exclusive, that is, no one had any right to interfere between them, though the lord himself might be tenant to a yet higher superior: thus, A. might be tenant to B. and B. tenant to C., but C. would have nothing to do with A. Hence, in the pure feudal system, the king or other head of the state was to a great extent merely a feudal lord, having no right to the allegiance of his tenants' tenants: but this was never so in England; for although since the Norman Conquest, when the feudal system was introduced, all lands in England "are holden mediately or immediately of the king,"<sup>1</sup> yet he has always been the feudal superior not only of his tenants in chief but also of their tenants and tenants' tenants.<sup>2</sup> § 4. It will be seen from the titles *Tenures*, *Incidents*, *Estate*, *Seignory*, *Subinfeudation*, that but few traces of the feudal system now survive, except in the rules of descent, in the operative words required to pass an estate of inheritance by deed (see *Fee*, § 3; *Heir*), and in the law of copyholds.

**FIAT**, in procedure, is a memorandum written on a document by a judicial officer, giving leave to take some step. (Latin = "Let it be done".)

On petition. Thus in Chancery practice, when a petition is presented, the Master of the Rolls' secretary writes a fiat on it, directing all parties to attend on a certain day when the petition will be heard.<sup>3</sup> (See *Petition*.)

In patent practice. So in patent law, the fiat of the Attorney-General or other law officer must be obtained before a disclaimer or memorandum of alteration can be filed.<sup>4</sup>

For writ of error. In criminal procedure, a writ of error cannot be sued out unless the Attorney-General grants his fiat for that purpose.<sup>5</sup> (See also *Commissioners in Bankruptcy*.)

**FICTION.** A fiction is a rule of law which assumes as true, and will not allow to be disproved, something which is false, but not impossible.<sup>6</sup> Formerly the practice and jurisdiction of the Courts rested largely on fictions: thus the Court of King's Bench acquired jurisdiction in actions for debt, &c., by surmising (that is, feigning) that the defendant had been arrested for a trespass which he had never committed, and then allowing

<sup>1</sup> Co. Litt. 1 a.

<sup>2</sup> The oath of allegiance from inferior tenants was not exacted until the Council of Salisbury (1086), but the feudal system does not seem to have been completely introduced until that time; Stubbs, Const. Hist. i. 266. See further as to the feudal system generally, Spelman on Feuds and glossary, v. *Feodum*; Butler's note to Co.

Litt. 191 a; Bl. Comm. ii. 44; Hallam, i. 163; Fustel de Coulanges, Inst. de l'Ancienne France.

<sup>3</sup> Daniell, Ch. Pr. 1433-5.

<sup>4</sup> Stats. 5 & 6 Will. 4, c. 83; 15 & 16 Vict. c. 83, s. 39.

<sup>5</sup> Archbold, Crim. Pl. 199.

<sup>6</sup> Best on Evidence, 419.

the plaintiff to proceed against him for debt.<sup>1</sup> Fictions are now of little importance.<sup>2</sup> (See *Colour*; *Colourable*.)

**FIDUCIARY.** A person is said to stand in a fiduciary relation to another when he has rights and powers which he is bound to exercise for the benefit of that other person. Hence he is not allowed to derive any profit or advantage from the relation between them, except with the knowledge and consent of the other person. Such is the relation between trustee and cestui qui trust, solicitor and client, principal and agent, and generally wherever from the position of two persons, one of them reposes confidence in the other.<sup>3</sup> Promoters and directors also stand in a fiduciary relation to their companies.<sup>4</sup>

**FIELD REEVE** is an officer elected by the owners of a regulated pasture (see *Pasture*) to keep in order the fences, ditches, &c. on the land, to regulate the times during which animals are to be admitted to the pasture, and generally to maintain and manage the pasture subject to the instructions of the owners.<sup>5</sup>

**FI. FA.—FIERI FACIAS—FIERI FECI.**—§ 1. A fieri facias or fi. fa. is a writ of execution to levy a judgment debt.<sup>6</sup> It commands the sheriff or other officer to whom it is directed to levy or *cause to be made* of the goods and chattels of the debtor (including his chattels real) the sum recovered by the judgment with interest. In executing the writ, the officer enters upon the premises in which the execution debtor's goods are (if he can do so peaceably, and without breaking open any outer door), and leaves one of his assistants in possession of them. After the seizure, the officer gets an auctioneer to make an inventory of the goods, and to remove and sell them, or to sell them on the premises, if the debtor, or the person on whose premises the goods are, consent to it.<sup>7</sup> When the writ becomes returnable (see *Return*), the sheriff returns either *fieri feci*, i. e., that he has levied the sum named in the writ, or a part of it, which he is ready to pay to the execution creditor; or that he has taken goods which remain unsold for want of buyers (see *Venditioni exponas*; *Distingas nuper Vicecomitem*); or *nulla bona*, i. e., that the execution debtor has no goods within his bailiwick.<sup>7</sup> (See *Writ*; *Levari facias*.)

§ 2. Fieri facias de bonis ecclesiasticis.—When the sheriff, to a common fieri facias, returns *nulla bona*, and that the defendant is a beneficed clerk not having any lay fee, the plaintiff may sue out a fieri facias de bonis ecclesiasticis, directed to the bishop of the diocese (or to the archbishop, during a vacancy of the bishop's see), commanding him to make of the

De bonis  
ecclesiasticis.

<sup>1</sup> Bl. Comm. iii. 43.

<sup>2</sup> As to importance of fictions in the history of law, see Maine, *Anc. Law*, 21 *et seq.*

<sup>3</sup> Snell's *Eq.* 403.

<sup>4</sup> *Liquidators of Imperial Merc. Credit Ass. v. Coleman*, L. R., 6 H. L. 189; *Erlanger v. New Sombrero Co.*, 3 App.

Ca. 1218; 5 Ch. D. 73.

<sup>5</sup> General Inclosure Act, 1845, s. 118.

<sup>6</sup> See Rules of Court, xliii.

<sup>7</sup> Smith's *Action*, 186; Steph. Comm. iii. 583. As to what goods may be taken under a fieri facias, see stats. 8 Anne, c. 14; 56 Geo. 3, c. 50; 1 & 2 Vict. c. 110; 14 & 15 Vict. c. 25; and title *Goods*.

ecclesiastical goods and chattels belonging to the defendant within his diocese, the sum therein mentioned. This is done by issuing a sequestration (*q.v.*) to levy the debt out of the tithes and other profits of the defendant's benefice.<sup>1</sup>

De bonis  
testatoris;

de bonis  
propriis.

§ 3. Fieri facias de bonis testatoris is the writ issued on an ordinary judgment against an executor when sued for a debt due by his testator; if the sheriff returns to this writ nulla bona, and a devastavit (*q.v.*), the plaintiff may sue out a fieri facias de bonis propriis, under which the goods of the executor himself are seized.<sup>2</sup> (See *Scire fieri Inquiry*; *Devastavit*; *Judgment*.)

**FILE.**—§ 1. A file is literally a piece of string or wire passing through papers relating to the same matter, to keep them together. It seems to have been the practice in olden times to fasten together in this way writs and other papers in the offices of the Courts, and it is still done in the London Bankruptcy Court. In the High Court, however, documents which are filed are merely placed in pigeon holes or tied in bundles. Affidavits and other documents requiring filing are handed to the proper officer with the necessary stamps.

§ 2. A document will be ordered to be taken off the file if it is scandalous or an abuse of the forms and proceedings of the Court.

**FINAL.** See *Interlocutory*; *Judgment*.

**FINDER OF LOST PROPERTY**, like every other possessor of property, is entitled to the possession of it against all persons, except the true owner.<sup>3</sup> (See *Possession*.) § 2. If a person, when he finds lost property, knows whom it belongs to, or knows that the owner can be found, and appropriates it for himself, he commits larceny.<sup>4</sup>

**FINDING.**—A finding is a conclusion upon an inquiry of fact. Thus, when the jury in an action return a verdict, they find either generally, *i.e.*, for one of the parties, or specially, *i.e.*, as to certain facts. (See *Fact*, § 3; *Verdict*.) Frequently, too, by consent of the parties, questions are drawn up and put to the jury in an action, and their answers are termed findings. Decisions upon questions of fact are also termed findings, when they are come to by substitutes for juries, *e.g.*, a judge sitting without a jury. (See *Trial*.)

Criminal.

**FINE.**—I. § 1. In criminal law, a fine is a sum of money ordered to be paid to the Queen by an offender, as a punishment for his offence.

<sup>1</sup> Archbold, Pr. 1062; Smith's Action (11th edit.), 275, 396.

<sup>2</sup> 1 Wms. Saund. 246; Smith's Action (11th edit.), 368.

<sup>3</sup> *Armory v. Delamirie*, 1 Str. 504; Smith, L. C. i. 357.

<sup>4</sup> Steph. Crim. Dig. § 302; *R. v. Moore*, L. & C. 1; *R. v. Glyde*, L. R., 1 C. C. R. 139; *R. v. Thurborn*, 1 Den. 387.

A fine is at common law one of the punishments for misdemeanors, and it has been made a punishment for several offences by modern statutes.<sup>1</sup> Thus, when any person has been convicted of an indictable misdemeanor punishable under the Criminal Law Consolidation Acts,<sup>2</sup> the Court may, in addition to or in lieu of any punishment authorized by the particular act, inflict a fine upon the offender.<sup>3</sup>

§ 2. The superior Courts (see *Court*, § 3) have a general power of imposing pecuniary mulcts for disobedience to their orders, not only on their own officers and on parties to suits depending before them, but also on strangers.<sup>4</sup> (See *Amercement*.)

II. § 3. In the law of tenure, a fine is a money payment made by a feudal tenant to his lord. The only existing fines of any importance occur in copyhold lands, where upon a change in the tenancy a fine is commonly due to the lord.<sup>5</sup> The most usual fine is that payable on the admittance of a new tenant, but there are also due in some manors fines upon alienation, on a licence to demise the lands, or on the death of the lord, or other events.<sup>6</sup> Fines are of two kinds, arbitrary and certain.

§ 4. A fine certain may be fixed by the custom at a particular sum for every admittance, when it is called a "general fine;"<sup>7</sup> or at so much for every acre, or the like; or it may be ascertained by reference to some other standard, as where the tenant is to pay a year's value for a fine. § 5. The amount of an arbitrary fine is not left to the discretion of the lord, except in those cases where the grant is purely voluntary, as where a copyholder has come into the ownership of the lord, or where a copyholder for lives, without right of renewal or power of nominating a successor, surrenders his estate for the purpose of putting in more lives. In other cases the fine, though arbitrary, must be reasonable; and the Court will decide what is reasonable under the particular circumstances.<sup>8</sup> In ordinary cases it must not exceed two years' improved value of the land.<sup>9</sup>

§ 6. A "full" fine is the highest amount which the lord can exact on an ordinary admittance, as opposed to a "small" or nominal fine: thus in some manors where a person who is already a customary tenant is admitted to other copyholds he pays only a small fine certain, *e.g.*, a penny.<sup>10</sup> § 7. There are also many fines payable under particular customs and having special names: thus in some manors there is a custom for the lord of the manor for the time being to admit each tenant to his estate, which gives him the right to hold it during the joint lives of himself and the admitting lord; on the death of the lord the tenant pays what is called a "general fine" for admittance to the succeeding lord, which gives him a new estate during the joint lives of himself and the new lord,

For contempt of Court.

Copyhold fines.

Fines on admittance, &c.

Certain.  
General (I.).

Arbitrary.

Full,  
small.

General fine (II.).

<sup>1</sup> Greaves, Criminal Law, 6; Stephen's Crim. Dig. 7; Steph. Comm. iv. 444. "And it is called *finis*, because it is an end for that offence;" Co. Litt. 126 b; 8 Co. 39 a, 59 b.

<sup>2</sup> 24 & 25 Vict. cc. 96, 97, 98, 99, 100.

<sup>3</sup> Broom & Hadley, Comm. iv. 472, 247; Steph. Comm. iv. 444.

<sup>4</sup> Steph. iii. 269.

<sup>5</sup> Co. Litt. 59 b.

<sup>6</sup> Elton, Copyh. 159.

<sup>7</sup> *Middleton v. Jackson*, 1 Ch. Rep. 33; Toth. 164.

<sup>8</sup> Elton, 162.

<sup>9</sup> *Ibid.* 165; Co. Litt. 59 b.

<sup>10</sup> Elton, 164.

Dropping  
fine.

while on the death or alienation of the tenant his heir or devisee pays the lord a "dropping fine" for admittance.<sup>1</sup>

Fines on  
alienation.

§ 8. One of the incidents of tenure in capite by knight service was that a fine was due to the king on every alienation or conveyance of the land by the tenant to another person. Fines of this kind were abolished by stat. 12 Car. 2, c. 24.<sup>2</sup>

Fines of land.

III. § 9. Before the Fines and Recoveries Act<sup>3</sup> (*q. v.*) there existed a fictitious judicial proceeding known as a fine, which was formerly in common use as a mode of conveying land. It was really a compromise of a fictitious suit commenced concerning the lands intended to be conveyed, and the operation (called levying a fine) was thus performed.

Præcipe.

A præcipe or writ was sued out and the parties appeared in Court; a composition of the suit was then entered into, with the consent of the judges, whereby the lands in question were declared to be the right of (that is, to belong to) one of the parties. This agreement was reduced into writing, and was enrolled amongst the records of the Court, so that it had the effect of a judgment of the Court. On the completion of the fine a writ was issued to the sheriff of the county in which the land lay, in the same form as if a judgment had been obtained in a hostile suit, directing the sheriff to deliver seisin and possession to the person who acquired the lands. But if he was already in possession this writ was dispensed with. A fine consisted of five parts:—namely, the original writ, the licence to agree, or *licencia concordandi*, which was given by the leave of the Court, on payment of a fine to the king, called the king's silver. The third part was the concord or agreement, by which it was agreed that the lands were the right of the person in whose favour the fine was levied. The fourth part was a note of the proceedings, drawn up by an officer called the chirographer; and the fifth part was the *foot or chirograph* of the fine, which recited the whole proceedings. This chirograph was delivered to the parties, and was legal evidence of the fine, and was retained by the purchaser as one of his title deeds.<sup>4</sup> The person to whom the land was to be conveyed was called the complainant or conusee, and he by whom it was to be conveyed the deforciant (see *Deforcement*) or conusor (cognisor), because he *acknowledged* the right of the complainant.<sup>5</sup>

Foot or  
chirograph.

§ 10. The principal use of fines was to put an end to all adverse claims to the land after a certain period. For this purpose a fine required to be levied with proclamations, that is, to be openly and solemnly read in Court in four successive terms. Such a fine barred the claims of all persons unless they took proceedings within five years.<sup>6</sup>

§ 11. Fines were also used by tenants in tail to effect a discontinuance of the entail (see *Discontinuance*), and to bar their issue in tail (see *Recovery*):<sup>7</sup> and to enable a married woman to join with her husband in making a conveyance of her lands, which she could not otherwise do; in such a case the wife was examined by the judges apart from her husband in order to ascertain whether she consented freely to the conveyance.<sup>8</sup>

*Sur conusance  
de droit come  
ceo, &c.*

§ 12. Fines were of four kinds.<sup>9</sup> The first and most usual was a fine *sur conusance* (or *cognizance*) *de droit come ceo qu'il ad de son done*, that is, a fine "on acknowledgment of right as that which he has of his gift." In other words, the fine was founded on an acknowledgment by the conusor that the conusee was entitled to the land in question by virtue of a gift or feoffment to him by the conusor. It was used for the conveyance of an estate in fee simple or freehold in possession. § 13. A fine *sur cognizance de droit tantum* ("on acknowledgment of right only") was used for passing an estate in reversion

*Sur conusance  
de droit  
tantum.*

<sup>1</sup> *Somerset v. France*, 1 Stra. cited in Elton, Copyh. 160.

<sup>2</sup> Bl. Comm. ii. 71.

<sup>3</sup> Stat. 3 & 4 Will. 4, c. 74.

<sup>4</sup> Williams on Seisin, 106; Bl. Comm. ii. 348; Steph. Comm. i. 559; Shelford's R. P. Stat. 301.

<sup>5</sup> Williams, 108; Bl. Comm. iii. 174.

<sup>6</sup> Williams, 109. A common instance of this being done was when a person had

acquired a tortious fee simple by a feoffment, and wished to bar the owner of the reversion; he did this by levying a fine.

<sup>7</sup> Williams, 158.

<sup>8</sup> *Ibid.* 108. For the other operations of a fine see Smith on Fines, 2; Hargrave's note to Co. Litt. 121 a, n. (1).

<sup>9</sup> Williams, 108 *et seq.*; Bl. Comm. ii. 352 *et seq.*; Steph. Comm. i. 562 *et seq.*



or remainder. § 14. A fine *sur concessit* (he has granted") was where the conuser, in *Sur concessit.* order, as the form ran, to make an end to all disputes, granted to the conusee a new estate by way of supposed composition. This kind of fine was principally used for granting estates for life or years. § 15. A fine *sur done, grant et render* ("on gift, grant *Sur done, &c.* and re-grant") was a double fine. It had the effect of the fine *sur cognizance de droit come ceo*, &c. and of the fine *sur concessit* combined, that is, the conusee, after the right was acknowledged to be in him, rendered or granted back to the conuser or to a stranger some other estate in the land.

§ 16. Fines were abolished by the Fines and Recoveries Act (*q. v.*), which substitutes *Abolition.* simpler modes in those cases where the operation of fines was beneficial. The Statute of Limitations (3 & 4 Will. 4, c. 27) was passed to provide for the protection of titles to land after the lapse of a certain time, without the necessity of levying a fine.

See *Non-Claim*.

ETYMOLOGY.]—Fines were so called from the words with which the record of the fine began: *Hæc est finalis concordia inter, &c.*: "this is a final concord or compromise between, &c." <sup>1</sup>

**FINES AND RECOVERIES ACT** is the stat. 3 & 4 Will. 4, c. 74. Its principal objects were: 1st. To abolish fines and recoveries and to make warranties by a tenant in tail no longer effectual for barring entails; 2ndly. To enable a tenant in tail to bar the entail either wholly or partially by a deed enrolled, instead of by a fine or a recovery; 3rdly. To enable a married woman, with the concurrence of her husband, to dispose of land by a deed acknowledged by her before a judge or commissioner, instead of by a fine.<sup>2</sup> (See *Disentailing Deed*; *Acknowledgment*, § 2; *Fine*, § 11; *Recovery*; *Warranty*.)

**FIRE.**—The owners of houses in which fires arise accidentally and without negligence are not responsible for damage thereby caused to other persons.<sup>3</sup>

As to policies of insurance against fire, see *Insurance*. As to fire-bote, see *Estovers*, § 1. As to incendiary fires, see *Arson*.

**FIREWORKS.**—As to the manufacture, sale, &c. of fireworks and the punishment of persons letting them off in streets or public places, see stat. 38 & 39 Vict. c. 17.

**FIRM** denotes I. the style or title under which one or several persons carry on business; and II. the partnership itself, that is, the individual members forming the partnership. The mercantile notion of a firm is that it is a body distinct from the members composing it, and having rights and obligations distinct from those of its members; in other words, a firm is by laymen considered as a kind of corporation.<sup>4</sup> Although this

<sup>1</sup> Williams, 106; Litt. § 441.

<sup>2</sup> As to the minor provisions of the act, see Shelford's Real P. Statutes, 299 *et seq.*

<sup>3</sup> Stat. 14 Geo. 3, c. 78, s. 86; Steph. Comm. ii. 236.

<sup>4</sup> See Lindley, Partn. 208.

is not the legal status of a firm, yet in the following respects its quasi-corporate nature is recognized.

Actions by  
and against  
firms.

§ 2. In procedure, an action may be brought by or against a firm in the name of the firm,<sup>1</sup> and when a firm is so sued the writ may be served at its place of business on the manager of the business;<sup>2</sup> provision is also made for issuing execution against the members of the firm.<sup>3</sup>

Bankruptcy.

§ 3. In bankruptcy, where a firm becomes bankrupt, the assets of the firm (called the joint assets), and the assets of each individual partner (called the several assets), are administered separately. (See *Joint*.)

§ 4. Again, when several persons form a firm, and one or more of them (not being all) form another firm, the former is called the major, and the latter the minor, firm. The distinction is of importance, because where one of such firms becomes bankrupt any member of the other may prove against it notwithstanding the general rule that a partner cannot prove against the joint estate in competition with the joint creditors; and where both become bankrupt a creditor of the two firms may prove against each.<sup>4</sup>

**FIRST FRUITS** are the whole profits of a spiritual preferment during the first year of its being held by a new incumbent. First fruits and tenths (*q. v.*) were originally payable to the Church of Rome, until by the stat. 26 Hen. VIII. this revenue was transferred to the crown. Under stat. 7 Eliz. c. 4, and various statutes of Anne, benefices under 50*l.* per annum clear yearly value are discharged of first fruits and tenths; and in those cases where they are payable, the payment is spread over a period of two or (in some cases) four years. And by the stat. 2 & 3 Anne, c. 11 (or 20), the revenue of first fruits and tenths was converted into the fund commonly called Queen Anne's Bounty (*q. v.*).<sup>5</sup>

**FIRST IMPRESSION.**—A case which presents to a Court of law for its decision a question of law which is new, and for which there is consequently no precedent, is said to be a case of first impression.

**FISH ROYAL** are whale and sturgeon, which, when either thrown ashore or caught near the coast, are the property of the sovereign. It is said, that in the case of a whale it is divisible between the king and the queen, the head being the king's, and the tail the queen's.<sup>6</sup> (See *Prerogative*.)

**FISHERY.**—§ 1. A fishery or piscary "is a liberty of fishing in another man's waters, or his own."<sup>7</sup>

<sup>1</sup> Rules of Court, xvi. 10, 10 a. A person carrying on business alone under a firm name must sue in his own name.

<sup>2</sup> *Ibid.* ix. 6.

<sup>3</sup> *Ibid.* xlii. 8; and see vii. 2, xii. 12.

<sup>4</sup> Robson's Bank. 574, 620; Bankruptcy Act, 1869, s. 37; and see *Ex parte Honey*,

7 Ch. App. 178.

<sup>5</sup> Steph. Comm. ii. 532.

<sup>6</sup> *Ibid.* 448, 540.

<sup>7</sup> Termes de la Ley, s. v. *Piscary*; Bracton, 208 b; Britton, 109 b. Primarily "fishery" seems to have meant a several fishery; Britton, 158 b.

Fisheries are either royal, public or private.

I. § 2. A royal fishery is the exclusive right of the crown of fishing in *Royal*. a public river. Such a right cannot be created de novo since Magna Charta.<sup>1</sup> If it has been granted to a subject, it is called a free fishery (*infra*, § 5).

II. § 3. A public or common fishery (or public common of fishery) is *Public or common*. the right of the public to fish in the sea and in public navigable rivers as far as the tide flows.<sup>2</sup> This right cannot exist if the water is subject to an exclusive right of fishery in some person or corporation.

III. Private fisheries are of three kinds.

*Private.*

i. § 4. A several fishery or piscary (sometimes called simply a fishery or piscary<sup>3</sup>) is an exclusive right of fishing in a particular water, and vested either in the owner of the soil or in someone claiming under him. Hence if a man grants a several fishery in water belonging to him, the grantee may exclude him from fishing there.<sup>4</sup> And a several fishery may be confined to a particular kind of fish.<sup>5</sup> (See *Dereliction*, § 3.)

*Several.*

§ 5. A several fishery in public waters which excludes the public from fishing there, may be either in the crown, in which case it is also called a royal fishery (*supra*, § 2), or in a private person or body claiming under the crown: but it cannot have been created since Magna Charta.<sup>6</sup>

§ 6. The owner of a several fishery has a privileged property in the fish before they are caught.<sup>7</sup> (See *Property*.)

ii. § 7. Common of piscary or fishery is the right of fishing in another man's waters, such as a pond or private river, but in common with, that is, not in exclusion of, the owner of the soil. Common of piscary is a profit à prendre,<sup>8</sup> and may be either appurtenant or in gross, but apparently not appendant.<sup>9</sup> The term seems to be confined to that right of fishing which the tenants of manorial land have of fishing in the waters of the lord<sup>10</sup> (*infra*, § 8).

*Common of piscary.*

iii. § 8. The true nature of a free fishery is a disputed point. According to Coke it is much the same (at all events in the right which it confers) as a common of piscary,<sup>11</sup> while Blackstone says that a free fishery is an exclusive right of fishing in a public river, and is a royal franchise.<sup>12</sup> There is no doubt that the term is used in both senses.<sup>13</sup> It may be suggested that "free fishery" originally meant merely a liberty or right of fishing created by express grant from the owner of the soil or water.

*Free fishery.*

<sup>1</sup> Rolle, Abr. *Prerogative le Roy*, B 2, 14, 15.

<sup>2</sup> Elton on Commons, 106; Phear on Water, 65.

<sup>3</sup> *Supra*, note (1), and Co. Litt. 4 b.

<sup>4</sup> Co. Litt. 122 a. See Shelford, R. P. Stat. 46. As to whether the ownership of the land is presumed to belong to the owner of a several fishery, see *Marshall v. Ulleswater, &c. Co.*, 3 B. & S. 732; Williams on Commons, 260.

<sup>5</sup> Phear, 63.

<sup>6</sup> *Malcolmson v. O'Dea*, 10 H. L. C. 593; *Mayor of Carlisle v. Graham*, L. R.,

<sup>4</sup> Ex. 361; *Bristow v. Cormican*, 3 App. Ca. 641; *Saltash v. Goodman*, 5 C. P. D. 431.

<sup>7</sup> *Child v. Greenhill*, Cro. Car. 553.

<sup>8</sup> Co. Litt. 122 a; Bl. Comm. ii. 34; Hall on Commons, 307.

<sup>9</sup> Elton on Commons, 105. See, however, Coulson & Forbes, 341.

<sup>10</sup> See Williams on Commons, 137, 259; Elton, 105.

<sup>11</sup> Co. Litt. 122 a, and Hargrave's note.

<sup>12</sup> Bl. Comm. ii. 39; Elton, 107.

<sup>13</sup> *Malcolmson v. O'Dea*, 10 H. L. C. 593.

Consequently such a right, if granted by the crown, would give the right of fishing in a public river to the exclusion of all private persons (though not necessarily to the exclusion of the crown), while, if granted by the owner of a several fishery, it would give the right of fishing in his water to the exclusion of all persons except himself: in other words, it would create the right of fishing in common with him.<sup>1</sup> The term "common of fishery," having been already appropriated to denote the right of the tenants of a manor to fish in the lord's waters in common with him (*supra*, § 7), the term "free fishery" would conveniently be used to denote any other right of fishing in common with the owner of the water; so that, according to this view, a free fishery and a common of fishery in private waters both confer the right of fishing in common with the owner of the soil, and only differ in their origin.<sup>2</sup>

**FISHERY LAWS.**—The Fishery Laws are a series of statutes passed for the regulation of fishing, especially to prevent the destruction of fish during the breeding season, and of small fish, spawn, &c., and the employment of improper modes of taking fish.<sup>3</sup>

**FITZHERBERT.**—Anthony Fitzherbert, the author of the *Grand Abridgment*, a species of digest of the law (see *Digest*, § 2, and note (2)), and of the *New Natura Brevium*, was a serjeant-at-law, and afterwards a judge of the Common Pleas, during Henry VIII.'s reign. He also wrote a work on justices of the peace.<sup>4</sup>

**FIXTURES** are personal chattels annexed to land, that is, fastened to or connected with it.<sup>5</sup> The general rule is that if the owner or occupier of land annexes anything to the freehold it becomes part of the freehold, so that the ownership of the chattel passes with the ownership of the freehold.<sup>6</sup> Thus, if A. sets up fixtures on his land, and then mort-

<sup>1</sup> This view is confirmed by *Seymour v. Courtenay* (5 Burr. 2814), where the three kinds of fisheries, several fishery, free fishery and common of fishery, are distinguished.

<sup>2</sup> Co. Litt. 122 a.

<sup>3</sup> Steph. Comm. iii. 165, where the principal acts up to 1873 are enumerated; to these may be added the Fisheries (Oyster, Crab and Lobster) Act, 1877; Fisheries (Dynamite) Act, 1877; Freshwater Fisheries Act, 1878; Salmon Fishery Act, 1879.

<sup>4</sup> Reeves; Foss.

<sup>5</sup> As to fixtures generally, see *Elwes v. Mawe*, 3 East, 38; Smith's L. C. ii. 162; *Horn v. Baker*, 9 East, 215; Smith, ii. 205; Amos & Ferard on Fixtures; Chitty on Contracts, 326 *et seq.*; Woodfall's Landlord & Tenant, 581 *et seq.*; Smith's L. C. ii. 182. "The term fixtures is also sometimes applied to things expressly to denote that they cannot legally be removed. . . . Thus it has been said that an article shall fall in with the lease

to the landlord, or descend to the heir with the inheritance, because it is a fixture. There is, however, another sense in which the term fixtures is very frequently used, and which it is thought expedient to adopt in the following treatise, viz., as denoting those chattels which have been annexed to land and which may be afterwards severed and removed by the party who has annexed them, or his personal representative, against the will of the owner of the freehold." (Amos & Ferard, 1.) This definition has been judicially approved (*Hallen v. Runder*, 1 C. M. & R. 266); but is nevertheless incorrect (see Smith's L. C. ii. 182). Fixtures are things fixed to land—some are removeable, some not. When we speak of a chattel passing to the heir because it is a fixture we mean that it is an irremovable fixture; when we speak of a tenant's fixture we mean that it is removeable.

<sup>6</sup> Co. Litt. 53 a; Chitty, 327; Amos & Ferard, 9. "Whether a machine or other article has been so fixed and attached to

gages the land to B., and afterwards becomes bankrupt, the fixtures pass with the freehold to B., although all the other chattels belonging to A. (not comprised in a registered bill of sale) pass to his trustee in bankruptcy.<sup>1</sup> For the same reason no fixture can be taken in distress for rent.<sup>2</sup>

§ 2. If the rule that fixtures form part of the freehold were invariable, it would have the effect of entitling every heir, devisee and reversioner of land to the fixtures left on the land by the ancestor, testator or tenant for life, instead of their passing to his personal representatives with his other chattels: it would also entitle every freeholder to all the fixtures set up by his tenants; but it is relaxed in certain cases, especially as between landlord and tenant.

§ 3. Hence fixtures are divided into two classes; (1) landlord's fixtures, or those which belong to the landlord; and (2) tenant's fixtures, or those which belong to and may be removed by the tenant at any time during his tenancy. Tenant's fixtures again are divisible according to their nature into (a) trade fixtures, being articles erected by the tenant solely for the purposes of trade or manufacture, such as engines, cisterns, plants and trees planted by nurserymen, &c.,<sup>3</sup> and (b) ornamental fixtures, or articles put up for domestic use or ornament, such as bookcases, marble chimney-pieces, &c.<sup>4</sup>

§ 4. Agricultural fixtures, or those erected by a tenant for agricultural purposes, are subject to special rules and statutory provisions, the general rule (in the absence of a special agreement) being that he is entitled to remove such fixtures, on giving notice to his landlord, unless the latter elects to purchase them.<sup>5</sup>

**FLETA** is the name given to a *Commentarius Juris Anglicani*, composed by an unknown writer during the reign of Edward I. The title is derived from the book having been written during the author's confinement in the Fleet prison. He appears to have derived his materials from Bracton and Glanville (*q.v.*).

**FLOATING.** See *Security*.

**FLOOR.** The floor of a Court is that part between the judge's bench and the front row of counsel. Litigants appearing in person, in the

the freehold as to become parcel of it, is a question of fact depending on the circumstances of each case, and principally on two circumstances: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them; whether it can easily be removed integrè, salvè et commodè, or not, without injury to itself or the fabric of the building: secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling . . . , or merely for a temporary purpose, or the more complete

enjoyment and use of it as a chattel." Woodfall, 584.

<sup>1</sup> *Holland v. Hodgson*, L. R., 7 C. P. 328; *Horn v. Baker*, Smith's L. C. ii. 205. Mortgages of trade machinery must in all cases be registered as bills of sale; Bills of Sale Act, 1878, s. 4; Pope on Bills of Sale, 7.

<sup>2</sup> Woodfall, 398.

<sup>3</sup> Chitty, 329, 332.

<sup>4</sup> *Ibid.* 329, 331.

<sup>5</sup> Cooke's Agricult. Hold. Act, 99, 141; stat. 14 & 15 Vict. c. 25; Agricultural Holdings Act, 1875; Woodfall, 593.

High Court or Court of Appeal, are supposed to address the Court from the floor.

**FLOTSAM.** See *Jetsam, Flotsam and Ligan*.

**FOLDAGE** is a privilege possessed in some places by the lord of a manor, and consists in the right of having his tenant's sheep to feed on his fields, so as to manure the land, in return for which the lord provides a fold for the sheep. It is a seignorial right (*q. v.*).

§ 2. The name of foldage is also given in parts of Norfolk to the customary fee paid to the lord for exemption at certain times from this duty.<sup>1</sup>

**FOLDCOURSE** means (i) in its proper sense, the right which the lords of some manors have of feeding a certain number of sheep on the lands of their tenants during certain times of the year.<sup>2</sup> It seems that such a right is not strictly a right of common, although frequently so called,<sup>3</sup> but a seignorial right reserved by the lord of the manor over his tenant's lands.<sup>4</sup>

"Foldcourse" also means (ii) land subject to a right of foldcourse, or the same thing as a sheepwalk<sup>5</sup> (*q. v.*); and (iii) the right of a tenant of a manor to pasture sheep on the land of the lord; such a right is a common appurtenant.<sup>6</sup>

See *Foldage*; *Common*.

**FOOT.** See *Fine*, § 9.

**FORCIBLE DETAINER** is the offence committed by a person who, having wrongfully entered upon any lands or tenements, detains them with violence or threats, that is, in the same manner as would render an entry upon them for the purpose of taking possession a forcible entry<sup>7</sup> (*q. v.*).

**FORCIBLE ENTRY** is the offence of entering upon any lands or tenements in a violent manner in order to take possession thereof, whether the violence consists in actual force applied to any other person, or in threats, or in breaking open any house, or in collecting together an unusual number of persons for the purpose of making such entry.

Forcible entry is a misdemeanor:<sup>8</sup> a summary remedy by justices of the peace is also available.<sup>9</sup>

**FORECLOSE—FORECLOSURE.**—§ 1. When a mortgagor has failed to pay off the mortgage debt within the proper time, the mortgagee is entitled to bring an action in the Chancery Division of the High Court

<sup>1</sup> Elton on Commons, 45, 46.

<sup>2</sup> *Ibid.* 44.

<sup>3</sup> Williams' Saund. ii. 727; *Spooner v. Day*, Cro. Car. 432.

<sup>4</sup> Elton, 45.

<sup>5</sup> Co. Litt. 6a, n. (1.)

<sup>6</sup> *Robinson v. Duleep Singh*, 11 Ch. D.

798.

<sup>7</sup> Stephen's Crim. Dig. 47; Russell on Crimes, 410.

<sup>8</sup> Stephen's Crim. Dig. 46; Russell on Crimes, i. 404 *et seq.*; *Lows v. Telford*, 1 App. Ca. 414.

<sup>9</sup> Woodfall, L. & T. 795.

asking that a day may be fixed on which the mortgagor is to pay off the debt, and that in default of payment on that day he (the mortgagor) may be foreclosed of his equity of redemption, that is, deprived or debarred of his right to redeem. The judgment fixes a place and time for payment (generally the Rolls Chapel, Chancery Lane, London), at the expiration of six months from the date of the judgment,<sup>1</sup> and orders that the mortgagor be foreclosed if the debt is not paid on that day. Upon an affidavit of non-payment at the appointed time and place, the order for foreclosure contained in the original judgment will be made absolute by an order which is obtained, as of course, upon motion.<sup>2</sup> The effect of the foreclosure is to bar the mortgagor's right or equity of redemption, and thus to vest the property absolutely in the mortgagee; and he cannot subsequently sue the mortgagor for any deficiency of value, unless he gives the mortgagor a new right of redemption.<sup>3</sup> § 2. Foreclosure actions are now comparatively rare in practice, as the mortgagee's remedy by sale, under the power of sale usually conferred on him, is in general more speedy and convenient. As to the derivation of the word, compare *Forjuge*. (See *Day to show Cause*; *Judgment*; *Mortgage*; *Power*.)

**FOREIGN**, in law, is that which is out of a certain state, country, county, liberty, manor, jurisdiction, &c.<sup>4</sup> Thus in the law of divorce "foreign" means anywhere out of England, and "foreigner" means one who is not a domiciled Englishman.<sup>5</sup> As to foreign law, see *Fact*, § 2. As to foreign judgments, see *Judgment*. As to foreign services, see *Service*. As to foreign bills of exchange, see *Bill of Exchange*, § 10. See also *Denizen*, note (14); *Foreign Attachment*; *Forfeiture*, § 5; *State*.

**ETYMOLOGY.**—Lat. *foras*, out of; low Latin, *foraneus*; Norm. Fr. *foreyn*.<sup>6</sup> "Foreign" is translated *forinsecus* by our early law-writers, e. g. *servitia forinseca*, &c.<sup>7</sup>

**FOREIGN ATTACHMENT.**—§ 1. By the custom of the city of London (and a few other cities<sup>8</sup>) if an action of debt is brought in the Mayor's Court, and the defendant makes default in appearing to the action, and it appears that he has nothing within the city whereby he may be summoned, the Court may, on the plaintiff alleging that some person within the city has property belonging to the defendant in his possession, attach the property to compel the defendant to appear. The attachment is effected by warning the person in whose possession the property is not to part with it without the further order of the Court. This person is then called the garnishee. If the defendant still makes default in appearing, the garnishee is required to show cause why the plaintiff should not

<sup>1</sup> *Cox v. Watson*, 7 Ch. D. 196.

<sup>2</sup> Fisher on Mortgage, 504, 1038, 1102.

<sup>3</sup> *Ibid.* 1057. But even after an order of foreclosure absolute the Court has a discretion to re-open the foreclosure within a reasonable time and allow the mortgagor to redeem; *Campbell v. Holyland*, 7 Ch. D. 166.

<sup>4</sup> "Foreign matter triable in another county," Pl. Cor. 154; Kitchen on Courts, 126; "Foreign plea is a refusal of the

judge as incompetent, because the matter in hand is not within his precincts," that is, jurisdiction; Kitch. 75; Termes de la Ley, s. v.; Britt. 22 b.

<sup>5</sup> *Yelverton v. Yelverton*, 1 Sw. & T. 586.

<sup>6</sup> Littré, v. *Forain*; Diez, i. 192.

<sup>7</sup> Bract. 36 a.

<sup>8</sup> Bristol, Exeter, Lancaster; Brandon, For. Attach. 1. See Termes de la Ley, s. v. *Foreign*.

have execution of the property attached, and in default of cause being shown, the plaintiff obtains execution, first giving security to restore the property to the defendant if he should within a year and a day come into Court and disprove the debt alleged in the action. (See *Pledges to restore; Scire facias*.) What the plaintiff receives by the execution operates as a satisfaction (wholly or pro tanto) of the debt due to him from the defendant.

§ 2. Where the property attached is money belonging to the defendant, the judgment is final, but in the case of goods the judgment is interlocutory, and is called judgment of appraisement, because it directs the goods to be appraised (*i.e.*, valued) by the serjeant at mace, in order that the defendant may be credited with their value, and when this is done final judgment is signed and execution issued.<sup>1</sup>

§ 3. Theoretically the primary object of the process of foreign attachment is to compel the defendant to appear, and therefore if the defendant appears according to the custom, as by giving bail, paying money into Court, &c. (see *Appearance*, § 7), the attachment is dissolved or at an end. In practice, however, the proceeding by foreign attachment is used principally for the purpose of taking the defendant's property in satisfaction of the debt. Hence it has become usual to make the record in a proceeding by foreign attachment recite a number of steps which are purely fictitious, *e.g.*, a return by the sheriff that the defendant has nothing within the city whereby he may be summoned, a "solemn calling" of the defendant, his default, &c., &c.: "all this is recited in the record as occurring at one and the same Court: no specific time is necessary to elapse, but immediately the action is entered and the plaintiff makes a satisfactory affidavit of his debt, he is at liberty to issue the attachment,"<sup>2</sup> which is a command of the Court to the sheriff to attach the property; the sheriff accordingly serves on the garnishee an "attachment paper" or notice not to part with the property; after the fictitious "solemn calling" of the defendant and his four successive defaults (for as the proceedings to obtain execution are founded on the defendant's supposed default in appearing, it is necessary to allege his default although it has not actually taken place), a *scire facias* is issued to warn the garnishee to appear and show cause why the plaintiff should not have execution of the property attached, and if no cause is shown, or if cause is shown but judgment is given for the plaintiff, he obtains execution of the property.<sup>3</sup> In a recent case,<sup>4</sup> however, where it appeared that the usual practice of inserting fictitious statements in the record had been followed, the Court held that the custom had not been followed, and restrained the proceedings in the Mayor's Court. It seems probable that this decision will considerably diminish the use made of the anomalous proceeding in question.

See *Attachment*.

ETYMOLOGY AND HISTORY.]—The citizens of London had a prompt remedy by

<sup>1</sup> Brandon, *For. Attach.* 91.

<sup>2</sup> *Ibid.* 9.

<sup>3</sup> See as to the custom generally, Brandon, *For. Attach.*; *Turbill's Case*, 1 Wms.

Saund. 87; *Mayor of London v. Cox*, L. R., 2 H. L. 239.

<sup>4</sup> *London Joint Stock Bank v. Mayor of London*, 5 C. P. D. 494.



arrest against all persons within the city, whether they were citizens or "foreigners" ("foreigners from the liberties of the city," *i. e.* persons not citizens); but they had no personal control over foreigners out of the city, and it was to compel such persons to appear and find bail that the process of attachment was first used; hence it was called "attachment of foreigners' goods," or "foreign attachment."<sup>1</sup> See *Foreign*.

**FOREIGN ENLISTMENT ACT, 1870** (repealing stat. 59 Geo. 3, c. 69), makes it an offence, punishable with fine and imprisonment, for any British subject, without the licence of the crown, to accept a commission in the military or naval service of any foreign State at peace with England, or to build or equip any ship for the service of any foreign State at war with a State at peace with England, or to assist in increasing her armament or warlike force.<sup>2</sup>

**FORENSIC MEDICINE**, or medical jurisprudence, as it is also called, is "that science which teaches the application of every branch of medical knowledge to the purposes of the law: hence its limits are, on the one hand, the requirements of the law, and, on the other, the whole range of medicine. Anatomy, physiology, medicine, surgery, chemistry, physics and botany, lend their aid as necessity arises; and in some cases all these branches of science are required to enable a Court of law to arrive at a proper conclusion on a contested question affecting life or property."<sup>3</sup>

§ 2. Forensic medicine is occasionally required in cases of a civil nature, such as questions of lunacy or unsoundness of mind (see *Lunacy*; *Delusions*), or cases of nuisances injurious to health. Its most important function however is in criminal trials, where the evidence of a medical expert is frequently required. Thus, in a trial for murder, where the evidence is circumstantial, it is almost invariably necessary to adduce evidence by a medical practitioner as to the appearance of the body and the results of a post-mortem examination. So far as he attempts to account for the symptoms or appearances observed by him, his evidence is merely opinion evidence.<sup>4</sup>

**FORESHORE** is that part of the land adjacent to the sea which is alternately covered and left dry by the ordinary flow of the tides, that is, by the medium line between the greatest and least range of tide (spring tides and neap tides). It forms part of the adjoining county, the justices of which have cognizance of offences committed there, whether it is or is not at the time covered with water. It also forms part of the adjoining parish.<sup>5</sup>

§ 2. The property in the foreshore is *primâ facie* vested in the crown, but a part of it may belong to a subject by an ancient grant from the crown, or by prescription. This ownership of the crown is for the benefit of the

<sup>1</sup> Brandon, 4.

<sup>2</sup> As to the "Three Rules" established by the Treaty of Washington, 1871, and the principles decided by the Geneva Arbitration, see Phillimore, *Int. Law*, iii. 251

*et seq.*

<sup>3</sup> Taylor on Med. Jur. 1.

<sup>4</sup> See Best on Evidence, 651 *et seq.*

<sup>5</sup> Coulson & Forbes on Waters, 13; stat. 31 & 32 Vict. c. 122, s. 27.

community, and cannot be used in any way so as to derogate from or interfere with the public rights of navigation and fishery.<sup>1</sup>

See *Alluvion* ; *Dereliction*.

**FOREST**, in the legal sense of the word, is the exclusive right of keeping and hunting wild beasts and fowls of forest, chase, park, and warren, in a certain territory of "wooddy grounds and fruitfull pastures," with laws and officers of its own, established for the protection of the game. These laws are now obsolete.<sup>2</sup>

§ 2. A royal forest is one belonging to the crown (see *Demesne*, § 5) : a forest in the hands of a subject is a franchise (*q. v.*).

§ 3. Forests, chases, parks, and warrens have this peculiarity, that they give their owners a qualified property or ownership in the animals confined in them, so that no other person can acquire a property in them either by taking them within the forest, &c., or by chasing them thence and taking them in other ground.<sup>3</sup>

See *Chase* ; *Park* ; *Warren* ; *Game* ; *Purlieu* ; *Animals Feræ Naturæ*.

Entry on  
land.

**FORESTALL—FORESTALMENT.**—§ 1. To forestall a person is to obstruct his way with force and arms. To prevent a person from going on land to demand or distrain for rent in arrear by forestalling him operated as a disseisin of the rent.<sup>4</sup> (See *Disseisin*.) The term is now obsolete.

Merchandise.

§ 2. It was also used to signify the offence of raising the price of certain goods, by buying merchandise on its way to market, or dissuading persons from bringing their goods there, &c.: it was abolished by stat. 7 & 8 Vict. c. 24.<sup>5</sup> (See *Engrossing*, § 3.)

**FORFEITURE** is where a person loses some property, right, privilege or benefit in consequence of having done or omitted to do a certain act.

Lease.

§ 2. Thus where a lease contains a provision enabling the lessor to put an end to the term if the lessee fails to pay the rent, or comply with the covenants, then if the lessee fails to pay his rent or repair, and the lessor puts an end to the term by re-entry, a forfeiture of the lease is said to take place.

Relief against  
forfeiture.

§ 3. In some cases the Courts will relieve against a forfeiture, that is, prevent the person entitled to take advantage of it from doing so, the general rule being that the Court will relieve against a forfeiture when its object is to secure the performance of some collateral act, such as the payment of money, and when the Court can give by way of compensation all that was expected or desired.<sup>6</sup> Thus the Court will relieve

<sup>1</sup> Coulson & Forbes on Waters, 13; *A. G. v. Tomline*, 12 Ch. D. 214.

<sup>2</sup> Bl. Comm. ii. 38; Steph. Comm. i. 665; Manwood, Forest; 4 Inst. 288; Co. Litt. 233 a.

<sup>3</sup> Bl. 419.

<sup>4</sup> Litt. § 240; Co. Litt. 161 b.

<sup>5</sup> Steph. Comm. iv. 266, n. (p).

<sup>6</sup> *Peachy v. Duke of Somerset*, 1 Stra. 447; *Sloman v. Walter*, 1 Bro. C. C. 418; *White & Tudor's L. C.* ii. 992.

against the forfeiture of a lease for nonpayment of rent, on the lessee paying what is due.<sup>1</sup> The powers of the Court in this respect have been extended by statute to the case of forfeiture for breach of a covenant to insure against fire.<sup>2</sup>

§ 4. A copyhold may be forfeited by a wrongful act to the prejudice of Copyhold. the lord, or by anything which amounts to a determination of the tenancy, e.g., by waste, refusal to perform the customary services, &c.<sup>3</sup>

§ 5. If the master or owner of a British ship conceals the British Ship. character of the ship, or assumes a foreign character with intent to deceive any person entitled to inquire into the matter, the ship is forfeited to the Crown.<sup>4</sup>

§ 6. Formerly forfeiture was a result of many acts by tenants or owners Estates. of estates on the ground of their being considered by the feudal law as contrary to the duties of the tenants towards their lords. Thus a feoffment of land by a tenant for life was a forfeiture of his estate, because it was an attempt to dispose of the reversion;<sup>5</sup> but this operation of a feoffment has been abolished.<sup>6</sup>

§ 7. In criminal law, forfeiture now seldom occurs. If a person Criminal law. solemnizes or assists at the marriage of any descendant of king George II., in contravention of the stat. 12 Geo. 3, c. 11, his lands and goods are forfeited to the Queen.<sup>7</sup> If a person is outlawed for treason, his lands are forfeited to the crown; if a person is outlawed for felony, he forfeits to the crown all his goods and chattels, real and personal, and also the profits of his freeholds during his life; after his death the Queen is further entitled to his freeholds for a year and a day, with the right of committing in them any waste she pleases (called the Queen's year, day, and waste). Formerly conviction for any kind of felony caused a forfeiture of goods and chattels, both real and personal, but this has been abolished.<sup>8</sup> (See *Attainder*; *Escheat*; *Administrator*, § 2.)

**FORGE—FORGERY.**—§ 1. To forge is to do one of the following things with intent to defraud, namely, (i) to make a document purporting to be what it is not, or (ii) to alter a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document, or (iii) to sign a document: (a) in the name of a person without his authority, whether such name is or is not the same as that of the person signing; (b) in the name of any fictitious person alleged to exist; (c) in a name represented as being the name of a different person from that of the person signing it, and intended to be mistaken for the name of the former; or (d) in the name of a person personated by the person signing the document, if the

<sup>1</sup> Snell's Eq. 274.

<sup>2</sup> 22 & 23 Vict. c. 35, s. 14; 23 & 24 Vict. c. 126, s. 2; Williams' R. P. 384; Woodfall's L. & T. 297 *et seq.*

<sup>3</sup> Elton, Copyh. 200.

<sup>4</sup> Merchant Shipping Act, 1854, s. 103, § 2: *The Annandale*, 2 P. D. 179, 218.

<sup>5</sup> Co. Litt. 251 a, where other instances of forfeiture are given; Bl. Comm. ii. 275.

<sup>6</sup> Stat. 8 & 9 Vict. c. 106. See *Feoffment*.

<sup>7</sup> Stephen's Crim. Dig. 39.

<sup>8</sup> Williams' R. P. 126; Bl. Comm. ii. 251; stats. 33 & 34 Vict. c. 23; 54 Geo. 3, c. 145.

effect of the document depends upon the identity between the person signing the document, and the person who he professes to be.<sup>1</sup>

§ 2. At common law, forgery is a misdemeanor:<sup>2</sup> by various statutes<sup>3</sup> the forgery of certain documents is felony, punishable with penal servitude for years or for life.<sup>4</sup>

The forgery of trade-marks is a misdemeanor.<sup>5</sup>

See *Utter*.

**FORJUDGE—FORJUDGMENT.**—To forjudge is to deprive a person of a thing or right by a judgment. Thus where under the old law a mesne lord was bound to acquit or indemnify his tenant paravail against services demanded of him by the lord paramount, and failed to do so, he was liable to be forjudged or deprived of the services of the tenant paravail.<sup>6</sup> (Norman French, *forjurer*,<sup>7</sup> from *foris*, out, and *judicare*, to judge.)

**FORM—FORMALITY.** See *Irregular*:<sup>8</sup> also *Action*, § 22. As to “common forms” in deeds, see *Abstract*, § 1.

**FORMA PAUPERIS.** See *In Formâ Pauperis*.

**FORMEDON.**—Writs of formedon (*de formâ donationis*) were brought by persons who claimed land under a gift (*donatio*) in tail when it was in the possession of a person not entitled to it. A formedon in the descender was brought by the issue in tail, a formedon in the remainder by a person entitled in remainder after the determination of the estate tail, and a formedon in the reverter by the reversioner or donor of the estate tail.<sup>9</sup> They were all abolished by stat. 3 & 4 Will. 4, c. 27, s. 36. (See *Discontinuance*, § 2.)

**FORTESCUE.**—John Fortescue was chief justice of the King's Bench in the reign of Henry VI.; he died about 1476. He wrote the well-known treatise *De Laudibus Legum Angliæ*.

**FRANCHISE**, in its general sense, is a liberty or privilege.

I. § 2. At common law, a franchise is a royal privilege or branch of the crown's prerogative, subsisting in the hands of a subject, either by grant or by prescription.<sup>10</sup> Franchises are of two classes—(1) those which originally formed part of the crown's prerogative, and could therefore be exercised by the king *jure coronæ* before they were granted to a subject: such as the franchises of waifs, estrays, wrecks, royal fish, forests, &c.: (2) those which can only be created by granting them to a subject: such as fairs, markets, tolls, parks, warrens, &c. (see the various titles). The distinction is so far of importance that when a franchise of the former class is appendant to a manor or the like, and they both come into the hands of the crown, the appendancy is extinguished, because the franchise merges in the prerogative: while in the case of a franchise of the

<sup>1</sup> Stephen's *Crim. Dig.* 267 *et seq.*; Russell on Crimes, ii. 618 *et seq.*; *Reg. v. Martin*, 5 Q. B. D. 34.

<sup>2</sup> Russell, 733.

<sup>3</sup> Especially 24 & 25 Vict. c. 98; Greaves' *Crim. Acts*, 265.

<sup>4</sup> Russell, 734 *et seq.*; Stephen, 274 *et seq.*

<sup>5</sup> Stat. 25 & 26 Vict. c. 88; Stephen, 287; Russell, ii. 610.

<sup>6</sup> Co. Litt. 100 a.

<sup>7</sup> Britton, 20 a.

<sup>8</sup> As to the history of juridical formalities, see Grimm, *Deutsche Rechtsalterthümer*; Savigny, *Syst.* iii. 238.

<sup>9</sup> Litt. § 595 *et seq.*

<sup>10</sup> Bl. Comm. ii. 37; Co. Litt. 114 a.

latter class the appendancy would be preserved.<sup>1</sup> § 3. A franchise is an incorporeal hereditament (see *Hereditament*); it not only authorizes something to be done, but gives the owner the right of preventing all other persons from interfering with its exercise: thus, the owner of a market, ferry or the like, can generally prevent anyone from setting up a new market or ferry so near to his as to diminish his custom.<sup>2</sup>

II. § 4. Franchise also means the locality subject to a franchise.

III. § 5. In ancient times, among other franchises usually granted by the crown to a new borough on its incorporation, was the right of sending burgesses to parliament, and hence franchise now means the right to elect members of parliament, whether in boroughs or counties.<sup>3</sup> (See *Borough*; *Election*, § 3; *Parliament*.)

Parliamentary franchise.

ETYMOLOGY.—Norman French, *fraunchise*, from *fraunc*, free: <sup>4</sup> see *Liberty*.

**FRANKALMOIGN** is the tenure by which the lands of the Church are for the most part held.<sup>5</sup> “And such tenure beganne first in old time. When a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the same land infeoffed an abbot and his covent, or prior and his covent, to have and to hold to them and their successours in pure and perpetuall almes or in frankalmoigne, in such case the tenements were holden in frankalmoigne.”<sup>6</sup> Tenants in frankalmoigne do no fealty or other temporal service to their lord, but are only bound to celebrate divine service in accordance with the book of Common Prayer;<sup>7</sup> and, if they fail to do so, the lord cannot distrain them, but can only complain to their ordinary or visitor.<sup>8</sup> (See *Tenure by Divine Service*.)

ETYMOLOGY.—Norman French, *fraunche aumoyne*, or *aumone*,<sup>9</sup> = free alms (because the tenant was free from temporal service.)<sup>10</sup>

**FRANKBANK**.—“In some boroughes, by custome, the wife shall have for her dower all the tenements which were her husband’s. And this is called frank banke, *francus bancus*.”<sup>11</sup> (See *Dower*; *Freebench*.)

**FRANKMARRIAGE**.—When land was given with the words “in frankmarriage” to a man and his wife by the father or some blood relation<sup>12</sup> of the wife, then she and her husband had the land to them and their issue, although no words of inheritance or procreation were used in the gift. They had therefore a kind of estate in tail special, the peculiarity of which was that they and their issue to the fourth degree held the land free of services to the donor, and that they had to bring it into hotchpot before they could take any other land by descent in fee simple from the donor.<sup>13</sup> (See *Estate Tail*; *Hotchpot*.) It is now obsolete.

ETYMOLOGY.—Frankmarriage = free marriage, low Latin *liberum maritagium*. *Maritagium* was a dowry or gift to a woman about to marry: it was said to be “free” when it was free from services.<sup>14</sup>

<sup>1</sup> *Case of the Abbot of Strata Marcella*, 9 Co. 24. See *In Capite*.

<sup>2</sup> Steph. Comm. i. 664; see, however, *Mayor of Penryn v. Best*, 3 Ex. D. 292.

<sup>3</sup> 12 Co. 120; Hale, Anal. 18; Homersham Cox, Inst.

<sup>4</sup> Britton, 29 b.

<sup>5</sup> Williams, R. P. 132.

<sup>6</sup> Litt. § 133.

<sup>7</sup> *Ibid.* § 135; Co. Litt. 95 b.

<sup>8</sup> Litt. § 136.

<sup>9</sup> Britton, 164 b; Loysel, Inst. Cout. gloss. s. v.

<sup>10</sup> Britton, 164 b.

<sup>11</sup> Litt. § 166.

<sup>12</sup> The Norman word in Littleton (§ 17) is “cousin,” which means a blood relation. Blackstone translates it by the English word cousin (ii. 115).

<sup>13</sup> Co. Litt. 21 b; Digby’s Hist. R. P. 75, 157. See also Litt. §§ 266 *et seq.*

<sup>14</sup> Bracton, 77 a, 92 b; Co. Litt. 21 b.

**FRANKPLEDGE** (Norman French *fraunc plege* = free pledge) is a mistranslation of the Saxon word *friborh* or *frithborh*, literally pledge or surety for peace; it was the name given to those associations of ten persons into which, about the time of the Conquest, all men were bound to combine themselves. They were standing sureties for one another's good behaviour. The "view of frankpledge," or duty of seeing that these associations were kept in perfect order and number, was vested in the local courts, especially the courts leet<sup>1</sup> (*q. v.*).

**FRANK-TENEMENT** is the same as "freehold" (*q. v.*).<sup>2</sup>

**FRAUD** is used in many senses, but the point common to all of them is pecuniary advantage gained by unfair means.

ACTUAL  
FRAUD.

I. § 2. Actual fraud is where one person causes pecuniary injury to another by intentionally misrepresenting or concealing a material fact which from their mutual position he was bound to explain or disclose.<sup>3</sup> (See *Misrepresentation; Concealment.*) This kind of fraud is also sometimes called "personal" or "moral," as opposed to "legal" or "constructive" fraud (*infra*, § 6). § 3. The difficulty in saying whether a particular act amounts to fraud, lies in the necessity of determining what relation gives rise to the obligation to disclose a fact which if disclosed would materially affect the conduct of the defrauded person: and as the variations of human transactions and circumstances are infinite, an exhaustive enumeration of the relations giving occasion for fraud is impossible. Moreover, in many cases, the effect of fraud may be counteracted by the conduct of the defrauded person: as where he does not rely on the representation (see *Dolus dans locum contractui*), or where he is guilty of gross negligence.<sup>4</sup>

By misrepresentation or concealment.

The following are some of the more important instances of actual fraud. § 4. If a person by intentional misrepresentation or concealment of a material fact peculiarly within his own knowledge induces another person to enter into a contract, conveyance or similar transaction with him, which he would not have entered into had he known the truth, the contract or other transaction is fraudulent: as where a person is induced to purchase a business by false accounts of its position and profits.<sup>5</sup>

By matter subsequent.

§ 5. Fraud also exists when a person enters into a contract, conveyance or similar transaction, with the intention of afterwards doing some act of such a nature that if the other party had known of his intention he would not have entered into the transaction.<sup>6</sup> Accordingly if A. induces B. to enter into a contract with him with the object of committing an illegal or unlawful act to the injury of B., that is a fraud on B.: thus a separation deed is fraudulent if the wife's real object in entering into it is to enable her to renew a former illicit intercourse which has been concealed from the husband;<sup>7</sup> so it is a fraud to buy goods with the intention of not paying for them.<sup>8</sup>

<sup>1</sup> Stubbs, Const. Hist. i. 87, where the authorities are referred to; also Britton, 72 a, and Nichols's note (*g*).

<sup>2</sup> Co. Litt. 43 b.

<sup>3</sup> Chitty on Contracts, 630; Snell's Eq. 360; Pollock on Contract, 472 *et seq.*

<sup>4</sup> Chitty, 630; *Central Railway Co. v. Kisch*, L. R., 2 H. L. 99 at p. 120. See the observations of Fry, J., in *Davies v.*

*London & Prov. &c. Co.*, 8 Ch. D. at p. 474.

<sup>5</sup> *Rawlins v. Wickham*, 3 De G. & J. 304.

<sup>6</sup> Pollock, 472.

<sup>7</sup> *Evans v. Carrington*, 2 De G. F. & J. 481.

<sup>8</sup> *Ferguson v. Carrington*, 9 B. & C. 59; *Clough v. L. & N. W. Rail. Co.*, L. R., 7 Exch. 26.

II. § 6. Fraud sometimes exists where no wrongful intention is proved. In this sense of the word, "fraud," or "constructive" or "legal fraud," is *nomen generalissimum*,<sup>1</sup> and indicates the cases in which a Court will not enforce or will set aside a contract, instrument or transaction, "in which the Court is of opinion that it is unconscientious for a person to avail himself of the . . . advantage which he has obtained."<sup>2</sup> The principal instances of this kind of fraud are as follows:—§ 7. First, the fraud "may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would accept on the one hand, and as no honest and fair man would accept on the other, which are inequitable and unconscientious bargains: and of such even the common law has taken notice: for which, if it would not look a little ludicrous, might be cited *James v. Morgan*, 1 Lev. 111."<sup>3</sup> Intrinsic fraud.

§ 8. Secondly, the fraud may be presumed from the circumstances and condition of the parties contracting, by that rule of equity established to prevent one person from taking surreptitious advantage of the weakness or necessity of another, "which knowingly to do is equally against conscience as to take advantage of his ignorance; a person is equally unable to judge for himself in one as the other."<sup>4</sup> The principal instances of this kind of fraud occur (1) where there is a confidential or fiduciary relation between the parties; hence all contracts and conveyances whereby benefits are secured by children to their parents or guardians, and between cestui que trusts and their trustees, are always liable to be set aside, unless they are entered into with scrupulous good faith and are reasonable under the circumstances;<sup>5</sup> (2) where one person takes an unfair advantage of the necessities or inexperience of another: it is on this ground that "catching bargains" with heirs, reversioners and expectants, for the sale of their reversions or expectancies, during the life of their parents or ancestors, will in general be relieved against, unless the purchaser can show that a fair price was paid.<sup>6</sup> "Catching bargains."

§ 9. Thirdly, a transaction may be fraudulent on the ground of public policy. To this class belong marriage brocage contracts (*q.v.*), and the following kinds of transactions. Public policy.

§ 10. "Fraud on third persons" exists where one enters into an arrangement with or incurs an obligation to another, and at the same time, or afterwards, does an act without his knowledge by which the benefit of the Fraud on third persons

<sup>1</sup> See Broom's Comm. C. L. 337; *Thomson v. Eastwood*, 2 App. Ca. at p. 243. "Legal" of course here does not mean "lawful," but something created or presumed by law, not actually existent.

<sup>2</sup> *Torrance v. Bolton*, L. R., 8 Ch. at p. 124.

<sup>3</sup> Per Lord Hardwicke in *Chesterfield v. Janssen*, 2 Ves. 125; 1 Atk. 352; *White & Tudor's L. C. i.* 483. *James v. Morgan* is the celebrated case in which a man agreed to buy a horse for a barleycorn for the first nail on the horse's shoes, two barleycorns for the second, and so on double for every succeeding nail. There

being 32 nails, the quantity came to 500 quarters of barley. The vendor only recovered 8*l.* for the value of the horse.

<sup>4</sup> *Chesterfield v. Janssen*, *ubi supra*.  
<sup>5</sup> Snell's Eq. 376. See *Fiduciary; Undue Influence; Voluntary; New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73.

<sup>6</sup> Snell, 383; *Chesterfield v. Janssen*, *ubi supra*; *O'Rorke v. Bolingbroke*, 2 App. Ca. at p. 833. See *Expectant Heir*. See also *Hart v. Swaine*, 7 Ch. D. 42, where a sale of copyhold land by a person who believed and represented it to be freehold was set aside on the ground of legal fraud.

Fraud on  
creditors.

arrangement or obligation is partly or wholly destroyed. The following are instances:—§ 11. If an insolvent debtor enters into an arrangement with the general body of his creditors by which they accept a proportion of their debts in satisfaction of the whole, and the debtor, or any person on his behalf, in order to procure the consent of some particular creditor secretly promises him an advantage over the others, this agreement is void as being "in fraud of creditors."<sup>1</sup> § 12. If a woman entitled to property enters into a contract for marriage, and during the treaty secretly conveys away the property in such a manner as to defeat the intended husband's marital right and secure to herself the separate use of it, and the concealment continues until the marriage, the conveyance is voidable at the suit of the husband as being a fraud on his marital rights, even if he was ignorant of the existence of the property.<sup>2</sup>

Fraud on  
marital rights.

Fraud on  
power.

§ 13. A person to whom a power of appointment is given must exercise it *bonâ fide* for the end designed by the donor, otherwise the appointment will be set aside on the ground that it is what is termed a fraud on the power.<sup>3</sup> Thus, if a parent having a power of appointing an estate to any of his children, appoints it to one upon a previous bargain with that child that he should pay the father a consideration for it, the Court will set aside the appointment.<sup>4</sup> So it seems that if a power is given to a person to appoint by will only, a covenant by him to exercise it in a particular way is void, being a fraud on the power.<sup>5</sup>

Fraud on the  
public.

§ 14. An act may be a fraud on the public: on this principle, an agreement to publish a work under a misleading title will not be enforced by the Court.<sup>6</sup>

Fraud on  
statute.

§ 15. An act is sometimes said to be a fraud on a statute when it is an evasion of its provisions. For example, A. sold a patent to B. in consideration of B. paying him royalties; B. at the same time lent A. 12,500*l.*, and it was agreed that B. should retain one-half of the royalties as they became payable towards satisfaction of the debt, provided that if A. became bankrupt B. might retain the whole of the royalties in satisfaction of the debt: this proviso was held to be a fraud upon the bankruptcy laws and void.<sup>7</sup>

STATUTORY  
FRAUD.

III. § 16. Certain acts are made frauds by statute. Thus, by the Companies Act, 1867, a prospectus which does not comply with the requirements of the act in specifying all contracts entered into by the company, or the promoters, trustees or directors thereof, before the issue of the prospectus, is to be deemed fraudulent.<sup>8</sup> This is an instance of "legal" fraud, in which proof of fraudulent intention is not required (*supra*, § 6, and see *Fraudulent Conveyances*; *Fraudulent Preference*).

<sup>1</sup> Chitty, 634; Pollock, 224; Leake, 403.

<sup>2</sup> White & Tudor's L. C. i. 364; Snell, 319; Pollock, 231.

<sup>3</sup> *Aleyn v. Belchier*, 1 Eden, 132; White & Tudor's L. C. i. 339.

<sup>4</sup> *Ibid.*; *McQueen v. Farquhar*, 11 Ves. 467.

<sup>5</sup> *Palmer v. Locke*, 15 Ch. D. 294.

<sup>6</sup> *Post v. Marsh*, 16 Ch. D. 395.

<sup>7</sup> *Ex parte Mackay*, L. R., 8 Ch. 643. "Contra legem facit, qui id facit quod lex prohibet; in fraudem vero, qui salvis verbis legis sententiam ejus circumvenit." "Fraus enim legi fit, ubi quod fieri noluist, fieri autem non vetuist, id fit." Dig. i. 3, fr. 29, 30.

<sup>8</sup> 30 & 31 Vict. c. 131, s. 38. As to the remedy of the person defrauded, see *Gover's Case*, 1 Ch. D. 182.



§ 17. The effect of fraud may be said in general to be to entitle the injured person to avoid the transaction induced by the fraud (*e.g.*, in the case of a contract, to have it rescinded) or to recover damages for the injury (see *Deceit*); it gives rise to a defence to any action brought by the fraudulent party to enforce the contract or other transaction, but it does not make it void *ab initio*.<sup>1</sup> In some cases an act is both a fraud on A. and also wrongful against B., as in the case of the wrongful use of trade marks and trade names (*q. v.*).

Effect of fraud.

§ 18. Certain frauds are also dealt with by the criminal law, and constitute misdemeanors. Such are frauds committed by public officers in discharge of their duties and affecting the public,<sup>2</sup> frauds committed by trustees, directors and other officers.<sup>3</sup>

Criminal law.

ETYMOLOGY.—Latin, *fraus*, apparently derived, with *frustra* and *frustum* (a morsel), from a root signifying to break.<sup>4</sup>

**FRAUDULENT CONVEYANCE.**—§ 1. By stat. 13 Eliz. c. 5, conveyances of landed estates or of goods, made for the purpose of delaying, hindering or defrauding creditors, are void as against them unless made for valuable consideration and *bonâ fide* to a person not having notice of the fraud.<sup>5</sup> (See *Voluntary*.)

Statute of Elizabeth.

§ 2. By the Bankruptcy Act, 1869, a fraudulent conveyance, gift, delivery or transfer by a debtor of his property or any part thereof, is an act of bankruptcy<sup>6</sup> (*q. v.*): by "fraudulent" is meant that the conveyance is one which tends to defeat or delay the creditors.<sup>7</sup> (See *Act of Bankruptcy*, § 3; *Fraudulent Preference*.)

Bankruptcy Act.

**FRAUDULENT PREFERENCE.**—§ 1. The doctrine of fraudulent preference has for its object to prevent a debtor on the eve of bankruptcy from making a voluntary distribution of his property amongst his creditors, so as to defeat the distribution which is contemplated by the bankrupt laws.<sup>8</sup> Accordingly, every conveyance of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by an insolvent person in favour of any creditor with a view of giving that creditor a preference over the others, will, if the insolvent becomes bankrupt within three months after the conveyance, payment, &c. be deemed fraudulent and void as against the trustee in bankruptcy.<sup>9</sup> § 2. The doctrine of fraudulent preference also applies to insolvent companies.<sup>10</sup>

**FREE.** See *Chapel*, § 3; *Fishery*, § 8; *Service*; *Socage*; *Warren*. As to free miners, see *Gale*.

<sup>1</sup> See Chitty, 628; *Oakes v. Turquand*, L. R., 2 H. L. 325; Broom's Comm. C. L. 335 *et seq.*; *Urquhart v. Macpherson*, 3 App. Ca. 831. As to actions to set aside judgments, &c., obtained by fraud, see *Flower v. Lloyd*, 6 Ch. D. 297; 10 Ch. Div. 327; *Daniell's Ch. Fr.* 1428; *In re Pinto Silver Mining Co.*, 8 Ch. 273.

<sup>2</sup> Steph. Crim. Dig. 73.

<sup>3</sup> *Ibid.* 260 *et seq.*; stat. 24 & 25 Vict.

c. 96, s. 80 *et seq.*

<sup>4</sup> Corssen, i. 150.

<sup>5</sup> Williams' R. P. 76; Watson's Comp. Eq. 270; *Twyne's Case*, 3 Co. 80; Smith's L. C. i. 1; Robson's Bankr. 113.

<sup>6</sup> Sect. 6, § 2.

<sup>7</sup> See Robson's Bankr. 116.

<sup>8</sup> Robson's Bankr. 125.

<sup>9</sup> Bankr. Act, 1869, s. 92.

<sup>10</sup> Companies Act, 1862, s. 164.

**FREE ENTRY, EGRESS AND REGRESS** is an expression used to denote that a person has the right to go on land again and again as often as may be reasonably necessary. Thus in the case of a tenant entitled to emblements (*q. v.*) after the expiration of his tenancy, the law "giveth him a speedy remedy to enter into the land, and to take and carry [the crop] away, and compelleth not him to take it at one time, or to carry it before it be ready to be carried; and therefore the law giveth all that is convenient, viz., free entry, egress and regress as much as is necessary."<sup>1</sup>

**FREEBENCH** is an estate which by the custom of most manors the widow of a copyholder has in the land of which her husband was tenant. The nature and duration of the estate, and the quantity of the lands to which it extends, vary according to the particular custom, but in many points freebench closely resembles dower (*q. v.*). Although the Dower Act does not apply to copyholds, the widow's right to freebench is in most manors subject to any alienations of the land made by the husband whether inter vivos or by will; it is, however, paramount to his debts.<sup>2</sup>

Man's freebench.

§ 2. In some places the widower of a female copyholder has by custom an estate in his wife's lands analogous to an estate by the curtesy in freeholds, and called his "man's freebench" or customary curtesy.<sup>3</sup> (See *Curtesy*.)

The right to freebench is enforced by an action similar to an action of dower.<sup>4</sup> (See *Dower*, § 5.)

**FREE FOLD** is said to be the same as foldage or faldage<sup>5</sup> (*q. v.*), but it would seem to denote the right of the tenant to have his sheep folded by the lord, rather than the right of the lord to have the tenant's sheep on his land.

**FREEHOLD** is applied to interests in land in two senses, either to denote the quality of an estate, or to denote the tenure by which the land is held.

Freehold in quality.

I. § 2. With reference to the quality of an estate, "every one which hath an estate in any lands or tenements for term of his owne life or another man's life, is called tenant of freehold, and none other of a lesser estate [*e. g.*, a tenant for years] can have a freehold; but they of a greater estate have a freehold; for he in fee simple hath a freehold, and tenant in taile hath a freehold, &c."<sup>6</sup> Hence estates of freehold are opposed to estates for years and other chattel interests.<sup>7</sup> (See *Estate*, §§ 4, 5; *Interest*.) § 3. In the old writers "freehold" is used generally to denote an estate for life as opposed to a reversion.<sup>8</sup> An estate of freehold descendible is an estate given to A. and his heirs or the heirs of his body during the life of B.<sup>9</sup> (See *Quasi-Tail*; *Occupant*.)

Freehold descendible.

<sup>1</sup> Co. Litt. 56 a. For other instances, see Litt. § 69.

<sup>2</sup> Williams' R. P. 386.

<sup>3</sup> Elton, Copyh. 146.

<sup>4</sup> C. L. P. Act, 1860, s. 26.

<sup>5</sup> Elton on Commons, 45.

<sup>6</sup> Litt. § 57.

<sup>7</sup> Co. Litt. 43 b.

<sup>8</sup> Litt. § 302.

<sup>9</sup> Bl. Comm. ii. 259; Steph. Comm. i. 450.

II. § 4. With reference to its tenure, land is said to be freehold when it is held by socage tenure (or by knight's service or other military tenure when those tenures existed), as opposed to land held by villenage or customary tenures, such as copyhold land.<sup>1</sup> (See *Service; Tenure*.) Where two persons enter into a contract for the purchase and sale of land, whether in fee simple or otherwise, they are presumed to intend freehold land unless the nature of its tenure appears, and therefore if it turns out to be copyhold the purchaser cannot be compelled to carry out the contract, unless the tenure is in reality equivalent to freehold.<sup>3</sup>

See *Seisin; Customary Freehold*.

ETYMOLOGY.—§ 5. "Freehold" originally meant an estate held by a freeman, as opposed to "villeinage"<sup>2</sup> (*q. v.*). It seems to have been originally used in much the same sense as *seisin* (*q. v.*), that is, the feudal possession of land. Thus in the old books a distinction is drawn between freehold in deed and freehold in law. Where a man dies seised of land so that it descends to his son, then until the son enters on the land he has only a freehold in law, which, however, is sufficient to entitle his wife to dower if he dies before entry.<sup>4</sup>

**FREEHOLD LAND SOCIETIES.** See *Building Societies*, § 6.

**FREIGHT.**—§ 1. Strictly speaking, freight is the reward payable to a carrier by sea for the safe carriage and delivery of goods.<sup>5</sup> Hence in ordinary cases it does not become payable unless the voyage is completed and the goods carried to their destination;<sup>6</sup> but in some cases, where a part only of the voyage has been performed, freight is recoverable for that portion *pro ratâ* [*parte* or *portione*] *itineris peracti* (proportionally to the portion of the voyage performed): thus if the consignee voluntarily accepts the goods at a point short of their destination in such a way as to raise a fair inference that the further carriage is intentionally dispensed with, a new contract will be implied to pay freight for that portion of the voyage which has actually been performed.<sup>7</sup>

§ 2. When freight is prepaid, its nature differs considerably from that of ordinary freight, for it then ceases to be dependent on the safe delivery of the goods,<sup>8</sup> and therefore if the goods are lost the shipowner is not liable to refund the prepaid freight.<sup>9</sup>

§ 3. In ordinary cases, the shipowner has a right of action against the consignor, or sometimes also against the consignee, for the recovery of the freight, and also has a lien on the goods for the amount, unless he has entered into a contract inconsistent with or expressly waiving his right of lien.

§ 4. Dead freight is money payable by a person who has chartered a

Freehold  
in tenure.

Freehold in  
law.

Freight pro  
ratâ.

Prepaid  
freight or  
freight in  
advance.

Dead freight.

<sup>1</sup> Co. Liitt. 43 b.

<sup>2</sup> Dart, V. & P. 115, 138, 1073.

<sup>3</sup> Bracton, 224 a; Britton, 83 b.

<sup>4</sup> Litt. §§ 681, 448; Co. Litt. 31 a, where it is called *seisin* in law.

<sup>5</sup> Maude & Pollock, Merch. Shipp. 268. Per Blackburn, J., in *Allison v. Bristol &c. Co.*, 1 App. C. at p. 228.

<sup>6</sup> Maude & Pollock, 269.

<sup>7</sup> *Ibid.* 272.

<sup>8</sup> Maude & Pollock, 269. "It is in effect money to be paid for taking the goods on board and undertaking to carry, not carrying them." Per Blackburn, J., *ubi supra*, p. 220.

<sup>9</sup> See the cases cited in *Allison v. Bristol &c. Co.*, 1 App. C. 209. See further as to the nature of freight, *Keith v. Burrows*, 2 C. P. D. 163; 2 App. Ca. 636.

ship and only partly loaded her, in respect of the loss of freight caused to the shipowner by the deficiency of cargo.<sup>1</sup>

See *Affrightment*; *Bill of Lading*; *Charterparty*; *Lien*.

ETYMOLOGY.]—Dutch, *vragt* or *vracht*; Old German, *frēhtī*, earning, reward.<sup>2</sup>

**FRESH SUIT.**—§ 1. If a person is robbed of goods, and makes fresh suit, that is, immediately follows and apprehends the thief, he shall have his goods again, notwithstanding the thief may have thrown them away, so that if it were not for the fresh suit they would become waifs<sup>3</sup> (*q. v.*).

§ 2. In the law of distress, if the landlord comes to distrain and sees the tenant's cattle on the land, and the tenant to prevent the distress drives the cattle off the land, then if the lord makes fresh suit he may distrain the cattle, although they are not on the land which the tenant holds of him.<sup>4</sup>

**FRIENDLY SOCIETIES** are societies established to provide, by the voluntary subscriptions of their members, for the relief or maintenance of the members and their families during sickness or old age, or for the relief or maintenance of the widows and orphan children of deceased members, or similar objects.<sup>5</sup> Such societies have no legal status unless they are registered in pursuance of one of the Friendly Societies Acts.<sup>6</sup> (See *Registrar*.) Every registered society has one or more trustees in whom its property is vested,<sup>7</sup> and who in ordinary cases take and defend legal proceedings on its behalf.<sup>8</sup> It must be regulated by rules defining its objects, the mode of holding meetings, the rates of the subscriptions and of the allowances during sickness and on death, the investments in which the funds are to be placed, &c. &c.<sup>9</sup>

Limit of  
amount.

§ 2. Friendly societies are intended for the encouragement of the frugal and industrious poor, and the legislature has therefore limited the amount to which any person can become entitled by being a member of one or more societies, to 200*l.* by way of gross sum, and 50*l.* a year by way of annuity.<sup>10</sup>

Deposit  
societies.

Dividing  
societies.

§ 3. Friendly societies are of numerous varieties,<sup>11</sup> but the only two requiring mention are deposit societies and dividing societies. A deposit society combines the functions of a savings bank with those of a friendly society, in a manner too complicated to be here described.<sup>12</sup> A dividing society is one which periodically divides its funds among its members, the simplest plan being for the members to subscribe a fixed sum weekly or monthly, receiving in return certain benefits in case of sickness or death during the current year, at the end of which period the surplus funds are divided among the members.<sup>13</sup>

<sup>1</sup> *McLean v. Fleming*, L. R., 2 Sc. & D. 128.

<sup>2</sup> Schmitthenner, D. Wörtl.; Diez. Etym. Wörtl.

<sup>3</sup> Steph. Comm. ii. 547.

<sup>4</sup> Co. Litt. 161 a.

<sup>5</sup> Friendly Soc. Act. 1875, s. 8; F. S. Amendment Act, 1876.

<sup>6</sup> For a history of the legislation on the subject see Appendix 1 to the Fourth

Report of the Friendly Soc. Comm.

<sup>7</sup> Act of 1875, ss. 14, 16.

<sup>8</sup> Sect. 21.

<sup>9</sup> Sect. 13; Davis on F. S. 26, and the form of rules, 247.

<sup>10</sup> Davis, 118; F. S. Act, 1875, s. 27.

<sup>11</sup> See Fourth Report of the Commissioners on F. S. xxiv.

<sup>12</sup> *Ibid.* lxxxiii.; Davis, 53.

<sup>13</sup> Davis, 55; Fourth Report, lxxii.

§ 4. A society with branches is one in which the members are divided into branches or groups, each having a separate fund administered by itself, although they are all under the control of a central body.<sup>1</sup>

Societies with branches.

See *Benevolent Societies*; *Cattle Insurance Societies*; *Working Men's Clubs*; *Building Societies*; *Industrial and Provident Societies*; *Nomination*; *Dissolution*.

**FRONTAGE—FRONTAGER.**—A frontager is a person owning or occupying land which abuts on a highway, river, seashore, or the like. The term is generally used with reference to the liability of frontagers on streets to contribute towards the expense of paving, draining, or other works on the highway carried out by a local authority, in proportion to the frontage of their respective tenements.<sup>2</sup> It is also used with reference to rights of access (*q. v.*).

**FUNCTUS OFFICIO**, “having discharged his duty,” is an expression applied to an agent or donee of an authority who has performed the act authorized, so that the authority is exhausted and at an end.<sup>3</sup>

**FUND.**—§ 1. In its widest sense, a fund is a sum of money available for the payment or discharge of liabilities. Thus, the assets of a testator form a fund for the payment of his debts. (See *Blended Fund*.) So the borough fund of a corporation is primarily liable for defraying the expenses of the borough. (See *Borough*, § 4.)

As to the Chancery funds, see *Account*, § 15.

§ 2. In its narrower and more usual sense, “fund” signifies capital, as opposed to interest or income; as where we speak of a company funding the arrears of interest due on its debentures, or the like, meaning that the interest is capitalized and made to bear interest in its turn, until it is repaid.

§ 3. The national debt of Great Britain is in part funded, and in part unfunded, the former being that which is secured to the creditor or holder upon the public funds, the latter that which is not so provided for.<sup>4</sup> The unfunded debt is comparatively but of small amount, and is generally secured by exchequer bills and bonds (*q. v.*). The funded debt consists of annuities, as they are called, granted to those who originally advanced the money, being the right to receive an annual sum equal to interest at a certain rate on the principal advanced. The principal itself is not repayable, except at the option of the government. These annuities are

Funded and unfunded debt.

<sup>1</sup> F. S. Act, 1875, s. 4. These are sometimes called affiliated societies (Fourth Report of Comm. xxv.)

<sup>2</sup> Public Health Act, 1875, s. 150. There is no liability at common law binding a frontager on the sea to maintain a sea-wall on his land; *Hudson v. Tabor*, 1 Q. B. D. 225.

<sup>3</sup> Chitty on Contracts, 192; *Bedwell v. Wood*, 2 Q. B. D. 626.

<sup>4</sup> This is the explanation given in Stephen's Commentaries (ii. 574) and may be correct as applied to the English national debt. The term “fund,” however, is frequently used to signify the conversion of a temporary or floating debt into one which is either perpetual or comparatively permanent. The change, therefore, of exchequer bills into government annuities would be the change of an unfunded into a funded debt.

charged on the consolidated fund (*q. v.*), and are themselves popularly called the public funds. They are a species of personal property, passing by transfer inter vivos, or on the death of the holder to his personal representatives.<sup>1</sup>

**FURTHER CONSIDERATION.**—§ 1. Where, on motion for judgment made in an action, the Court has not before it the materials for finally determining all the questions in dispute and disposing of the action, it may reserve the further consideration of the action, and give directions for obtaining the necessary materials in the meantime.<sup>2</sup>

Chancery  
practice.

§ 2. Thus, in an action for the administration of an estate in the Chancery Division, the judgment commonly directs a number of inquiries and accounts to be made and taken in chambers<sup>3</sup> (see *Account*, § 6; *Inquiry*); and when this has been done the action is heard on further consideration, and the rights of the parties are ascertained. If all the questions arising in the action cannot then be disposed of, the further consideration may be again reserved, and so on. Sometimes the further consideration is taken in chambers, in order to save expense.<sup>4</sup>

In chambers.

Queen's B. D.  
practice.

§ 3. In the practice of the Queen's Bench Division, the term "further consideration" is commonly applied to those cases where the judge before whom an action is tried (with a jury) thinks that the questions of law involved are sufficiently doubtful to require more discussion than can be conveniently held at the trial, and accordingly reserves the case for further consideration, when the questions of law are argued and judgment given.<sup>5</sup>

## G.

**GALE.**—§ 1. Under stat. 1 & 2 Vict. c. 43, passed to regulate the peculiar laws and customs of the coal, iron and other mines belonging to the crown in the Forest of Dean and Hundred of St. Briavel's in Gloucestershire, the "free miners" of the district have the exclusive right of having gales or grants made to them, and of selling, devising or disposing of them to any persons whomsoever. All male persons born and abiding within the Hundred of St. Briavel's, of the age of twenty-one, who have worked a year and a day in a coal or iron mine within the hundred, are free miners. Quarrymen coming under a similar description, are deemed free miners for the purpose of obtaining gales of stone quarries. A person holding a gale is called a galee.

§ 2. A gale is the right to open and work a mine within the Hundred of St. Briavel's, or a stone quarry within the open lands of the Forest of

<sup>1</sup> See the National Debt Act, 1870.

<sup>2</sup> Rules of Court, xl. 10; compare xxxiii.

<sup>3</sup> Daniell's Ch. Pr. 1228 *et seq.*

<sup>4</sup> *Ibid.* 1234; *Gilbert v. Smith*, 2 Ch. D. 686.

<sup>5</sup> See *Irvine v. Watson*, 5 Q. B. D. 102; Rules of Court, xxxvi. 22.

Dean. The right is a licence or interest in the nature of real estate, conditional on the due payment of rent and observance of the obligations imposed on the galee. It follows the ordinary rules as to the devolution and conveyance of real estate. The galee pays the crown a rent known as a galeage rent, royalty or some similar name, proportionate to the quantity of minerals got from the mine or quarry. Provision is made for fixing the extent of the mine, pit or quarry comprised in each gale.

§ 3. The gaveller (or deputy gaveller) is bound to grant gales to free miners in the order of their applications, which must be made in writing. Until the grant is actually made, the applicant has no interest or title. No free miner is entitled to more than three gales at a time.<sup>1</sup>

ETYMOLOGY.—Obviously from *gavel*, a rent.<sup>2</sup>

**GAME** consists of certain wild animals, the hunting or taking of which is a recognized sport or pastime. The old writers divide wild animals into beasts of the forest and chase (deer, hares, boars, foxes and wolves), and beasts and fowls of warren (hares, rabbits, pheasants and partridges),<sup>3</sup> but under the statutes regulating the taking of game (commonly called the Game Laws), "game" consists of hares, pheasants, partridges, grouse, heath or moor game, black-game and bustards.<sup>4</sup> Under these acts the right to kill game upon any land is vested in the occupier thereof, unless he holds it under a lease or agreement by which the right is reserved to the landlord. But every person killing, taking or pursuing game (with certain exceptions, including persons entitled to kill game under the Ground Game Act, 1880, *infra*, § 3), is required to take out a yearly excise licence, and persons who (having no such licence) deal in game, must take out two annual licences for the latter purpose, one a licence by justices of the peace, the other an excise licence.<sup>5</sup> § 2. The Game Laws also contain provisions for the preservation of game and for the prevention of poaching, the contravention of which is punishable with fine or imprisonment (*infra*, § 4): in the case of poachers armed with guns, the punishment is penal servitude.<sup>6</sup>

§ 3. The Ground Game Act, 1880, provides that every occupier of land under a contract of tenancy created since the 7th September, 1880, shall have the right to kill and take ground game thereon, concurrently with any other person who may be entitled to do so, and that he shall not be able to divest himself of the right. He may also authorize certain persons to kill and take ground game on the land. "Ground game" means hares and rabbits. Ground Game Act, 1880.

§ 4. As regards the property or ownership in game, the common law rules on this subject are founded on the principle of occupancy (*q. v.*), so that if A. starts game on B.'s land, and kills it on C.'s land, the pro-

<sup>1</sup> Stat. 1 & 2 Vict. c. 43; 24 & 25 Vict. c. 40; 34 & 35 Vict. c. 85; *James v. The Queen*, 5 Ch. D. 153; Bainbridge on Mines, 160.

<sup>2</sup> See Co. Litt. 142 a.

<sup>3</sup> Manwood, Forest, 2 b; Co. Litt. 233 a. See *Forest*; *Chase*; *Park*; *Warren*.

<sup>4</sup> Stat. 1 & 2 Will. 4, c. 32, s. 2; Pater-son's Game Laws.

<sup>5</sup> Stat. 1 & 2 Will. 4, c. 32, s. 18; 23 & 24 Vict. c. 90; 24 & 25 Vict. c. 91, s. 17.

<sup>6</sup> See especially stat. 9 Geo. 4, c. 69; 24 & 25 Vict. c. 96; 25 & 26 Vict. c. 114; Russell on Crimes, i. 621; Steph. Crim. Dig. 313.

perty in it vests in A.: this rule, however, has been so far modified by stat. 1 & 2 Will. 4, c. 32, s. 36, that if the trespasser is found on the land with the game in his possession, and in search or pursuit of other game, C. may take the game from him. A trespasser is of course always liable to an action at law, and by s. 31 *et seq.* of the same statute, trespassing in search of game is made an offence punishable by fine on summary conviction. If A. starts game on his own land and kills it on B.'s land, the property remains in A.; but if, being a trespasser, he starts it on B.'s land and kills it there, the property vests in B.<sup>1</sup>

There are special rules as to game confined in parks, chases, forests and warrens. (See those titles, and *Animals Fera Naturæ*.)

**GAMING.** See *Wagering*.

The principal acts for the punishment of those who keep or frequent common (*i. e.*, public) gaming houses are 8 & 9 Vict. c. 109, 16 & 17 Vict. c. 119, and 17 & 18 Vict. c. 38; gaming in public places is punishable under stat. 5 Geo. 4, c. 83.<sup>2</sup> (See *Disorderly House*.)

**GAOL DELIVERY.**—The commission of general gaol delivery is one of the commissions given to the judges or commissioners of assize. (See *Assize*, § 3.) It authorizes them to try, and (if acquitted) to deliver, *i. e.*, discharge from custody, every prisoner who shall be in gaol for some alleged crime when they arrive at the circuit town. Formerly a special writ of gaol delivery was issued for each particular prisoner, but this has long been obsolete. The commission of general gaol delivery is supplemental to the commission of Oyer and Terminer (*q. v.*), which only empowers the judges to try persons indicted before them at the same assizes, while the commission of general gaol delivery authorizes the trial of every prisoner, whensoever and before whomsoever indicted.<sup>3</sup> Persons are considered to be in gaol for this purpose although they may have been liberated on bail. (See *Central Criminal Court*.)

**GAOLS.** See *Prison*.

**GARNISHEE** is a person in whose hands a debt has been attached. (See *Attachment*, §§ 5, 6; *Examination*, § 4; *Foreign Attachment*.) § 2. In the High Court an order for the attachment of debts is called a garnishee order. If the garnishee does not dispute his indebtedness to the judgment debtor, he must pay the money into Court; if he fails to do so, the Court may direct execution to be issued to levy the amount of the debt. If he disputes his liability, the Court may direct an issue to decide the question.<sup>4</sup>

As to the practice in the Mayor's Court, see *Foreign Attachment*.

**ETYMOLOGY.**—Norman French, *garnir*, to warn,<sup>5</sup> from Teutonic *warnôn*.<sup>6</sup> Garnishment seems to have originally meant any kind of notice to the opposite party in a proceeding.<sup>7</sup>

<sup>1</sup> Steph. Comm. ii. 21.

<sup>2</sup> *Ibid.* iv. 272.

<sup>3</sup> *Ibid.* iv. 315; Reeves' Hist. i. 157; Judicature Act, 1873, ss. 16, 37. "Prisoner" includes persons liberated on bail.

<sup>4</sup> Rules of Court, xlv. 4, 5.

<sup>5</sup> Britton, 50 a.

<sup>6</sup> Littré, Dict. s. v.

<sup>7</sup> *Marshe's Case*, 1 Leon. 325.



**GAVELET** is "a remedy or process, peculiar in denomination to Kent and London, by which the lord of the fee, when his tenant is in arrear for rent or service, may force him to pay the arrears and damages by seizing the land and holding it till payment."<sup>1</sup> The word seems to have originally meant *rent*.<sup>2</sup> (See *Cessavit*.)

**GAVELKIND** is the tenure by which all land in the county of Kent is presumed to be held until the contrary is proved. The tenure also occurs in other parts of England. No land is now gavelkind which can be shown to have originally been held by a tenure higher than socage, such as frankalmoign or a military tenure.<sup>3</sup>

§ 2. Its principal incidents are (a) the partibility of the inheritance, that is, the land descends, on the death of the tenant, to all the sons of the tenant equally: in some cases the custom extends to collaterals, *e.g.*, brothers (see *Coparcener*); (b) the right of the widow or widower of a deceased tenant to have half the land for dower or curtesy until a second marriage, the widower taking by the curtesy whether the issue has been born of the marriage or not (see *Dower; Curtesy*); (c) the right of an infant tenant to aliene his land by feoffment at the age of fifteen years. (See *Feoffment*.) Formerly, also, gavelkind lands were peculiar in being exempt from the liability to forfeiture on conviction for murder, but in this respect other lands now stand on the same footing.<sup>4</sup> In many places in Kent the freeholders are subject to customary heriots, fines and other ancient dues, and are compellable under penalty of distress to come for admittance into their tenancies.

§ 3. The most remarkable incident of this tenure being the partibility of the land upon descent, the word *gavelkind* has come to be applied to many copyholds which only resemble the freehold tenure in this particular; but this use of the word is improper, and apt to lead to mistakes.<sup>5</sup>

See *Coparcener; Disgavel; Socage; Tenure*.

ETYMOLOGY.—Apparently from *gavel*, a rent.<sup>6</sup> Compare *Gale; Gaveller; Gavelet*.

**GAVELLER** is an officer of the crown having the general management of the mines, pits, and quarries in the Forest of Dean and Hundred of St. Briavel's, subject, in some respects, to the control of the Commissioners of Woods and Forests. He grants gales to free miners in their proper order, accepts surrenders of gales, and keeps the registers required by the acts. There is a deputy gaveller, who appears to exercise most of the gaveller's functions. (See *Gale*.)

**GENERAL AVERAGE.** See *Average*, § 3.

**GENERAL LEGACY.** See *Legacy*.

**GENERAL MEETING.** See *Meeting*.

<sup>1</sup> Hargrave's note to Co. Litt. 142 a; Termes de la Ley, s. v.

<sup>2</sup> Co. Litt. 142 a.

<sup>3</sup> Elton, Tenures of Kent; Elton, Copyh.

S.

11; Litt. §§ 210, 265; Co. Litt. 140 a.

<sup>4</sup> Williams' R. P. 130.

<sup>5</sup> Elton, Copyh. 10.

<sup>6</sup> Co. Litt. 142 a.

**GENERAL SESSIONS** is a Court of record held by two or more justices of the peace for the execution of the authority given them by the commission of the peace and certain statutes. General sessions held at certain times in the four quarters of the year pursuant to stat. 2 Hen. V. are properly called quarter sessions (*q.v.*), but intermediate general sessions may also be held.<sup>1</sup>

**GENERAL SHIP.**—Where the master and owners of a ship engage with separate merchants to convey their goods to the place of her destination, the contract is said to be for conveyance in a general ship, as opposed to a chartered ship, that is, a ship which is let to one or more persons under one contract of affreightment, called a charter-party (*q.v.*). In the case of a general ship, the contract with each freighter generally takes the form of a bill of lading (*q.v.*).<sup>2</sup>

A shipowner who professes to carry the goods of all persons who apply to him, so long as he has room in his ship, is a common carrier<sup>3</sup> (*q.v.*).

**GENERAL WORDS.**—In conveyances, mortgages and many other assurances of corporeal hereditaments, numerous words descriptive, not only of every kind of easement, privilege or appurtenance, supposed to be capable of belonging to the property assured, but also of portions of the soil, fixtures and produce of the land (as timber) are added to the parcels or description of the property, and are called the “general words.” They are useful when there are any easements or privileges reputed to belong to the property, although not legally appurtenant to it, as they would not pass with the property unless expressly mentioned. But with this exception the “general words” are as a rule unnecessary verbiage.<sup>4</sup> (See *All the Estate; Operative Part; Parcels.*)

**GENTILI.**—Alberico Gentili (Albericus Gentilis) was born the 14th January, 1552,<sup>5</sup> in Ancona, took the degree of doctor at Perugia in 1572, became professor of law at Oxford in 1587, and died there in 1611. He wrote *De juris interpretibus dialogi sex*, Lond. 1582; *De Legationibus*, 1583; *De jure belli libri III.*, Lugd. Bat. 1589; *Comment. secunda de jure belli*, 1589; *Opera omnia*, Neap. 1770.<sup>6</sup> Professor Holland has recently published a new edition of the *De jure belli libri tres* (Clarendon Press, 1877).

**GESTATION.**—The period of gestation is that time which elapses between the conception and birth of a child. It is usually about nine months of thirty days each; but may be shorter or longer.<sup>7</sup> The time is added, where necessary, to the period allowed under the rule against perpetuities: for example, if an estate is limited to A. for life, with remainder to his eldest son on attaining twenty-one, and A. dies leaving his widow pregnant with a son, but without any other issue, the remainder to the son takes effect on his birth.<sup>8</sup> (See *De Ventre inspiciendo.*)

<sup>1</sup> Pritchard, Q. S. 2.

<sup>2</sup> Smith's Merc. Law, ch. iii. sec. 2.

<sup>3</sup> *Nugent v. Smith*, 1 C. P. D. 19, 423.

<sup>4</sup> See Davids. Conv. i. 91 *et seq.*

<sup>5</sup> See a fragment from Gentili's MSS. published

in the “Academy” for Sept. 8, 1877.

<sup>6</sup> Holtz. Encycl. s. v.

<sup>7</sup> Co. Litt. 123 b and Hargrave's note. Coke calls it *legitimum tempus*.

<sup>8</sup> Williams, R. P. 320.

**GIFT—GIVE**—are words of wide signification, and import the transferring of property from one to another,<sup>1</sup> especially when it is done without recompense, as opposed to a sale or barter. A gift by will is either a devise or a bequest (*q. v.*). Some writers speak of a gift in law, or gift by act of law: thus, when a woman is married to a husband, this operates as a gift in law of all her goods to him,<sup>2</sup> subject to the rules introduced by the Married Women's Property Act (*q. v.*).

§ 2. As an operative word in conveyancing, "give" is as wide as "grant" (*q. v.*).<sup>3</sup> It was formerly the technical and proper word in a feoffment (*q. v.*), and created an implied warranty of title, now abolished.<sup>4</sup>

§ 3. "Gift" in the old writers frequently means a conveyance of land Estate tail. in tail.<sup>5</sup> (See *De Donis*; *Donee*; *Donor*.)

§ 4. "Gift" is also applied to benefices or livings. Thus, if an Living. advowson belongs to A., the living is said to be in A.'s gift.

§ 5. In popular language, a voluntary conveyance or assignment is Deed of gift. called a deed of gift.

**GLANVILLE.**—The work called *Tractatus de Legibus et Consuetudinibus Angliæ* is generally attributed to Ranulph de Glanville, who was sheriff, justice itinerant, and afterwards chief justiciary under Henry II. He died at Acre, on an expedition to the Holy Land in 1190.<sup>6</sup>

**GLEBE** in ecclesiastical law is a portion of land attached to a benefice as part of its endowment.<sup>7</sup>

**GOODS** "includes all chattels, as well reall as personall."<sup>8</sup> In practice, however, the term "goods" is confined to those chattels which are capable of manual delivery, such as furniture and merchandise. Assignments of goods, by way of sale or mortgage, are subject to various statutory regulations, as to which see *Bill of Sale*; *Statute of Frauds*. The two words "goods and chattels" are generally used together, to denote personal property, especially in the old books, and in old forms which have survived: thus, writs of execution against personal property refer to it as the "goods and chattels" of the judgment debtor. In writs of fieri facias, the term "goods and chattels" includes not only furniture, cattle, merchandise, &c., but also money, bank notes, bills of exchange, bonds and other securities for money,<sup>9</sup> and leaseholds or other chattel interests in land: the wearing apparel, bedding and implements of trade of a judgment debtor (not exceeding in value 5*l.*) cannot be seized.<sup>10</sup> (See *Chattels*; *Chose*; *Execution*; *Growing Crops*; *Personal Property*.)

<sup>1</sup> Co. Litt. 301 b; Britton, 87 a.

<sup>2</sup> Shepp. Touch. 227; Co. Litt. 118 b.

<sup>3</sup> Co. Litt. 301 b.

<sup>4</sup> 8 & 9 Vict. c. 106, s. 3; Williams on Seisin, 101.

<sup>5</sup> Shepp. Touch. 228.

<sup>6</sup> Foss, Biog. Dict.

<sup>7</sup> Co. Litt. 341 a; Phill. Eccl. Law, 1459; Steph. Comm. ii. 714.

<sup>8</sup> Co. Litt. 118 b.

<sup>9</sup> Stat. 1 & 2 Vict. c. 110; Steph. Comm. iii. 584.

<sup>10</sup> Stat. 8 & 9 Vict. c. 127, s. 8.

**GOODWILL.**—I. § 1. The goodwill of a business is the benefit which arises from its having been carried on for some time in a particular house, or by a particular person or firm, or from the use of a particular trade mark or trade name (*q. v.*). Its value consists in the probability that the old customers will continue to be customers notwithstanding a change in the firm or place of business. It is personal property.<sup>1</sup>

Personal.

§ 2. A goodwill is said to be personal when it depends on the personal character, that is, the skill or reputation of the person who carries it on. In the case of a public house, baker's shop or the like, the goodwill is not personal, because it consists in the habit which the customers have of resorting to the house. Therefore, if a baker or publican mortgages his house of business without mentioning the goodwill, and the mortgagee sells the house as a going concern, thus obtaining the benefit of the goodwill, the mortgagor is not entitled to that part of the purchase-money which represents the value of the goodwill.<sup>2</sup>

§ 3. Questions of goodwill chiefly arise between an assignor and an assignee. An assignment of a goodwill implies a recommendation of the assignee by the assignor to his customers, and an agreement by him to abstain from all competition with the assignee. If A. carries on business under a firm name which is wholly or partially artificial (such as "A. & Z." or "A. & Co."), and assigns the goodwill of his business to B., then B. becomes entitled to the exclusive use of the firm name as against A., and against all the world, so that A. can neither complain of B.'s use of the name, nor use any name so resembling it, as to be calculated to represent to the world that he (A.) is carrying on the business which he assigned to B.<sup>3</sup> On the same principle A. is not allowed to solicit old customers of the business to deal with him, although he may deal with them, if they come to him without solicitation.<sup>4</sup>

Copyholds.

II. § 4. In the law of real property, where copyholds are granted for the lives of several persons, the first-named life, or the first taker as he is called (that is, the first-named cestui que vie), is generally, though not invariably, the beneficial owner. By the special customs of a great number of manors, the first taker has the right to surrender his estate, and thereby to bar all the rest. And it is frequently part of the custom that the life in possession, or the first of the lives in possession, shall have a veto upon any fresh creation of tenancies in remainder, without his assent or "goodwill," for the manifesting of which there is frequently a customary ceremony, the object being to preserve to the beneficial owner the power of surrendering to the lord and taking a new estate for his own benefit.<sup>5</sup>

**GRAND JURY.** See *Jury*.

<sup>1</sup> *Crutwell v. Lye*, 17 Vesey, 335; *Churton v. Douglas*, Johns. 174; Sebastian on Trade Marks, 180; Robson's Bankr. 512.

<sup>2</sup> *Ex parte Punnett*, 16 Ch. D. 226, following *Chisum v. Dewes*, 5 Russ. 29; *King v. M. R. Co.*, 17 W. R. 113.

<sup>3</sup> *Churton v. Douglas*, *ubi supra*; *Levy v. Walker*, 10 Ch. D. 436.

<sup>4</sup> *Leggott v. Barrett*, 15 Ch. D. 306, overruling *Ginesi v. Cooper & Co.*, 14 Ch. D. 596.

<sup>5</sup> Elton, Copyhold, 48.

**GRAND SERJEANTY.**—§ 1. "Tenure by grand serjeanty is where a man holds his lands or tenements of our sovereign lord the king by such services as he ought to do in his proper person to the king, as to carry the banner of the king, or his lance, or to lead his army, or to be his marshall, or to carry his sword before him at his coronation, or to be his server at his coronation, or his carver, or his butler, or to be one of his chamberlaines at the receipt of his exchequer, or to do other like services, &c. And the cause why this service is called grand serjeanty is for that it is a greater and more worthy service than the service in the tenure of escuage."<sup>1</sup>

§ 2. The tenure by grand serjeanty still continues, though it is no longer a tenure by knight's service, the stat. 12 Car. 2, c. 24, having converted it into free and common socage, merely preserving the honorary services incident to it.<sup>2</sup>

See *Cornage*; *Knight's Service*; *Petty Serjeanty*; *Serjeant*; *Tenure*.

**GRANT.**—I. § 1. "This word is taken largely where anything is granted or passed from one [the grantor] to another [the grantee]. And in this sense it doth comprehend feoffments, bargains and sales, gifts, leases, charges, and the like; for he that doth give or sell doth grant also. . . . And so some grants are of the land or soil itself; and some are of some profit to be taken out of or from the soil, as rent, common, &c. And some are of goods and chattels; and some are of other things, as authorities, elections, &c."<sup>3</sup> § 2. But though "grant" was always an operative word of the most general effect and extent,<sup>4</sup> it is especially used in the following cases:—

In conveyancing.

Special uses of the word.

(1) It always was and is still the appropriate word for the conveyance, inter vivos, of incorporeal hereditaments (such as commons, easements, &c.), remainders, reversions, and generally of freehold estates not lying in livery, and consequently not the subject of livery of seisin and feoffment.<sup>5</sup> (See *Livery*.)

(2) By the Act 8 & 9 Vict. c. 106, s. 2, all corporeal hereditaments, as regards the conveyance of the immediate freehold thereof, are deemed to lie in grant as well as in livery, so that "grant" is now not only the sufficient, but the proper technical word of conveyance of every freehold estate,<sup>6</sup> and a simple deed of grant has superseded the old-fashioned feoffments, leases and releases, &c., which were formerly required to convey freehold estates in possession. (See *Conveyance*; *Feoffment*; *Lease and Release*.) The word "grant," although always used, is not absolutely necessary in a deed of grant, for other words indicating an intention to grant will answer the purpose.<sup>7</sup>

§ 3. "Grant" is applied to copyhold lands to signify that the lord accepts a person as tenant of the land by copy of court roll. An ordinary grant takes place where the lord admits a tenant in pursuance of a surrender by the preceding tenant, or on his death. A voluntary grant is where copyhold land is "in hand," i.e., is in the possession of the lord free from the rights of any tenant, and the lord regrants the land to be held by copy of court roll.<sup>8</sup> (See *Demise*; *Extinguishment*.)

Of copyholds.

Voluntary grant.

<sup>1</sup> Litt. § 153.

<sup>2</sup> Co. Litt. 108 a, n. (1).

<sup>3</sup> Shepp. Touch. 228; Perkins, § 57.

<sup>4</sup> Davids. Conv. i. 73.

<sup>5</sup> *Ibid.* 72.

<sup>6</sup> *Ibid.* 74, ii. 176.

<sup>7</sup> Williams, R. P. 203, where a form of the modern deed of grant is given.

<sup>8</sup> Elton, Copyh. 55; Co. Copyh. § 34.

By the crown. II. § 4. "Grant" is the term commonly applied to rights created or transferred by the crown, *e. g.*, grants of pensions, patents, charters, franchises.<sup>1</sup>

Probate and administration. General. Limited. De bonis non. III. § 5. A grant of probate or letters of administration is made when probate or administration is issued from the proper Court. A grant is said to be *general* when it is unrestricted, and *limited* when it is confined to a part of the deceased's property, or to a period of time, or to a particular object.<sup>2</sup> § 6. Where a married woman has made a will under a power, or disposing of her separate estate, the Court will grant probate limited to the particular property.<sup>3</sup> § 7. If an executor or administrator dies or becomes incapable to act before he has administered the estate, the Court will appoint a new representative by granting probate or letters of administration *de bonis non* [*administratis*], "of the goods not administered," so that the new representative may complete the administration. Probate *de bonis non* is only granted where the deceased executor has specially appointed a person to be executor of the original testator's will, and not of his own.<sup>4</sup>

Durante viduitate, minoritate, &c. Cessate. Grants limited in time:—§ 8. The commonest instances are—grants of probate limited to the life or widowhood of the executor or executrix;<sup>5</sup> grants of administration—(a) "till a will be found," where the will has been lost since the death of the testator; (b) *durante minoritate, absentiâ* or *dementiâ*, "during the minority," "absence" or "insanity" of the executor or person entitled to a general grant of administration, hence sometimes called "grants for the use and benefit *jus habentium*," that is, for the benefit of persons "having a right" to a grant<sup>6</sup> (see *Guardian*, § 13); (c) *pendente lite*, where a suit touching the validity of the will of the deceased is pending.<sup>7</sup> § 9. When the time of a limited grant has expired, the person entitled may apply for a general and regular grant; this is called a supplemental or *cessate* grant.<sup>8</sup>

Ad litem. Ad colligenda bona. Cæterorum. "Save and except." Grants limited to a particular object:—§ 10. The commonest instances are—(a) grants of administration *ad litem*, limited to the purpose of commencing, carrying on, or defending proceedings, involving a certain part of the deceased's estate; (b) grants of administration *ad colligenda bona* [*defuncti*], "to collect the goods [of the deceased]," where the estate is of a perishable or precarious nature, and regular probate or administration cannot be granted at once; (c) grants *cæterorum* [*bonorum*], "of the rest [of the goods]," where a grant limited to part of the estate, or to a particular purpose, has already been granted: thus, where probate is granted of the will of a married woman, disposing of her separate property (*supra*, § 6), the husband is entitled to a grant *cæterorum*, that is, to letters of administration of all her goods, except what she had power to dispose of by will. § 11. A grant "save and except" is the reverse of a *cæterorum* grant.

<sup>1</sup> Chitty, *Prer.* 384.

<sup>2</sup> Browne's *Probate Practice*, 214 *et seq.*

<sup>3</sup> *Ibid.* 216.

<sup>4</sup> *Ibid.* 217.

<sup>5</sup> Coote, 41 *et seq.*

<sup>6</sup> *Ibid.* 107, 116. An administrator

*durante minore ætate* (and, semble, every other administrator for a limited period) has all the powers of an ordinary administrator; *In re Cope*, 16 Ch. D. 49.

<sup>7</sup> Browne, 224.

<sup>8</sup> *Ibid.* 242.

Thus, in the foregoing example, if the grant were made to the husband first, it would be a grant of administration to all his wife's goods and chattels, "save and except" such as she had power to dispose of, and had disposed of.<sup>1</sup>

**GREAT SEAL.**—§ 1. By the Act of Union (5 Anne, c. 8, art. 24), it is provided that there be one Great Seal for the United Kingdom, to be used for sealing writs to elect and summon the parliament, and for sealing all treaties with foreign states, and all public acts, instruments and orders of state which concern the whole United Kingdom, and in all other matters relating to England, as the Great Seal of England was then used.

§ 2. The Great Seal is affixed to documents in pursuance of a warrant (*q. v.*).<sup>2</sup>

§ 3. The office of Lord Chancellor is created by delivery of the Great Seal. (See *Chancellor*, § 2.)

§ 4. The Great Seal Patent Office is the office in which charters, grants of office, pensions and annuities, licences of denization, licences for theatres and certain other licences are prepared and issued. Letters patent for inventions were also formerly issued from this office, but they are now issued by the Commissioners of Patents.<sup>3</sup> Patent office.

See *Crown Office in Chancery; Seal*.

**GRIEVOUS BODILY HARM.** See *Malicious Injuries to the Person*.

**GROSS.** See *In Gross*.

**GROTIUS.**—Hugo de Groot, commonly called Grotius, was born at Delft on the 10th April, 1583, and died in Rostock the 28th August, 1645. He wrote *Mare Liberum* and *De Jure Belli et Pacis*, two important works on international law; and various smaller works.<sup>4</sup>

**GROUND-RENT.** See *Rent*.

**GROWING CROPS** are part of the land, and therefore if A. conveys or devises land to B. the crops pass with it and belong to B. If, however, the owner dies intestate, the crops go to his executors, and not to his heir-at-law, because they are mainly the result of labour incurred at the expense of his personal estate.<sup>5</sup> Tenants for limited terms are sometimes entitled to reap crops which have been sown by them, when their estate has determined before the crop is ripe. (See *Away-going Crop; Emblements*.) Severed crops are personal estate, and, in the case of hay or corn, may be distrained on for rent.<sup>6</sup> Growing crops are liable to be

<sup>1</sup> Browne, 237 *et seq.*; Coote, 135 *et seq.*

<sup>2</sup> See Great Seal Acts, 1851 and 1880, and the Crown Office Act, 1877.

<sup>3</sup> Rep. Comm. Fees, 8, 25. By stat. 37 & 38 Vict. c. 81, power is given to

abolish the office of Clerk of the Patents. See also Great Seal Act, 1880, s. 5.

<sup>4</sup> Holtz. Encycl.

<sup>5</sup> Williams' P. P. 19.

<sup>6</sup> Steph. Comm. iii. 250; stat. 2 Will. & Mary, c. 5.

taken in execution under a *fi. fa.*, subject to the landlord's right of distress.<sup>1</sup> (See *Timber*.)

**Bills of sale.** § 2. An assignment or charge of growing crops does not require registration under the Bills of Sale Act (*q.v.*), if by the same instrument any freehold or leasehold interest in the land is conveyed or assigned to the same person.<sup>2</sup>

### GUARANTEE - GUARANTIE - GUARANTOR - GUARANTY.

—§ 1. A guarantee, guarantie, or guaranty, is a collateral promise to answer for the debt, default or miscarriage of another, as distinguished from an original and direct contract for the promisor's own act.<sup>3</sup> It is, therefore of the essence of a guarantee that there should be some one liable as principal: consequently where one person agrees to become responsible for another, but no valid claim ever arises against the latter, no contract of guarantee exists.<sup>4</sup>

§ 2. The person who binds himself by the guarantee is called the guarantor or the surety, the person to whom it is made the guarantee, and the person for whom it is made is called the principal. Thus, if A. agrees to supply goods to B. in consideration of C.'s promise to pay him for them if B. fails to do so, this is a contract of guarantee by C., who is the guarantor or surety, A. being the guarantee and B. the principal.

§ 3. Under the Statute of Frauds, every guarantee must be in writing, but the consideration need not be stated.<sup>5</sup>

**Continuing.** § 4. A continuing guarantee is one which continues in force until recalled by the guarantor, as opposed to a guarantee applying only to a particular act, sum or transaction: thus, a guarantee "for any goods which A. may supply B. with to the amount of 100*l.*," is a continuing guarantee, and is, therefore, not discharged by one transaction, that is, by a supply of goods to the amount stated and a payment for them.<sup>6</sup>

§ 5. It is sometimes a question whether a continuing guarantee can be determined by the guarantor or not. In the instance above given (§ 4), there seems no doubt that the guarantor could withdraw the guarantee at any time by notifying A. that he would not be liable for any goods supplied to B. *after that date*. Such a guarantee would also probably be determined *ipso facto* by the guarantor's death. But if the arrangement is of such a nature that the person to whom the guarantee is given cannot put a stop to future transactions, then the guarantee is not determinable by the guarantor, or on his death.<sup>7</sup>

§ 6. A representation in the nature of a guarantie is where A. makes a wilfully false representation to B. as to the credit or solvency of C., whereby B. is induced to trust C.<sup>8</sup> It gives B. a right of action for damages against A., if B. trusts C. and thereby loses money.

<sup>1</sup> Steph. Comm. iii. 584; stat. 14 & 15 Vict. c. 25.

<sup>2</sup> Bills of Sale Act, 1878, s. 7.

<sup>3</sup> Chitty on Contracts, 470. Cf. 29 Car. 2, c. 3, s. 4; Smith's Merc. Law, 460.

<sup>4</sup> Chitty, 470.

<sup>5</sup> Stat. 19 & 20 Vict. c. 97.

<sup>6</sup> Chitty, 490; Smith's Merc. Law, 470.

As to the important distinction between a guarantee for part of a debt and a guarantee for the whole of a debt with a limitation on the amount for which the surety is to be liable, see *Ellis v. Emmanuel*, 1 Ex. D. 157.

<sup>7</sup> *Lloyds v. Harper*, 16 Ch. D. 290.

<sup>8</sup> Smith's Merc. Law, 477.



**GUARDIAN** is a person having the right and duty of protecting the person, property, or rights of someone who is supposed to be incapable of managing his own affairs, such as an infant or a lunatic. They are of two kinds, guardians of the person or property, and guardians ad litem. (See *Guardians of the Poor.*)

I. Guardians of the person or property of infants are of five kinds, namely, by the common law, by statute, by custom, guardians by nature in the modern sense, and by judicial appointment. Guardians of person or property.

§ 2. Guardians by the common law were formerly of five kinds, viz., guardian in chivalry, guardian by nature (in the technical sense), guardian in socage, guardian by nurture, and guardian by election. The first two are completely obsolete, the last three practically so. Guardians in chivalry and in socage are sometimes called guardians by tenure.

§ 3. Before tenure by knight's service was abolished, one of its incidents was guardianship or wardship in chivalry, "for when such tenant dyeth, and his heire male be within the age of 21 yeares, the lord shall have the land holden of him untill the age of the heire of 21 yeares. . . . And also if such heire be not married at the time of the death of his ancestor, then the lord shall have the wardship and marriage of him,"<sup>1</sup> that is, the wardship of the heir's person as well as of the land. Guardian in chivalry.

§ 4. While the lord had the wardship he was said to be guardian in right; if he assigned the wardship of the land or person of the heir or both to another person, the grantee was called guardian in fact or guardian in deed.<sup>2</sup> § 5. But if land held by knight's service descended to an eldest son under age during the lifetime of his father, "in this case the lord shall have the wardship of the land, but not of the bodie of the heire, because none shall be in ward of his bodie to any lord, living [*i. e.*, during the life of] his father."<sup>3</sup> This guardianship of the father was called guardianship by nature in the proper sense of the phrase, and it applied only to the custody of an heir apparent.<sup>4</sup> Guardian by nature (I.)

§ 6. According to the old law, if land or any other tenement held in socage descended to an heir under the age of fourteen, the next of blood to whom the inheritance could not descend had the wardship of the land and of the heir until he attained fourteen (or, in the case of gavelkind land, fifteen), when he could enter and oust the guardian and occupy the land himself.<sup>5</sup> During the wardship the guardian could grant leases for a term ceasing on the ward attaining fourteen.<sup>6</sup> This was called a guardianship in socage, and, though in theory it may still exist, it is in practice obsolete.<sup>7</sup> Where a child has a testamentary guardian (*infra*, § 9), the guardian in socage has no authority. Guardian in socage.

§ 7. Guardianship by nurture only occurs where the infant is without any other guardian, and none can have it except the father or mother. It extends no further than the custody and government of the infant's person, and determines at fourteen in the case both of males and females.<sup>8</sup> Guardian by nurture.

§ 8. Guardianship by election is where an infant himself chooses a guardian, which he can only do when he would otherwise be wholly without one. This may happen either before fourteen, when the infant has no guardian by tenure and the father is dead without having appointed Guardian by election.

<sup>1</sup> Litt. § 103.

<sup>2</sup> *Ibid.* § 116.

<sup>3</sup> *Ibid.* § 114.

<sup>4</sup> Co. Litt. 84 b, 88 b, and Hargrave's note (12); 3 Co. 37 b.

<sup>5</sup> Litt. § 123; Co. Litt. 87 b; Steph. Comm. ii. 310. If the next of blood was himself an infant in wardship, his guardian

became guardian of the new heir, and was then called guardian per cause de gard; Co. Litt. 88 b, n. (3).

<sup>6</sup> Bl. Comm. i. 461, n. (5).

<sup>7</sup> See Bythewood's Conv. iv. 226.

<sup>8</sup> Hargrave's note (13) to Co. Litt. 88 b. See another sense of the term given in Sheppard's Abr. v. *Gard*.

Guardian per cause de gard.

a guardian, and there is no mother; or after fourteen when the infant has been in wardship by socage, which terminates on his attaining fourteen.<sup>1</sup> As to guardians by election in probate practice, see *infra*, § 13.

Guardians by statute or testamentary guardians.

§ 9. Guardians by statute. The stat. 12 Car. 2, c. 24, enacts that any father may by deed or will from time to time dispose of the custody and tuition of his children during their minority or any less time to any person or persons other than popish recusants, and that such disposition shall be good against all persons claiming the custody of any such child as guardian in socage or otherwise, and that the guardian so appointed shall take into his custody and management the property of the infant for his benefit.<sup>2</sup> A guardian so appointed is called a guardian by statute or testamentary guardian.

Guardian by custom.

§ 10. Guardianship by custom is said to occur in the city of London and various other cities and boroughs, where the mayor and aldermen have the guardianship of orphans;<sup>3</sup> in the county of Kent, when a tenant in gavelkind dies leaving his heir or heirs under fifteen; and in certain manors, where the lord has the power of naming or is himself the guardian of an infant copyholder.<sup>4</sup> But these kinds of guardianship are rare.

Guardianship by nature (II.)

§ 11. Guardianship by nature, in its modern sense, is a term of somewhat uncertain scope, but the meaning intended to be conveyed by it seems to be that where a child has some property or rights in respect of which it requires to be represented, then its father, if it has one, is its guardian by nature, and if it has no father or other guardian, then its mother is its guardian by nature. So a mother is called the natural guardian of her illegitimate children, apparently because the full legal relation of parent and child is not recognized in the case of illegitimate children.<sup>5</sup> Some writers, however, use the term "guardianship by nature" to express the ordinary relation of parent and child, but this is unnecessary and confusing.

Guardian by judicial appointment.

§ 12. Guardians of the person or property by judicial appointment.

<sup>1</sup> Co. Litt. 87 b; Hargrave's note (16) to 88 b; Bl. Comm. i. 862, n. (12), where it is said that the office of a guardian by election seems not to extend beyond giving the consent to marriage required by the Marriage Act.

<sup>2</sup> See White & Tudor's L. C. ii. 613; notes to *Eyre v. Countess of Shaftsbury*, 2 P. W. 103; Snell's Eq. 322; Watson's Comp. Eq. 294. The stat. 4 & 5 Ph. & M. c. 8, was passed to prevent the taking away or marrying of any damsel under the age of sixteen years from the custody of her father or mother, or of any person to whom the father by deed or will had assigned her custody. From these provisions it was held that the act had impliedly created a power for the father to assign a guardian to his daughters, and that during his life he, or after his death and in the absence of an appointment by him, the mother, was their guardian by nature. *Ratcliff's Case*, 3 Co. 37; Co. Litt. 88 b, and Hargrave's note

(14). The 4 & 5 Ph. & M. was repealed by 9 Geo. 4, c. 31.

<sup>3</sup> This seems to have originally been in respect of burghage tenements held by the orphans; see Elton, Cophy. 158.

<sup>4</sup> See Bl. Comm. i. 462 and notes; Co. Litt. 88 b, and Hargrave's note (16), and the authorities cited in both works; Elton, Cophy. 157; Elton, Tenures of Kent, 79.

<sup>5</sup> Bl. Comm. i. 461 and note; Watson's Comp. Eq.; Co. Litt. 88 b, n. (12); *Reg. v. Howes*, 30 L. J., M. C. 47, where it was decided that the guardianship (for some purposes) lasts until the age of 16 years; *Mallinson v. M.*, L. R., 1 P. & D. 221; *In re Marquis of Salisbury*, 2 Ch. D. 29, where it was held that the word "guardian" in s. 1 of the act 36 & 37 Vict. c. 50, includes guardian by nature in the sense of the father, so as to enable him to bind his infant son by joining in a conveyance on his behalf.

The Chancery Division of the High Court, in the exercise of its general jurisdiction over infants, will appoint a suitable guardian to an infant ward of Court where there is no testamentary guardian or guardian in socage, or where the father or guardian is unfit to have charge of the child. Such a guardian can take no steps as to the person or property of the infant without the direction of the Court.<sup>1</sup>

§ 13. In probate practice, where a person who would otherwise be entitled to a grant of probate or administration is under age and has no testamentary or judicial guardian, a curator or guardian is appointed for the purpose of taking out letters of administration for his use and benefit during his minority. If he is above the age of seven, but under twenty-one, he is styled a minor, and has the privilege of electing anyone of his next of kin to be his guardian, which he does by signing and filing an instrument to that effect: if he is under seven, he is styled an infant, and is considered incompetent to elect a guardian: one of his next of kin is therefore appointed guardian for him by the Court.<sup>2</sup> (See *Grant*, § 8.)

Guardian of  
minor  
(probate).

#### II. Guardians ad litem.

§ 14. A guardian ad litem is a person appointed by a Court to defend an action or other proceeding on behalf of an infant, or a lunatic or idiot not so found, who is defendant or respondent to a proceeding in the Court.<sup>3</sup> If no such guardian is appointed on the application of the infant or lunatic, the plaintiff may apply for the appointment of a solicitor as the guardian.<sup>4</sup> § 15. In divorce practice, an infant elects his guardian ad litem, for the purpose of proceeding on his behalf as petitioner, respondent or intervener.<sup>5</sup> (See *Next Friend*.)

Guardian ad  
litem.

**GUARDIANS OF THE POOR.**—§ 1. By stat. 22 Geo. 3, c. 83, explained by stat. 33 Geo. 3, c. 35, any parish is authorized, by the vote of two-thirds in number and value of its owners or occupiers, to nominate three persons, from whom two justices may appoint one (or in some cases two) to act as guardian of the poor for the parish. Such guardians practically act in lieu of overseers in all matters relative to the relief and management of the poor, except the making and collection of rates. (See *Overseer*.)

§ 2. By stat. 4 & 5 Will. 4, c. 76, where any parishes are formed into a union with the concurrence of the Poor Law Commissioners (now the Local Government Board), its affairs are administered by a board of

<sup>1</sup> Watson's Comp. 295; White & Tudor's L. C. ii. 613; Snell's Eq. 322; Hargrave's note (16) to Co. Litt. 88 b; Bl. Comm. i. 463 and note; Judicature Act, 1873, s. 34. As to guardians appointed by the old ecclesiastical Courts see Hargrave's note (16) to Co. Litt. 88 b. The High Court has no power to appoint a guardian of a lunatic; see *Beall v. Smith*, L. R., 9 Ch. 85; *In re Bligh*, 12 Ch. D. 364, overruling *Vane v. Vane*, 2 Ch. D. 124; also *In re Brandon's Trust*, 13 Ch. D. 773, and see *Lunacy*.

<sup>2</sup> Coote's Prob. Pr. 130.

<sup>3</sup> Rules of Court, xvi. 8, xviii.; Daniell, Ch. Pr. 146, 158; Smith's Action, 371; Settled Estates Act, Orders (1878), Orders 5 *et seq.*; Pope on Lunacy, 308; Co. Litt. 135 b. It is said that the crown may by letters patent appoint a guardian to prosecute or defend for an infant in suits generally; Co. Litt. 88 b, n. (16).

<sup>4</sup> Daniell, 147, 160.

<sup>5</sup> Browne on Divorce, 23; Divorce Rules, (1866), 105; see also the meaning given to "guardian" in the Summary Jurisdiction Act, 1879, s. 49.

guardians elected by the ratepayers and owners of property in the respective parishes. All justices of the peace acting for the district are *ex officio* guardians. And where the Local Government Board direct that the poor law matters of any single parish shall be administered by a board of guardians, they are elected and constituted in the same manner. (See *Poor*.)

**GUARDIAN OF THE SPIRITUALITIES** of a diocese is the person to whom presentations may be made, and by whom institutions, &c. may be given during the absence of a bishop from England, or during the vacancy of the see. Usually the archbishop is the guardian,<sup>1</sup> (See *Temporalities*.)

**GUILTY.** See *Plea*.

## H.

**HABEAS CORPUS** is a writ so called because it is directed to a person who detains another in custody and commands him to produce or "have the body" of that person before the Court for a specified purpose.

Ad sub-  
jiciendum.

§ 2. The most important species of habeas corpus is that which is called by way of distinction the *habeas corpus ad subjiciendum*, from its commanding the person to whom it is directed to produce the body of the person detained, with the day and cause of his caption and detention, *ad faciendum, subjiciendum et recipiendum*—"to do, submit to and receive" whatsoever the Court shall direct. This writ was formerly much used for testing the legality of imprisonment for political reasons, especially during the reigns of the Stuarts; and the evasions and abuses practised by the judges (at the instance of the crown) to detain state prisoners in prison, gave birth to the Habeas Corpus Act (31 Car. 2, c. 2). This act in effect made the granting of a habeas corpus compulsory in the case of a person imprisoned without a legal cause being assigned in the warrant of committal, and provided for the speedy trial of persons imprisoned for treason or felony. The stat. 56 Geo. 3, c. 100, passed to render the writ more effectual in cases not within the statute of Charles II., provided for the issue and return of a habeas corpus in vacation as well as in term, and for examining into the truth of the facts stated in any return to a habeas corpus. The statute 25 & 26 Vict. c. 20, enacts that no habeas corpus shall issue out of England into any colony or foreign dominion of the crown where there is a Court having authority to issue the writ; subject to this limitation the writ of habeas corpus runs into all parts of the dominions of the crown.<sup>2</sup> At the present day the writ is only used to determine

<sup>1</sup> Phill. Eccl. Law, 77.

<sup>2</sup> Steph. Comm. iii. 642; Hallam's Constit. Hist. iii. 12.

questions of law, *e.g.*, as to the legality of an imprisonment (as where a person is arrested under the Extradition Acts<sup>1</sup>), or as to the person entitled to the custody of an infant,<sup>2</sup> or the like. The writ of habeas corpus ad subj. is a prerogative writ. (See *Writ*.)

§ 3. The following kinds of habeas corpus have become practically obsolete since the abolition of arrest on mesne process and of imprisonment for debt—(1) *Habeas corpus ad respondendum*, to bring up a prisoner confined by the process of an inferior Court, to charge him with a fresh action in the Court above: (2) *ad satisfaciendum*, used with a similar object when judgment had been given in the inferior Court against the prisoner: (3) *Habeas corpus cum causâ* (or *ad faciendum et recipiendum*), to remove an action in which the defendant had been arrested from an inferior Court to the Court above.<sup>3</sup> § 4. The writ of *habeas corpus ad prosequendum, testificandum, deliberandum, &c.*, was formerly used when a prisoner had to be brought up to bear testimony in any Court, or to be tried in the proper jurisdiction; the provisions of the acts 16 & 17 Vict. c. 30, s. 9; 19 & 20 Vict. c. 108, s. 31, and 30 & 31 Vict. c. 35, s. 10, have superseded this writ.<sup>4</sup>

Ad respondendum.

Ad satisfaciendum.

Cum causâ.

Ad pros.

**HABENDUM**, in a deed of conveyance, is the clause indicating the estate to be taken by the grantee.<sup>5</sup> (See *To have and to hold; Deed*.)

**HABERE FACIAS POSSESSIONEM** was the name for the writ by which the claimant in an action of ejectment (if successful) obtained possession of the land in question.<sup>6</sup> The name is still sometimes applied to the analogous writ of possession now used, which is in the same terms.<sup>7</sup> (See *Writ of Possession*.)

**HABITUAL CRIMINAL.** See *Police Supervision*.

**HABITUAL DRUNKARD.** See *Drunkenness*, § 2.

**HALE.**—Sir Matthew Hale was born at Alderley in 1609, became serjeant-at-law, a justice of the Common Pleas in 1654, Chief Baron of the Exchequer in 1660, Lord Chief Justice in 1671, and died in 1676. He wrote a History of the Common Law, an Analysis of the Law, a Treatise on Pleas of the Crown, all of which are works of authority, and some minor works.<sup>8</sup>

**HANAPER.**—The Hanaper was formerly an office on the common law side of the Court of Chancery, the clerks in which, in the days when every action was commenced by an original writ issuing from the Chancery, registered the fines that were paid on every writ, and saw that the writs were sealed up in bags, in order to be opened afterwards and issued: “these writs and the returns to them were, according to the simplicity

<sup>1</sup> *Reg. v. Wilson*, 3 Q. B. D. 42.

<sup>2</sup> *In re Goldsworthy*, 2 Q. B. D. 75; Steph. Comm. ii. 313.

<sup>3</sup> Steph. Comm. iii. (643), n. (c); Chitty's *Pr.* 1320 *et seq.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Davids. Conv. i. 99; Shepp. Touch.

74.

<sup>6</sup> Chitty, *Pr.* 1045.

<sup>7</sup> Smith's *Action*, 175.

<sup>8</sup> Foss, *Biog. Dict.*

<sup>9</sup> Gilbert, *Ch.* 10.

of ancient times, originally kept in a hamper, *in hanaperio*.”<sup>1</sup> It was also the duty of the Clerk of the Hanaper to take an account of all patents, commissions and grants that passed the Great Seal. By the stat. 15 & 16 Vict. c. 87, the duties of the office were transferred to the Clerk of the Crown.<sup>2</sup> (See *Chancery*; *Petty Bag Office*.)

**HANDWRITING.**—In the law of evidence, where a document requires attestation for its validity, it is necessary to call the attesting witness or one of them (if more than one) to prove the signature, but in the case of a document which, though not requiring attestation, has been attested, the signature may be proved as if it had not been attested.<sup>3</sup> Evidence as to the handwriting of a person may be given (i) by a person who saw him write the document in question; (ii) by a person who has seen him write other documents and believes the writing in question to be his; the presumption arising from such evidence is called *præsumptio ex visu scripti*onis; (iii) by a person who knows his handwriting from having corresponded with him or having had other opportunities of observing writing which there was reasonable ground for believing to be his (*p. ex scriptis olim visis*); (iv) by an expert or other person who has compared the writing in question with a document known to be in the handwriting of the party (*p. ex scripto nunc viso*).<sup>4</sup> (See *Comparison of Handwriting*; *Ancient Documents*; *Document*.)

**HANGING.**—§ 1. As to the punishment of hanging, see *Death*, § 2. § 2. In the old books “hanging” is used in the sense of “pending;” thus “hanging the process” means “pending the process.”<sup>5</sup>

**HARBOURS.**—§ 1. A harbour is a place naturally or artificially made for the safe riding of ships.<sup>6</sup> The term, therefore, includes ports (*q. v.*).

§ 2. The crown has the prerogative of appointing or constituting ports and havens, and of declaring the limits of existing harbours, where they were not originally fixed. In practice, however, a harbour is now always constituted either by a special act of parliament, or by a provisional order of the Board of Trade, confirmed by act of parliament.<sup>7</sup> The provisions of the Harbours, Docks and Piers Clauses Act, 1847 (which contains clauses usually required in acts authorizing the construction of harbours, docks and piers), apply to harbours so formed.

The crown is conservator of all ports and harbours. Its powers and duties in this respect are now chiefly exercised by the Board of Trade.<sup>8</sup>

A “harbour authority” is a body of persons, corporate or unincorporate, being proprietors of or intrusted with the duty of constructing, improving, managing or lighting any harbour.<sup>9</sup>

**HARRIOTT** is the old form of *heriot* (*q. v.*).<sup>10</sup>

<sup>1</sup> Bl. Comm. iii. 49.

<sup>2</sup> Rep. Comm. on Fees, 4, 5.

<sup>3</sup> Com. L. Proc. Act, 1854, s. 26; stat. 28 Vict. c. 18; Best on Evidence, 307.

<sup>4</sup> Best, 326.

<sup>5</sup> Co. Litt. 13 a.

<sup>6</sup> Coulson & Forbes on Waters, 42.

<sup>7</sup> *Ibid.* 45; Steph. Comm. ii. 499 *et seq.*; stat. 24 & 25 Vict. c. 45.

<sup>8</sup> Stat. 25 & 26 Vict. c. 69; Coulson & Forbes, 45.

<sup>9</sup> Stat. 24 & 25 Vict. c. 47.

<sup>10</sup> Williams on Seisin, 203.

**HAY-BOTE.** See *Estovers*.

**HEARING.**—Under the practice in Chancery before the Judicature Acts the hearing of a cause was the argument of it in Court after the conclusion of the pleadings and the close of the evidence. In the case of a suit heard on motion for decree, the original hearing on the motion for decree frequently did not dispose of the suit, but made it necessary to have a subsequent hearing on further consideration (*q. v.*). Under the present practice the hearing of an action generally takes the form either of a trial or a motion for judgment (*q. v.*).

**HEARSAY.** See *Evidence*, § 9.

**HEINECCIUS** was born at Eisenberg in 1681, became professor in Halle, and died in 1741. He wrote numerous works on Roman Law, which, though somewhat out of date, are still occasionally referred to. The principal are the *Elementa Juris Civilis* and the *Antiquitatum Syntagma*.<sup>1</sup>

**HEIR.**—I. § 1. The word “heir,” when used to describe or designate a given person, includes three classes, “heirs at law” or “heirs” simply, “heirs apparent” and “heirs presumptive.”

§ 2. An heir (or heir at law) is a person who stood in such a degree of relationship to a deceased person (called the ancestor), that the real property of the latter has descended to him, or would have descended to him if the ancestor had died intestate. The mode in which the relationship is to be computed is regulated by the canons of descent laid down by the Inheritance Act. (See *Descent*.)

§ 3. With reference to the rules of descent, by virtue of which they inherit, heirs are of the following kinds: (i) the heir at common law is he to whom his ancestor's lands, &c. descend according to the common law as modified by the Inheritance Act, as opposed to (ii) a customary heir or special heir,<sup>2</sup> who inherits by virtue of a custom, such as gavelkind or borough-English; (iii) an heir general takes by descent as fixed by law, as opposed to (iv) an heir special or heir in tail, who claims as issue in tail *per formam doni*, *i. e.*, according to the nature of the estate tail;<sup>3</sup> hence heirs special are called “heirs male of the body,” “heirs in special tail,” &c., according to the variety of the entail (see *Estate Tail*).

§ 4. With reference to the nature and degree of the relationship between the ancestor and the heir: (i) Formerly a person was said to be lineal heir if he was lineally descended from his ancestor, as son, grandson, &c.; for, before the Inheritance Act, descent could not be traced lineally upwards, from son to father, but now an heir may be a lineal descendant or a lineal ancestor, (ii) A collateral heir is related to his ancestor by being descended with him from a common progenitor, as

At common law.

Customary,

general,

special.

Lineal,

collateral.

<sup>1</sup> Holtz. Encycl.

<sup>2</sup> Co. Litt. 376 a, 386 b.

<sup>3</sup> 8 Co. 166 a.

- Whole blood, in the case of brothers, cousins, nephew and uncle, &c. (iii) An heir of the *whole blood* is descended from the same pair of progenitors as his ancestor, while (iv) an heir of the *half blood* and his ancestor have only one common progenitor. Thus A. and B. his wife have two sons, X. and Y.: B. dies, and A. marries C., and they have a son Z: here Y. is heir of the full blood to X., but only heir of the half blood to Z. (v) Heirs of the part of the father are those related by blood to the father of the ancestor (*e. g.*, a paternal uncle), and (vi) heirs of the part of the mother, are those related by blood to the mother of the ancestor,<sup>1</sup> but this distinction is not now of importance. (See *Descent*, § 12.) (vii) Heir by propinquity is where the heir takes as being the nearest blood relation, as opposed to (viii) heir by representation, where he takes as representing or standing in the place of his ancestor.<sup>2</sup> (See the fourth canon of descent, *Descent*, § 5.)<sup>3</sup>
- By limitation, § 5. When land is given to "the heir" of a person, the heir claims not by descent from his ancestor, but by purchase from the donor, the word "heir" being used as a *descriptio personæ*; and hence he is called heir by limitation, as opposed to the heir in fact, heir in deed (or actual heir).<sup>4</sup> If a testator devises land to his own heir at law, the latter takes as devisee and not as heir.<sup>5</sup>
- in fact.
- Co-heirs. § 6. Co-heirs are two or more persons who take by the same descent. Thus, if a tenant of gavelkind land leaves several sons, they take as co-heirs. So if a tenant of ordinary land leaves no son and several daughters, they take his land as co-heiresses.<sup>6</sup> (See *Coparcenery*.)
- Heir apparent. § 7. An heir apparent is a person who will be heir to his ancestor if he survives him. He is not heir in the proper sense of the word until after the death of his ancestor, for "*nemo est hæres viventis*." Formerly "heir apparent" was applied to the nearest living heir, for he would be heir if the ancestor died immediately, while a distinction was taken between an heir apparent who must be heir in any event ("certain and perdurable heir apparent"), and an heir apparent whose claim is liable to be defeated wholly or partially by the birth of a nearer heir or co-heir.<sup>7</sup> At the present day, however, "heir apparent" means him who, if he survives his ancestor, must certainly be his heir, *e. g.*, an eldest son in ordinary cases, while any other heir is called an heir presumptive, because his claim to inherit is liable to be defeated by the birth of a nearer heir.<sup>8</sup>
- Heir presumptive.

<sup>1</sup> Co. Litt. 12 a.

<sup>2</sup> *Ibid.* 10 b.

<sup>3</sup> The following distinctions are not now of practical interest:—"Immediate heir" was formerly used to signify that the heir was heir apparent or presumptive at the death of the ancestor, as opposed to the case where there is an intermediate descent without seisin. (See *Descent*, § 3 and note (6); Viner, *Abr. Heir* (G. 2).) Formerly a person might be heir and not absolutely heir; as if land descended to an heir presumptive and afterwards a nearer heir was born (Co. Litt. 11 b); but since the Inheritance Act this is impossible, except in the case of a posthumous heir being born.

<sup>4</sup> Viner, *Abr. Heir*, G. 3. "Right heir" seems to mean sometimes *heir at common law* (Brooke, *Abr. Discent*, 59; *Done*, 42), and sometimes *rightful heir*, as opposed to a *supposititious heir* (Co. Litt. 8 b). *Hæres astrarius* is used in the old books to denote an heir apparent to whom his ancestor has conveyed the inheritance in his lifetime, and he is so called of *astre* (modern French *âtre*), a hearth, used figuratively for a dwelling-house (Co. Litt. 8 b). As to mesne heirs, see *Seisin*.

<sup>5</sup> Stat. 3 & 4 Will. 4, c. 106, s. 3.

<sup>6</sup> Litt. §§ 241, 265.

<sup>7</sup> Co. Litt. 8 b; 35 b.

<sup>8</sup> Bl. Comm. ii. 208.



§ 8. An heir apparent or presumptive is an immediate heir, that is, he is the nearest blood relation capable of inheriting to his ancestor. All other blood relations capable of inheriting are called remote heirs: thus A.'s eldest son is his immediate heir, and his younger son is his remote heir.<sup>1</sup>

II. § 9. "Heir" is also used as a word of limitation to denote the quality of an estate of inheritance on its creation. An estate in fee cannot be created by deed without the words "and his heirs" following the name of the grantee. "Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs for ever."<sup>2</sup> If land is conveyed to A. simply, A. merely takes an estate for life.<sup>3</sup> Similarly, an estate tail is properly created by the words "and the heirs of his body" following the name of the grantee. In wills and agreements words of inheritance are not required. (See *Fee*; *Estate Tail*; *Words of Limitation*.)

III. § 10. "Heir" and "heirs" are used in a popular sense, especially by testators, to signify the eldest son, or all the children, or the devisee or the next of kin of a given person. The meaning to be given to the word is a question of construction, on which several rules have been laid down.<sup>4</sup>

See *Expectant Heir*; *Bastard*; *Monster*.

ETYMOLOGY.]—Norman French, *heire*; from Latin, *hæres*.

**HEIRESS** is a female heir. See *Heir*.

**HEIRLOOMS** are such goods and personal chattels as, contrary to the nature of chattels, go by special custom to the heir or devisee of the owner, along with the inheritance, and not to his executor. It is said that the owner of an heirloom cannot dispose of it by will so as to sever it from the inheritance, although he may dispose of it during his lifetime.<sup>5</sup> Heirlooms in the strict sense are rare. When personal property is left by will, or settled so as to descend like a proper heirloom as far as the rules of law allow, it is called an heirloom by devise or settlement, or a quasi-heirloom. (See *Chattels*.)

**HEIRSHIP** is the quality or condition of being heir, or the relation between the heir and his ancestor.

**HERBAGE** is the same as vesture<sup>6</sup> (*q. v.*).

**HEREDITAMENT.**—§ 1. "Whatsoever may be inherited is an hereditament:"<sup>7</sup> in other words, when a right is of such a nature that on the death of its owner intestate it descends to his heir, it is a hereditament. The term includes a few rights unconnected with land, but it is generally used as the widest expression for real property of all kinds, and is therefore employed in conveyances after the words "lands" and

<sup>1</sup> Co. Litt. 242 b.

<sup>2</sup> Litt. § 1.

<sup>3</sup> *Ibid.*; see Co. Litt. 8 b.

<sup>4</sup> See Jarman on Wills, ii. 76.

<sup>5</sup> Bl. Comm. ii. 427; Co. Litt. 18 b, 185 b; 12 Co. 105.

<sup>6</sup> Co. Litt. 4 b.

<sup>7</sup> *Ibid.* 6 a; Shepp. Touch. 91.

"tenements" to include everything of the nature of realty which they do not cover.

The principal division of hereditaments is into those which lie in livery and those which lie in grant (see *Grant*; *Livery*). § 2. Hereditaments lying in livery are those whereof livery of seisin can be made, such as lands, houses, &c.: in other words, they are visible and tangible objects, and are hence also called corporeal hereditaments.<sup>1</sup> § 3. Hereditaments lying in grant are those whereof no livery of seisin can be made because they are mere rights, but they pass by deed of grant without more. They include (a) reversions, remainders and other executory interests in land; and (b) incorporeal hereditaments, namely, advowsons, tithes, easements, profits à prendre, services, rents, annuities, offices, dignities, franchises, &c.<sup>2</sup> Some writers include reversions and remainders among incorporeal hereditaments, and distinguish incorporeal hereditaments in the strict sense by calling them hereditaments purely incorporeal: but the classification is neither correct nor convenient.<sup>3</sup>

Real. § 4. Another division of hereditaments is into real, personal and mixed. Personal. Real hereditaments are lands and tenements. A personal hereditament is one which concerns neither lands nor tenements, such as an annuity granted to a man and his heirs. A mixed hereditament is partly real and partly personal, as where "the king created an earl of such a county or other place, to hold that dignity to him and his heires, this dignity is personall, and also concerneth lands and tenements."<sup>4</sup>

Legal, § 5. Hereditaments are also either *legal*, namely, such as descend to the heir by the rules of the common law, as in the preceding examples, equitable. or *equitable*, namely, those rights which exist only by the rules of equity; thus an equity of redemption (*q. v.*), and the interest of an heir in money directed to be laid out in the purchase of land, are equitable hereditaments.<sup>5</sup> (See *Conversion*.)

Collateral. § 6. Coke says that the franchises of chase, warren, and park are collateral hereditaments and not issuing out of the soil like rights of common, "and therefore if a man hath a chase in other men's grounds, and after purchase the grounds, the chase remaineth;"<sup>6</sup> in other words, it is not extinguished by unity of seisin, being a privilege distinct from the land.<sup>7</sup>

Entire, § 7. An entire hereditament is one, the parts of which are connected several, together, as opposed to several hereditaments, which are unconnected with one another; as if a man has two estates which are separated from one another by land belonging to other persons.<sup>8</sup> Entire hereditaments, again, are either divisible or indivisible. Thus a piece of land or a rent-charge is divisible, while an advowson or a common sans nombre cannot be divided, the former from its nature, the latter because its division

<sup>1</sup> Shepp. 228; Co. Litt. 9 a; Williams' R. P. 10.

<sup>2</sup> Bl. Comm. ii. 21; Co. Litt. 47 a, 165 a; Shepp. 228.

<sup>3</sup> Williams, 241, 322; Steph. Comm. i. 647, n. In Co. Litt. 47 a, reversions and remainders are expressly opposed to incor-

poreal hereditaments.

<sup>4</sup> Co. Litt. 2 a.

<sup>5</sup> Burton's Comp. § 1443.

<sup>6</sup> 4 Inst. 318.

<sup>7</sup> See Comyns' Dig. Chase D.

<sup>8</sup> See Co. Litt. 252 b.

would increase the charge to the owner of the commonable land. An advowson, however, may in effect be divided between co-parceners, for they may agree to present by turns.<sup>1</sup>

ETYMOLOGY.—Hereditament (low Latin *hereditamentum*,<sup>2</sup> from *hereditas*, inheritance) seems to be a comparatively modern word in English law: the old word is *heritage*.<sup>3</sup>

**HERESY** is an ecclesiastical offence, consisting in the holding of a false opinion repugnant to some point of doctrine clearly revealed in Scripture, and either absolutely essential to the Christian faith, or at least of most high importance.<sup>4</sup> It was formerly punishable by death, but the writ *de hæretico comburendo* was abolished by stat. 29 Car. 2, c. 9, and it is now punishable only by excommunication or other censure<sup>5</sup> (*q. v.*); the maximum punishment is consequently six months' imprisonment.<sup>6</sup> (See *Excommunication*.)

**HERIOTS** are of three kinds,—heriot service, suit heriot, and heriot custom.

§ 1. Heriot service can only exist as incident to a freehold tenure created before the Statute of Quia Emptores. It consists in the right of the lord to the best beast of a tenant dying seised of an estate of inheritance, and is recoverable by seizure or distress. Hence it is said to lie both in prender and in render (see those titles).<sup>7</sup> Heriot service.

§ 2. Suit heriot is the right to some chattel of a deceased tenant, reserved on a grant or lease of freehold lands made in modern times. It is not confined to the best beast or to the case of a tenant dying seised of an estate of inheritance. A suit heriot being a species of rent, the lord must either distrain or bring an action for it and cannot seize it.<sup>8</sup> Suit heriot.

§ 3. Heriot custom is usually found in copyholds, though it also occurs in freeholds held of a manor in which the freeholders are subject to a set of customary rules. It is not recoverable by distress except by special custom, and is in other respects entirely regulated by local custom; thus it may be confined to the second best beast, or to animals of a particular kind, or to "dead goods." A heriot custom may also be due on alienation as well as on death.<sup>9</sup> Heriot custom.

See *Service; Mortuary*.

ETYMOLOGY.—Norman French *heriet*,<sup>10</sup> late Latin *heriotum*, from Anglo-Saxon *hergeata*, *heregeatne*, an implement of warfare, because the lord on the death of his tenant was entitled to a certain number of the tenant's horses and arms, varying according to his military rank,<sup>11</sup> or, in the case of a villein, to his best beast.<sup>12</sup> Originally heriot and relief (*q. v.*) were spoken of as synonymous, but after the Conquest "relief" became appropriated to free tenants and "heriot" to villeins.<sup>13</sup>

<sup>1</sup> Co. Litt. 32 a, 164 b.

<sup>2</sup> Ducange, s. v.

<sup>3</sup> Britton, 186 b.

<sup>4</sup> Phillimore, Eccl. Law, 1092.

<sup>5</sup> *Ibid.* 1095.

<sup>6</sup> Stat. 53 Geo. 3, c. 127; Steph. Crim. Dig. 98.

<sup>7</sup> Elton, Copyh. 179 *et seq.*; Williams on Seisin, 203; Scriven on Copyholds, 369;

Watkin on Copyholds, ii. 98; Co. Copyh. § 24; Kitchen on Courts, 265.

<sup>8</sup> Scriven, 372; Elton, l. c.

<sup>9</sup> Elton, l. c.

<sup>10</sup> Britton, 178 a.

<sup>11</sup> Cnut's Laws, II. § 70.

<sup>12</sup> William I.'s Laws, 20. Compare the German *Besthaupt*, Grimm's R. A. 364.

<sup>13</sup> Britton, 178 a.

**HIDE** of land is the same as a ploughland or plowland<sup>1</sup> (*q. v.*).

**HIGH BAILIFF** is an officer attached to a County Court; his duties are to attend the Court when sitting, to serve summonses, and to execute orders, warrants, writs, &c.<sup>2</sup> He also has similar duties under the bankruptcy jurisdiction of the County Courts.<sup>3</sup>

**HIGH COURT OF ADMIRALTY** was a Court of maritime jurisdiction, anciently styled the Court of the Lord High Admiral (see *Admiral*). It had two jurisdictions, one as an Instance Court, in which originally not only civil but also criminal suits of a maritime nature were decided, and the other as a Prize Court. The same judge presided over both Courts, but by virtue of separate commissions.<sup>4</sup>

As to the matters usually falling within the cognizance of the Instance Court, see *Admiralty*; as to the jurisdiction of the Prize Court, see *Capture*; *Prize Court*.

By the Judicature Acts, 1873-5, the jurisdiction of the Admiralty Court was transferred to the Probate, Divorce and Admiralty Division of the High Court (*q. v.*).

**HIGH COURT OF JUSTICE** is that branch of the Supreme Court of Judicature (*q. v.*) which exercises (i) the original jurisdiction formerly exercised by the Court of Chancery, the Courts of Queen's Bench, Common Pleas and Exchequer, the Courts of Probate, Divorce and Admiralty, the Court of Common Pleas at Lancaster, the Court of Pleas at Durham, and the Courts of the judges or commissioners of assize, and (ii) the appellate jurisdiction of such of those Courts as heard appeals from inferior Courts<sup>5</sup> (*infra*, § 5). § 2. It is a Superior Court of Record (see *Court*), and was originally composed of the Lord Chancellor (who is the president but never sits as a judge in the High Court), the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the three Vice-Chancellors of the former Court of Chancery, such of the puisne judges of the old common law Courts as have not been transferred to the Court of Appeal, the judge of the former Probate and Divorce Court, the judge of the former Admiralty Court, and the "judges of her Majesty's High Court of Justice" who have been appointed since the Judicature Act came into operation.<sup>6</sup>

Divisions of  
the High  
Court.

§ 3. The High Court was also originally divided into five temporary divisions, corresponding to, and composed of the same judges as, the old Courts which it replaced, viz., the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce and Admiralty Division;<sup>7</sup> and it was enacted that most of the business which before the act was within the exclusive jurisdiction of any one of the old Courts should be assigned to the corresponding Division of the High Court, that is, the action or matter was to be commenced in that Division: thus actions for the execution of trusts were to be assigned to the Chancery Division, and proceedings relating to the

<sup>1</sup> Co. Litt. 69 a.

<sup>2</sup> Stat. 9 & 10 Vict. c. 95, s. 33; Pollock's C. C. Pr. 16.

<sup>3</sup> Bankruptcy Rules (1870), 58.

<sup>4</sup> Williams & Bruce, Adm. 1.

<sup>5</sup> Judicature Act, 1873, s. 16.

<sup>6</sup> *Ibid.* s. 5; Act of 1875, s. 3; Appellate Jurisdiction Act, 1876, ss. 15, 18; Judicature Act, 1877.

<sup>7</sup> Judicature Act, 1873, s. 31.

revenue to the Exchequer Division,<sup>1</sup> provision being made for the transfer of business from one Division or judge to another when necessary.<sup>2</sup>

§ 4. On the death in 1880 of the Lord Chief Justice of England and the Lord Chief Baron of the Exchequer, who were in office when the Judicature Act came into operation, a council of judges was held, and on the resolution then passed an Order in Council (which came into effect on the 26th February, 1881) was made under the 32nd section of the Judicature Act, 1873, abolishing the offices of the Lord Chief Justice of the Common Pleas and the Lord Chief Baron, and consolidating the "three common law divisions," that is, the Q. B., C. P. and Ex. Divisions, into one division called the Queen's Bench Division, under the presidency of a Lord Chief Justice. (See *Council of Judges*; *Queen's Bench Division*.) The High Court, therefore, now consists of three divisions, namely, the Chancery Division, the Queen's Bench Division, and the Probate, Divorce and Admiralty Division. The rules as to the distribution of business above mentioned have not been altered, except to this extent.

§ 5. Under the practice of the old common law Courts, almost every question of law arising in an action, such as demurrers, motions for new trials, for leave to enter verdicts, &c., had to be heard by the full Court, or Court sitting in banc, composed of at least three judges. To allow of the continuance of this practice, at all events for some time, the Judicature Act provided for the sittings of divisional Courts of the High Court (not to be confounded with the Divisions of the High Court, *supra*, §§ 3, 4), to be composed of two or three (but not more) judges of the High Court, including, if practicable, one or more judges of the Division to which the business to be heard was assigned.<sup>3</sup> In the Chancery, Probate, Divorce and Admiralty Courts, on the other hand, all the business was transacted before a single judge, each cause or matter in chancery business being marked for a judge by name, who heard all applications and questions in it from its commencement to its end. This practice is continued in the divisions corresponding to those Courts.<sup>4</sup> With the view of extending this practice to the "common law" divisions of the High Court, the Appellate Jurisdiction Act, 1876, provided that in future every action and proceeding in the High Court and all business arising out of the same, should, so far as is practicable and convenient, be heard and disposed of before a single judge, and that all proceedings in an action subsequent to the trial or hearing, should be taken before the judge before whom the trial or hearing took place.<sup>5</sup> The rules of Court made under this section<sup>6</sup> direct that appeals from chambers, and from County Courts, crown and revenue business, and some other matters, shall continue to be heard by divisional Courts.

§ 6. An appeal lies to the Court of Appeal (*q. v.*) from all judgments and orders of the High Court in its ordinary jurisdiction.

<sup>1</sup> Judicature Act, 1873, s. 34.

<sup>2</sup> *Ibid.* s. 36.

<sup>3</sup> *Ibid.* ss. 40, 41.

<sup>4</sup> *Ibid.* s. 42.

<sup>5</sup> *Ibid.* s. 17.

<sup>6</sup> Rules of December, 1876.

**HIGH SEAS** include the whole of the seas or open salt water on the globe, beyond the distance of three miles from the coast of any country.<sup>1</sup>

§ 2. The high seas are common to all nations, and no part of them can become the property of any one state. They are, therefore, open to the navigation, fishery and commerce of all the world, and no nation has the right to exercise civil or criminal jurisdiction over the ships of other nations while passing over the high seas.<sup>2</sup> The Courts of a country may however exercise jurisdiction over foreign ships in respect of injuries committed by them on the high seas, if they subsequently come within the territorial waters of that country: and the English Courts have in fact jurisdiction in such cases.<sup>3</sup> As regards the right of fishing on the high seas, where a particular locality is habitually frequented by fishermen of different countries, and a custom is established regulating the mode and time of fishing, and such matters, the custom is binding on all those who frequent the locality.<sup>4</sup>

§ 3. The bed of the high sea appears to follow the same general rule, that it is common to all nations. There is, however, this difference, that it is capable of permanent occupation, and it would consequently appear that if any state keeps uninterrupted and exclusive possession of a portion of the bed of the high seas, for a certain length of time, the state thereby acquires a right to it as against all others, by analogy to the doctrine of possession.<sup>5</sup>

See *King's Chambers ; Piracy*.

**HIGHER AND LOWER SCALE.**—In the practice of the Supreme Court of Judicature there are two scales regulating the fees of Court and the fees which solicitors are entitled to charge. The lower scale applies (unless the Court otherwise orders) to the following cases: all causes and matters assigned by the Judicature Acts to the Queen's Bench or the Probate, Divorce and Admiralty Divisions; all actions of debt, contract or tort; and in almost all causes and matters assigned by the acts to the Chancery Division in which the amount in litigation is under 1,000*l*. The higher scale applies in all other causes and matters, and also in actions falling under one of the above classes, but in which the principal relief sought to be obtained is an injunction.<sup>6</sup>

**HIGHWAY** is a passage which is open to all the king's subjects;

<sup>1</sup> Perhaps it should be added that the country must be one recognizing the obligations of international law, as the three-mile limit is an arbitrary creation of international law.

In the case of *Reg. v. Keyn* (2 Ex. D. 63), it was decided by a majority of seven against six judges, that the English criminal Courts had no jurisdiction to convict a foreigner for an offence committed on the open sea within a distance of three miles from the English coast. Two of the majority were also of opinion that the English parliament had no power to legislate with reference to the portion of the open sea within three miles, so as to give the English Courts jurisdiction over offences

committed there. The rest of the majority, however, considered that the English parliament had this power. The decision, therefore, merely went on the ground that legislation was necessary to give the English Courts jurisdiction, and that no statute having that effect had been passed. In accordance with this view, the Territorial Waters Act, 1878, was shortly afterwards passed. (See *Territorial Waters*.)

<sup>2</sup> Coulson & Forbes on Waters, 2 *et seq*.

<sup>3</sup> Merchant Shipping Act, 1854, s. 527.

<sup>4</sup> Coulson & Forbes, 5, 342.

<sup>5</sup> *Ibid.* 2.

<sup>6</sup> See *Chapman v. M. R. Co.*, 5 Q. B. D. 167, 431; *Duke of Norfolk v. Arbuthnot*, 6 Q. B. D. 190; Daniell, Ch. Pr. 1310.

thus public rivers are in law considered as highways.<sup>1</sup> A highway need not necessarily be a thoroughfare.<sup>2</sup> The interest of the public in a highway consists solely in the right of passage over it; thus a highway over land (which is what is usually meant by a highway), gives the right of walking, driving and riding.<sup>3</sup> The soil and freehold over which that right of way is exercised may be and generally is vested in a private owner, who may maintain an action against persons who infringe his rights therein, as for instance by permitting cattle to depasture there.<sup>4</sup> § 2. A way ceases to be a highway when all access to it has been legally stopped up,<sup>5</sup> and the right to the surface then reverts to the owner of the soil.<sup>6</sup>

§ 3. The unlawful stoppage or obstruction of a highway is a public nuisance.<sup>7</sup>

§ 4. The Highway Acts are various acts from 5 & 6 Will. 4, c. 50, to 25 & 26 Vict. c. 61, 27 & 28 Vict. c. 101 and 41 & 42 Vict. c. 77, relating to highways on land. They provide for the formation of highway districts and highway boards, and the levying of highway rates for the management and repair of highways; they also contain provisions for stopping up and diverting highways by order of two justices.<sup>8</sup> The Turnpike Acts also contain provisions relating to highways coming within their scope.

See *Dedication*; *Ad quod Damnum*; *Way*; *Navigation*; *Nuisance*.

**HILARY.** See *Sittings*; *Term*.

**HOBBS.**—Thomas Hobbes was born at Malmesbury in 1588 and died in 1679. He wrote *De Cive*, *The Leviathan*, and numerous other works, in which theoretical questions of law and government are discussed.

**HOLDING** is a piece of land held under a lease or similar tenancy for agricultural, pastoral or similar purposes. Under the Agricultural Holdings (England) Act, 1875, "holding" includes all land held by the same tenant of the same landlord for the same term under the same contract of tenancy.<sup>9</sup>

**HOLDING OVER** is where a tenant under a lease continues in possession of land after the determination of his tenancy. In ordinary cases the effect of holding over is either to make the tenant liable to an action for use and occupation (*q. v.*), or to continue the tenancy against his wish.

§ 2. By stat. 4 Geo. 2, c. 28, where a tenant for term of life or years wilfully holds over the land after the determination of the term and after demand and notice in writing by the landlord for the delivery of the possession, the tenant is liable to pay damages at double the yearly value of the land.

Double damages.

<sup>1</sup> Smith, L. C. ii. 142.

<sup>2</sup> *Ibid.* ii. 141; Shelford's R. P. Stat. 62.

<sup>3</sup> Co. Litt. 560.

<sup>4</sup> *Ibid.*, citing *Reg. v. Pratt*, 4 E. & B. 860.

<sup>5</sup> *Bailey v. Jamieson*, 1 C. P. D. 329.

<sup>6</sup> *Rolls v. St. George the Martyr*, 14 Ch. D. 785.

<sup>7</sup> Shelford, 67.

<sup>8</sup> Chitty's Statutes, tit. *Highway*; Stone's Justice, 332; Smith's L. C. ii. 152 *et seq.*; Steph. Comm. iii. 128.

<sup>9</sup> 38 & 39 Vict. c. 92, s. 4.

Double rent. § 3. By stat. 11 Geo. 2, c. 19, s. 18, a tenant who holds over after giving notice to quit, is liable to pay double rent for the time he continues in possession.<sup>1</sup>

Freeholders. Copyholders. **HOMAGE.**—I. § 1. Homage signifies the free tenants of a manor assembled in the Court Baron. They are sworn to make their presentments with impartiality, and are hence sometimes called the homage jury. But the attendance of free tenants at the Court Baron has become so unfrequent that the term "homage" is more commonly applied to the copyholders attending at the customary Court. The duty of a homage jury is to make presentments of all things done within the manor to the prejudice of the lord or tenants, and to recommend whatever may appear to be advantageous to the lord, and not injurious to the tenants.<sup>2</sup> (See *Presentment*.)

Service of. II. § 2. Formerly homage signified "a most honourable and humble service of reverence," which every free tenant for an estate in fee simple or fee tail was bound to perform to his feudal lord; it was so called because in doing homage in ordinary cases the tenant said to his lord "I become your man [Norman French *home*] of life and limb."<sup>3</sup> Homage created an obligation of assistance by the tenant to his lord, and of protection by the lord to his tenant.<sup>4</sup>

Liege homage, non ligeum, auncstral. Homage was of several kinds. § 3. Liege homage was without any saving or exception of the faith due by the tenant to anyone else, as where a tenant did homage to the king. Simple homage, or *homagium non ligeum*, was performed by a subject to a subject, as in ordinary cases, where the tenant promised to be faithful to his lord saving the faith he owed to the king.<sup>5</sup> § 4. Homage auncstral (*homagium antecessorium*) is "where a tenant holdeth his land of his lord by homage, and the same tenant and his ancestors, whose heire he is, have holden the same land of the same lord and of his auncstors, whose heire the lord is, time out of memorie of man, by homage, and have done them homage. And this is called homage auncstrell, by reason of the continuance which hath beene by title of prescription in the tenancie in the blood of the tenant, and also in the seignorie in the blood of the lord."<sup>6</sup> The peculiarity of homage auncstrel was that it imposed on the lord the duty of warranty (*q. v.*) and acquittal (*q. v.* § 2) towards his tenant.<sup>7</sup>

§ 5. Homage was abolished by the act 12 Car. 2, c. 24.

See *Fealty*.

ETYMOLOGY.]—Homage in the sense of service is derived from the Norman French *homage*, from *home*, a man, because the tenant became the lord's man.<sup>8</sup> Homage in the sense of the suitors at a Court Baron is said to be of the same derivation, because the suitors were those who had done homage;<sup>9</sup> this derivation is doubtful.

**HOMICIDE** is where one human being kills another.<sup>10</sup>

Felonious. § 2. Homicide is unlawful or felonious,

(a) When death is caused by an act done with the intention to cause death or bodily harm, or which is commonly known to be likely to cause

<sup>1</sup> Woodfall's L. & T. 697 *et seq.*

<sup>2</sup> Elton on Copyholds, 268; see also *Warrick v. Queen's College*, L. R., 6 Ch. at p. 727.

<sup>3</sup> Litt. § 85, where the ceremony is described; Williams on Seisin, 9. As to the form when the tenant was a man of religion or a woman, see Litt. §§ 86 *et seq.* As to the cases where it was due, see Litt. §§ 148 *et seq.*

<sup>4</sup> Co. Litt. 64 a.

<sup>5</sup> *Ibid.* 65 a and n. (3); also Litt. § 89. Hale (Pleas of the Crown, 72) also mentions mixed homage, *e. g.*, that homage

which is due to a prince who is sovereign in relation to his own subjects, and yet owes a subjection to some other prince.

<sup>6</sup> Litt. § 143; see also § 152. The continuance in the blood of the lord was not essential to the tenure, for land might be held of a corporation by homage auncstrel: Litt. § 146; Co. Litt. 102 b.

<sup>7</sup> Litt. §§ 143, 144.

<sup>8</sup> Britton, 174 a.

<sup>9</sup> Blount's Law Dict. s. v.; Williams on Seisin, 36.

<sup>10</sup> Stephen's Crim. Dig. 138.



death or bodily harm, and when such act has no legal justification or excuse (see *Murder*):

(b) When death is caused by an omission, amounting to culpable negligence, to discharge a duty tending to the preservation of life, whether such omission is or is not accompanied by an intention to cause death or bodily harm (see *Murder*; *Manslaughter*):

(c) When death is caused accidentally by an unlawful act<sup>1</sup> (see *Manslaughter*).

§ 3. Homicide is excusable when the person by whom it is committed is not altogether free from blame, though it is not of such a kind as to make him criminally responsible. Excusable homicide is either *per infortunium*, by misadventure, as where a person driving a carriage with due care accidentally kills anyone,<sup>2</sup> or homicide *se et sua defendendo*, that is, in defence of one's self or property upon some sudden affray considered by the law as in some measure blameable.<sup>3</sup> (See *Chance-Medley*.) Excusable.

§ 4. Homicide is justifiable where no blame whatever attaches to the person killing; as in case of the execution of a malefactor by legal warrant, or where a constable or other officer in the execution of his duty, in either a civil or criminal case, kills a person who assaults or resists him, or where one person kills another in defending himself or his property against an attempt to commit a felony with force, *e. g.*, murder, robbery.<sup>4</sup> Formerly a person who committed excusable homicide was liable to be tried and punished, but this liability has been abolished,<sup>5</sup> so that the distinction between excusable and justifiable homicide no longer exists. Justifiable.

ETYMOLOGY.]—Latin, *homicidium*, from *homo*, a man, and *occidere*, to kill. Formerly "homicide" meant manslaughter.<sup>6</sup>

**HOMOLOGATION** is the same thing as estoppel in pais<sup>7</sup> (*q. v.*).

**HONOR** means (i) a seignory in capite of which several inferior lordships or manors depend; and (ii) the land or district included in the seignory. An honor cannot be created since the Stat. Quia Emptores, except by act of parliament.<sup>8</sup> (See *In Capite; Manor; Tenure*.)

**HONOUR**.—The drawee of a bill of exchange is said to honour it when he accepts it. The acceptor of a bill, or the maker of a note, is said to honour it when he pays it. (See *Bill of Exchange*.) As to acceptance for honour, see *Acceptance*, § 5.

**HORSE**.—The law as to horses differs from that relating to other chattels chiefly in this respect, that by stats. 2 & 3 Ph. & M. c. 7, and 31 Eliz.

<sup>1</sup> Stephen's Crim. Dig. 143.

<sup>2</sup> Russell on Crimes, i. 844.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* 848 *et seq.* See also the curious case of one person pushing another off a plank at sea in order to save himself; Bacon's Elem. c. 5, cited Bl. Comm. iv. 186.

<sup>5</sup> Stat. 24 & 25 Vict. c. 100, s. 7; Archbold, Crim. Pl. 656.

<sup>6</sup> Co. Litt. 287 b.

<sup>7</sup> *Burkinshaw v. Nicolls*, 3 App. Ca. at p. 1026.

<sup>8</sup> Co. Litt. 108 a; Spelman, Gl. s. v.; Madox, Bar. Angl. *passim*; Bl. Comm. ii. 91; Stephen, Comm. i. 215.

c. 12, the sale of a stolen horse in market overt does not pass the property therein, unless the requirements of the acts to ensure publicity are complied with, and unless in addition the owner fails to put in a claim within six months after the horse was stolen; if he proves his case, and tenders the purchaser the price paid by him, he is entitled to have his horse back again.<sup>1</sup> As to horse races, see *Wagers*.

**HOTCHPOT.**—Where property is settled on the members of a class (*e.g.*, the children of a marriage) subject to a power of appointment among them, and part of it is appointed to one, that one is nevertheless not excluded by law from taking an equal share with the others in the part which remains unappointed, and thus obtaining a larger share than any of the others. This is usually prevented by the insertion of a clause called a hotchpot clause, which declares that no appointee shall take any share in the unappointed part without bringing his appointed share into hotchpot: that is, without adding it for the purpose of computation to the unappointed part, when the whole is divided equally. Of course an appointee is not bound to do this, and only does it when his appointed share is less than what he would obtain if no appointment had been made.<sup>2</sup>

The Statute of Distribution contains a similar provision applying to advancement. (See *Advancement*, § 3; *Frankmarriage*.)

ETYMOLOGY.—“It seemeth that this word *hotchpot* is in English a pudding.”<sup>3</sup> It is derived from the Dutch *hutsot*, from *hutsen*, to shake up, and *pot*: French, *hochepot*, from *hocher*, to shake up.<sup>4</sup>

**HOUSE OF COMMONS** is the third branch of parliament (*q.v.*), and consists of representatives of the nation at large (exclusive of the peerage), chosen by election. The counties of the United Kingdom are represented by members who are technically called knights of shires, and the cities and boroughs by members who are in like manner called citizens and burgesses. The principal universities also elect representatives.<sup>5</sup> (See *Election*, § 3, note <sup>(6)</sup>; *Lodger*; *Occupation*, § 11; *Registration*; *Revising Barrister*.)

**HOUSES OF CORRECTION** were a species of prison, originally designed for the confinement of vagrants and paupers refusing to work. By stat. 5 & 6 Will. 4, c. 38, they were made available for the detention of prisoners committed for trial,<sup>6</sup> and now there is no distinction between them and other prisons (*q.v.*).<sup>7</sup>

**HOUSE OF LORDS** is the assembly of lords spiritual and temporal, which forms the second branch of parliament (*q.v.*). The lords spiritual are the two archbishops and such of the bishops of the Church of

<sup>1</sup> Oliphant's Law of Horses, *passim*; Steph. Comm. ii. 75.

<sup>2</sup> Elphinstone, Conv. 309; Watson's Comp. Eq. 583.

<sup>3</sup> Litt. § 267; Co. Litt. 177 a.

<sup>4</sup> Littré, Dict. s. v.

<sup>5</sup> Stephen, Comm. ii. 333; stats. 2 Will. 4, c. 45; 30 & 31 Vict. c. 102; 31 & 32 Vict. cc. 48, 49; Ballot Act, 1872.

<sup>6</sup> Steph. Comm. iii. 122.

<sup>7</sup> Prisons Acts, 1865 and 1877.

England as have seats in parliament by ancient usage or by statute. § 2. The lords temporal consist of (1) the peers of the United Kingdom; (2) the representative peers of Scotland and Ireland, the Scotch peers having the right to elect for each parliament sixteen representatives from their own body, and the Irish peers twenty-eight for life; (3) two life peers, or Lords of Appeal in ordinary (see *Lords of Appeal*).<sup>1</sup> The Lord Chancellor is prolocutor and president of the House. (See *Chancellor*, § 2.)

§ 3. In addition to their functions as part of the legislature, the House of Lords exercise judicial authority (1) in the trial of peers for treason or felony (see *Certiorari*, § 3; *Lord High Steward*); (2) in claims of peerage; (3) in disputed elections of representative peers; and (4) as a Supreme Court of Appeal from the Court of Appeal in England, and the Superior Courts of Scotland and Ireland.<sup>2</sup>

As to the practice in appeals to the House of Lords, see *Appeal*, § 4; *Appendix*; *Case*; *Petition*.)

**HOUSE-BOTE.** See *Estovers*.

**HOUSEBREAKING** is where a person breaks and enters a dwelling-house or building occupied therewith, or a school-house, shop, warehouse or counting-house, and commits any felony therein, or where a person commits a felony in any such building, and then breaks out of it. The maximum punishment is fourteen years' penal servitude.<sup>3</sup> (See *Burglary*.)

**HUE AND CRY** "is the old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another."<sup>4</sup> All those who join in following upon a hue and cry are justified in apprehending the person pursued, even though it should turn out that he is innocent, or that no felony has been committed. To maliciously or wantonly raise a hue and cry is a misdemeanor and an actionable offence.<sup>5</sup>

**HUNDRED** is a district forming part of a county, and governed by a high constable or bailiff. Hundreds were originally so called because each consisted of a hundred families of freeholders, or ten tithings. Each hundred formerly had its Court (see *Hundred Court*), but they have fallen into disuse.<sup>6</sup>

As to the Hundred of St. Briavel's, see *Gale*.

§ 2. The status of a hundredor or freeholder of a hundred is now one of little importance. Under 7 & 8 Geo. 4 (which consolidated the law on the subject), if damage is done to buildings or erections by "persons riotously and tumultuously assembled together" the inhabitants of the

<sup>1</sup> May's Parl. Pr. 6 *et seq.*

<sup>2</sup> *Ibid.* 53.

<sup>3</sup> Stat. 24 & 25 Vict. c. 96, ss. 55, 56.

<sup>4</sup> Bl. Comm. iv. 293.

<sup>5</sup> Steph. Comm. iv. 351.

<sup>6</sup> Bl. Comm. i. 116; Steph. Comm. i. 126.

hundred, or district in the nature of a hundred in which the offence was committed, are liable to yield full compensation to the person damnified. The constable represents the hundred in the proceedings to recover the damages, which resemble those in an ordinary action, except that execution is levied by the sheriff making a warrant on the treasurer of the county, directing him to pay the amount to the plaintiff. A summary mode of proceeding is given for cases where the damage does not exceed 30*l*.<sup>1</sup>

§ 3. Formerly the jurors in an action were taken from the neighbourhood of the vill or place where the cause of action was laid in the declaration, and some of them were obliged to be returned from the hundred in which the vill lay; if none were returned, the array might be challenged for defect of hundredors;<sup>2</sup> this rule was abolished by stats. 24 Geo. 2, c. 16, s. 13, and 6 Geo. 4, c. 50, s. 13.

See *Challenge*; *Wapentake*.

**HUNDRED COURT** is only a larger Court Baron (*q. v.*), being held for all the inhabitants of a particular hundred (*q. v.*) instead of a manor.<sup>3</sup> Hundred Courts are now seldom held. (See *Salford Hundred Court of Record*.)

**HUSBAND AND WIFE.**—The law of husband and wife deals with the following matters:—

(1.) The pre-requisites and formalities of marriage, as to which see *Affinity*; *Consanguinity*; *Domicile*; *Licence*; *Marriage*.

(2.) The effect of the marriage on the rights and duties of the parties, as to which see *Curtesy*; *Dower*; *Fraud*, § 12; *Freebench*; *Marriage*; *Necessaries*.

(3.) Marriage settlements: see *Settlement*; *Equity to a Settlement*.

(4.) Protection orders and separation deeds (*q. v.*).

(5.) Restitution of conjugal rights, judicial separation, and divorce (*q. v.*).

Ship.

**HYPOTHECATION.**—§ 1. In its proper sense, hypothecation is where a ship, or her freight or cargo, or all three, are made liable for the payment of money borrowed by the master. It is of two kinds,—bottomry and respondentia (*q. v.*).<sup>4</sup>

Property.

§ 2. In modern times attempts have been made to introduce “hypothecation” from the Roman law, as a general term equivalent to “charge,” the proper English term. In this use of the word, to hypothecate property is to charge it with the payment of a sum of money or the performance of an obligation, giving the person in whose favour it exists neither the right to the possession of the property, nor the right to sell it, but

<sup>1</sup> Smith's Action, 346.

<sup>2</sup> Bl. Comm. iii. 359; Co. Litt. 157 a.

<sup>3</sup> 2 Inst. 71; Steph. Comm. iii. 281; County Courts Act, 1867, s. 28.

<sup>4</sup> Fisher on Mortgage, 7, 77 *et seq.*; Maude & Pollock, Merch. Shipp. 433; Williams & Bruce's Admiralty, 31.

merely the right of realization by judicial process, in case of nonpayment or nonperformance at the proper time.<sup>1</sup>

See *Pledge*.

ETYMOLOGY.]—Latin, *hypotheca*; Greek, ὑποθήκη, from ὑπο, under; τίθημι, to place. For a history of the Latin *hypotheca*, see Markby's *Elements of Law*, § 507; Kuntze, *Cursus*, § 555.

## I.

I. O. U.—An I. O. U. is an acknowledgment of a debt in this form:—

London, 1st January, 1878.

Mr. William Smith.

I. O. U. one hundred pounds.

£100.

JOHN AIKIN.

It need not however be addressed to the creditor by name. If an I. O. U. contains an agreement to pay, it becomes either an agreement or a promissory note, and must be stamped accordingly.<sup>2</sup>

**IDENTIFICATION—IDENTITY.**—To identify a person or thing is to show that he or it is *the* person or thing in question. Thus, on an inquest or trial for murder, the first thing is to identify the deceased, that is, prove who he was. So in investigating the title of land, the purchaser, in the absence of a stipulation to the contrary, is entitled to proof of the identity of the land described in the title deeds, with that which he has contracted to purchase.<sup>3</sup>

**IDIOCY—IDIOT.**—According to the old lawyers, an idiot or fool natural is a person who from his birth, by a perpetual or incurable infirmity, is of unsound mind.<sup>4</sup> By the Statute De Prerogativâ Regis (17 Edw. 2, c. 9), the king shall have the custody of the land of natural fools, taking the profits of them without waste or destruction, and shall find them their necessities; and after their death he shall render the lands to their right heirs. This prerogative was never favoured at law,<sup>5</sup> and is now never exercised, the procedure by inquiry in lunacy having made it unnecessary. At the present day idiocy is considered as a species of insanity or lunacy. (See *Insanity; Lunacy; Mute; Non Compos Mentis*.)

<sup>1</sup> Fisher, l. c., where the term is also made to include equitable assignments of debts, &c.

<sup>2</sup> Byles on Bills, 28.

<sup>3</sup> As to identity generally, see Moriarty

on Personation.

<sup>4</sup> Co. Litt. 247 a; 4 Co. 124 b; Pope on Lunacy, 12; Maudsley on Mental Disease, 66.

<sup>5</sup> Pope on Lunacy, 25.

**IGNORAMUS**, "We know nothing of it," was the indorsement formerly made on a bill of indictment by a grand jury when they thought the charge not sustained by the evidence. They now indorse "Not a true bill," or "Not found."<sup>1</sup> (See *Indictment*.)

**IGNORE**.—A grand jury are said to ignore a bill of indictment when they think the charge not sustained by the evidence. (See *Indictment*; *Jury*.)

**IGNORANCE OF FACT OR LAW**. See *Mistake*.

**ILLEGAL**.—§ 1. An act is illegal when it is one which the law directly forbids, as to commit a murder, to obstruct a highway, to sell a loaf otherwise than by weight.<sup>2</sup> The illegality of an act is not only of importance as subjecting the doer to the penalties imposed for disobedience of the law, but also because the act is not recognized by law as capable of creating any right, except as a remedy for any injury caused by it. Thus, if A. agrees with B. to pay him 50*l.* for the publication of a libel, or the like, the contract is void.<sup>3</sup> But an act is not illegal in the strict sense simply because it is not recognized by the law as capable of giving rise to rights. Thus a contract made *ultra vires* is void, but not illegal.<sup>4</sup>

§ 2. Illegal is also used (1) in the same sense as unlawful<sup>5</sup> (*q.v.*); (2) in the same sense as void;<sup>6</sup> but it is convenient to keep the ideas distinct.

See *Condition*, § 10; *Consideration*, § 8; *Immorality*.

**ILLEGITIMACY**. See *Bastard*; *Child*, § 2; *Legitimacy*.

**ILLUSORY**. See *Appointment*, § 4.

**IMMORALITY**<sup>7</sup> is of importance in law, because no party to a transaction founded on immorality can invoke the assistance of a Court of law in enforcing, nor (except in a few cases) in setting it aside. Thus, a contract for an immoral purpose or for an immoral consideration is void; but a party to an immoral contract or conveyance cannot, as a general rule, have it set aside.<sup>8</sup>

§ 2. Almost the only kind of immorality having this vitiating effect is that consisting in illicit cohabitation. Thus an agreement providing for or tending to illicit cohabitation is void.<sup>9</sup>

See also *Indecency*; *Policy*.

<sup>1</sup> Steph. Comm. iv. 367.

<sup>2</sup> Pollock on Contract, 218; *Collins v. Blantern*, Smith, L. C. i. 369.

<sup>3</sup> *Ibid.* 250; *Stockdale v. Onwhyn*, 5 B. & C. 173. See *In re South Wales, &c. Co.*, 2 Ch. D. 763.

<sup>4</sup> *Ashbury, &c. Co. v. Riche*, L. R., 7 H. L. at p. 672.

<sup>5</sup> See Chitty on Contracts, 607 *et seq.*

<sup>6</sup> *S. C.*, L. R. 9 Ex. 262, corrected by Lord Cairns, L. R., 7 H. L. at p. 673.

<sup>7</sup> "When we call a thing immoral in a legal sense, we do not mean so much that

it is ethically wrong, as that, according to the common understanding of reasonable men, it would be a scandal for a Court of justice to treat it as lawful or indifferent, though the transaction may not come within any positive prohibition or penalty." Pollock on Contract, 242.

<sup>8</sup> *Ayerst v. Jenkins*, L. R., 16 Eq. 275; *Batty v. Chester*, 5 Beav. 103, cited in Pollock on Contract, 244.

<sup>9</sup> Pollock, 243 *et seq.*; Chitty on Contracts, 611 *et seq.*

**IMPANEL.**—A jury is said to be impanelled when the sheriff has entered their names in the panel<sup>1</sup> (*q. v.*).

**IMPEACHMENT** is a complaint or accusation against a person for a great public offence, especially against a minister of the crown for malversation or treason. The House of Commons first find the crime, and then as prosecutors support their charge before the House of Lords, who try and adjudicate upon it. The charge is contained in articles of impeachment, to which the accused makes answers, and so on; the commons appoint managers to conduct the proceeding on their behalf.<sup>2</sup> (See *Lord High Steward.*)

**IMPEACHMENT OF WASTE.**—Where an estate for life is given to a person “without impeachment of waste,” he may cut down trees on the land and convert them to his own use,<sup>3</sup> and open mines, &c.; but he may not pull down the family mansion, or fell ornamental timber, or commit any other acts of the kind known as equitable waste.<sup>4</sup> (See *Waste.*)

**IMPERATIVE.** See *Directory.*

**IMPERTINENCE.**—Under the old rules of chancery pleading, impertinence consisted in the introduction of long and unnecessary or immaterial allegations into a bill. The plaintiff was liable to pay the costs occasioned thereby.<sup>5</sup> A similar rule still prevails.<sup>6</sup> (See *Scandal.*)

**IMPLICATION—IMPLIED.**—I. § 1. An intention, or an act evidencing intention (such as a promise, request, devise, gift, offer, &c.), is said to be implied when it does not really exist, but is presumed to exist; that is, the same legal effect is produced as if did exist. Thus, when a person goes to an inn with goods, and is taken in by the innkeeper, the law implies a promise by the innkeeper to keep his guest's goods safely, subject to certain exceptions, although the innkeeper may have had no such intention.<sup>7</sup> Such a promise is sometimes said to be “implied in law” (or to exist in implication of law) in order to distinguish it from implication in the wider sense of the word (*infra*, § 2).

II. § 2. Implication is also used in the sense of inference, that is, where the existence of an intention is inferred from acts not done for the sole purpose of communicating it, but for some other purpose.<sup>8</sup> (See *Express.*) Thus, if a person orders goods to be sent to him, he impliedly promises to pay for them. Such a promise is more correctly called a tacit promise, to distinguish it from an express promise. So where a testator gives property to one person in such terms as to show that he meant to give some interest in it to another, the latter takes an interest

Estate by  
implication.

<sup>1</sup> Co. Litt. 158 b.

<sup>2</sup> May, Parl. Pr. 55, 680; Homersham Cox, Inst. 470; Steph. Comm. iv. 299.

<sup>3</sup> Co. Litt. 220 a.

<sup>4</sup> Williams, R. P. 25.

<sup>5</sup> Daniell's Ch. Pr. 291.

<sup>6</sup> Rules of Court, xix. 2.

<sup>7</sup> Pollock on Contract, 28.

<sup>8</sup> Savigny, Syst. iii. 242.

by implication. Thus, if a testator gives personal property to A. after the death of B., without giving anything to B. expressly, then B. takes a life interest in the property by implication.<sup>1</sup>

§ 3. "Implied" is sometimes applied in both the above senses to the same subject-matter. See *Contract; Covenant; Trust; Warranty*; also *Constructive; Express; Tacit; Quasi-Contract*.

**IMPOSSIBILITY.**—§ 1. The question whether an act is possible is of importance in law with reference to the performance of conditions and agreements. (See *Performance*.)

I. With reference to the nature of the act required, an impossibility is either physical, legal or logical.

Physical :  
absolute,  
relative, or in  
fact,

§ 2. An act is physically impossible when it is contrary to the course of nature. Such an impossibility may be either absolute, that is, impossible in any case (*e. g.*, for A. to reach the moon), or relative (sometimes called impossibility in fact), that is, arising from the circumstances of the case, *e. g.*, for A. to make a payment to B., he being a deceased person.<sup>2</sup>

practical.

§ 3. To the latter class belongs what is sometimes called practical impossibility, which exists when the act *can* be done, but only at an excessive or unreasonable cost. Thus, when a ship is so injured that it is not worth while repairing her, the same effect with respect to the liability of the insurer is produced as if it were physically as well as practically impossible to repair her.<sup>3</sup> (See *Loss*.)

Legal or  
juridical.

§ 4. An act is legally or juridically impossible when a rule of law makes it impossible to do it, *e. g.*, for A. to make a valid will before his majority. This class of acts must not be confounded with those which are possible, although forbidden by law, as to commit a theft.<sup>4</sup> (See *Illegal; Unlawful*.)

Logical.

§ 5. An act is logically impossible when it is contrary to the nature of the transaction, as where A. gives property to B. expressly for his own benefit, on condition that he transfers it to C.<sup>5</sup> (See *Repugnancy*.)

Original.

II. § 6. With reference to the time when the impossibility first exists, the act may be either originally impossible (*ab initio*), or become impossible by matter subsequent (*ex postfacto*). Thus, if A. contracts with B. to pay money into the hands of C., and C. was dead at the time the contract was entered into, then the payment was originally impossible; if C. was alive at the time, but dies before the payment, it becomes impossible by matter subsequent.

Subsequent.

§ 7. The latter class are again divisible according as the performance of the act required is rendered impossible by the person creating the requirement, by the person for whose benefit the act was to be done, by the person required to do it, by a stranger, such as the Queen's enemies (*q. v.*), by the act of God (*q. v.*), by a change in the law, &c.<sup>6</sup>

Whether  
created by  
promisor,  
promisee, &c.

<sup>1</sup> Watson's Comp. Equity, 1271. See *Sweeting v. Prideaux*, 2 Ch. D. 413.

<sup>2</sup> Savigny, Syst. iii. 157, 164; Pollock on Contract, 330.

<sup>3</sup> Leake on Contracts (2nd edit.) 682; Pollock on Contract, 326; *Jones v. St.*

*John's College*, L. R., 6 Q. B. 115.

<sup>4</sup> Savigny, iii. 169.

<sup>5</sup> *Ibid.* 159; Pollock, 322, 326.

<sup>6</sup> Leake, 692 *et seq.*; Pollock, 330 *et seq.*; *Baily v. De Crespigny*, L. R., 4 Q. B. 180, and the cases there cited.



§ 8. These divisions are important with reference to the effect of non-performance of the impossible act. Thus a contract for the performance of an act which every reasonable person must know to be impossible (as to make a flying machine and fly to the moon with it) is void,<sup>1</sup> and an impossible consideration is no consideration.<sup>2</sup> On the other hand, if a person contracts to do an act which is only impossible from circumstances (as to build a house in a week, all the workmen in the building trade being on strike, or to pay money when he has none), the impossibility does not excuse his non-performance except in special cases. (*ante*, § 3).<sup>3</sup> Again, if the act becomes impossible by the act or default of the promisor, not only does this not excuse him, but it operates as a breach of his contract, although the time for performance may not have arrived;<sup>4</sup> while if it becomes impossible by the act of the person for whose benefit it was to be done, the promisor is discharged from performance. All these rules, however, are subject to the intention appearing from the whole transaction.<sup>5</sup> (See *Condition*, §§ 8, 10.)

Effect of impossibility.

**IMPOUND.**—In its literal sense, to impound is to put distrained cattle or other goods in a pound (*q. v.*), and as this is done to keep them as security, the term is also applied to cases where a document, money or other property is set apart to be kept in safety until some condition is fulfilled or some question is decided.<sup>6</sup>

**IMPRESSMENT** is a power possessed by the crown of taking persons or property to aid in the defence of the country with or without the consent of the persons concerned. It is usually exercised to obtain hands for the Queen's ships in time of war by taking seamen engaged in merchant vessels,<sup>7</sup> but in former times impressment of merchant ships was also practised.<sup>8</sup> The Admiralty issues protections against impressment in certain cases, either under statutes passed in favour of certain callings (*e. g.*, persons employed in the Greenland fisheries) or voluntarily.<sup>9</sup>

§ 2. Under the Army Discipline Act, 1879, power is given of impressing carriages, animals and drivers required for moving military baggage and stores.

**IMPREST-MONEY** is money imprested or advanced by the crown for the purpose of being employed for its use.<sup>10</sup> The term is not wholly obsolete.<sup>11</sup>

<sup>1</sup> See Leake, 686; *Clifford v. Watts*, L. R., 5 C. P. 577; Pollock, 324; Savigny, iii. 162.

<sup>2</sup> Chitty on Contracts, 44.

<sup>3</sup> *Thom v. Mayor of London*, L. R., 9 Ex. 163, 10 Ex. 112; 1 App. Ca. 120; *Thomborow v. Whitacre*, 2 Ld. Raym. 1164; Pollock, 330.

<sup>4</sup> Pollock, 345.

<sup>5</sup> See also Savigny, *Oblig. i.* 381 *et seq.* and with reference to legacies, &c., Watson's Equity, 1233.

<sup>6</sup> See *In re Westbourne Grove Drapery Co.*, 5 Ch. D. 248.

<sup>7</sup> Bl. Comm. i. 420; Maude & Pollock, *Merch. Shipp.* 123.

<sup>8</sup> Maude & Pollock, *Merch. Shipp.* 123, note (r).

<sup>9</sup> *Ibid.* 124, 125.

<sup>10</sup> Manning's Exchequer, 17; 13 Eliz. c. 4; 1 Mad. Exch. c. 10, s. 13, p. 387; 6 Price, 424 a.

<sup>11</sup> See the Public Revenues Acts of New Zealand, 1872, 1873.

Criminal law. **IMPRISONMENT**, as a punishment, consists in the detention of an offender in prison and in his subjection to the discipline appointed for prisoners during the period expressed in the sentence. It is of three kinds, imprisonment with hard labour, imprisonment without hard labour (in either case with or without solitary confinement), and imprisonment "as a misdemeanor of the first division." In the latter case the offender is not deemed to be a criminal prisoner; he is permitted to procure or receive food, wine, clothing, &c., and to follow his trade or profession, subject to certain restrictions.<sup>1</sup> (See *Penal Servitude*.)

For debt. § 2. Imprisonment is also in some rare cases a mode of executing a judgment for payment of a sum of money exceeding 20*l*. For this purpose the plaintiff issues a writ of *capias ad satisfaciendum* (*q. v.*). When the defendant is once arrested the judgment cannot be enforced against the defendant's property, and when he is discharged the debt is satisfied. (See *Debtors Act*.)

Disability. § 3. Formerly imprisonment was a disability, in certain cases, which prevented the Statutes of Limitation from running against the person imprisoned, but this is no longer so.<sup>2</sup>

**IMPROPRIATION — IMPROPRIATOR.** — Impro priation is where a rectory or tithes belong to a lay person called the impro priator. In the case of a rectory, the impro priator or lay rector is bound to provide for the cure of souls by appointing either a vicar or a perpetual curate.<sup>3</sup> (See *Appropriation*, § 7.)

**ETYMOLOGY.**—Said to be derived from the Latin *in proprietatem*, because the living is held as a lay property.<sup>4</sup>

**IMPROVEMENT OF LAND ACTS.**—By the Improvement of Land Act, 1864, any person in the possession or receipt of the rents or profits of land (not being a tenant under an unrenowable lease for life or years) may, with the sanction of the Enclosure Commissioners, borrow or advance money for the execution of certain improvements on the land, and obtain an order charging the amount, with interest, on the inheritance or fee of the land. The amount constitutes a rent-charge payable half-yearly over the period of years fixed by the order, in respect of principal and interest combined. The improvements authorized by the act include works of drainage, irrigation, embankment, reclamation, clearing and planting of land, and the construction of roads, farm and agricultural buildings, jetties, &c. The Limited Owners Residences Acts, 1870 and 1871, added to this list of improvements the erection of a mansion-house, with the usual and necessary outbuildings, &c., and the Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877, added to it the construction or erection of reservoirs or other permanent works for the supply of water.

<sup>1</sup> Stephen, *Crim. Dig.* 2 *et seq.*; Russell on Crimes, i. 78 *et seq.*; stat. 28 & 29 Vict. c. 126.

<sup>2</sup> Stat. 19 & 20 Vict. c. 97, s. 10; Shel-

ford, R. P. Stat. 187, 293.

<sup>3</sup> Bl. Comm. i. 386; Phillimore, *Eccl. Law*, 276.

<sup>4</sup> Phillimore, *Eccl. Law*, 275.

**IN CAMERÂ.**—A case is said to be heard in camerâ when the judge either hears it in his private room, or causes the doors of the Court to be closed, and all persons, except those concerned in the case, to be excluded. This is done where it is in the public interest that the facts of the case should not be published, especially in divorce cases, but it is not clear whether the Court can do so as a matter of course in any case.<sup>1</sup>

**IN CAPITE, IN CHIEF, or EN CHEF,** originally meant "directly," "immediately," *sine medio, sans mesne*.<sup>2</sup> Hence "tenure in capite" primarily means the tenure of very lord and very tenant (*q. v.*), or the relation between a tenant and his immediate feudal superior, as opposed to a mesne tenure<sup>3</sup> (see *Mesne*); but the phrase was always applied especially to land held directly of the crown,<sup>4</sup> and at the present day it is used exclusively in that sense. (See *Tenure*.) § 2. Tenure in capite, however, even when confined to the crown, is an ambiguous expression. Formerly land might be held directly of the king in three manners. First, it might have been originally granted to the tenant by the king in his capacity of king or lord paramount; this was called tenure ut de coronâ; secondly, an honor, castle or manor held by a private person might come into the hands of the crown (*e. g.* by escheat), so that the persons holding lands of the honor became tenants of the king in his capacity of lord of the honor: this was called tenure ut de honore; thirdly, if A. held land of B., a private person, in gross, and B.'s seignory escheated to the crown, then A. became tenant of the king, not in his capacity of king, but as if he were an ordinary mesne lord: this was called tenure ut de personâ. These distinctions were formerly important, for tenure ut de coronâ involved many burthensome incidents which tenants of the king by tenure ut de honore and ut de personâ were free from, because they did not become tenants of the king by their own free will. (See *Livery*.) Originally each of these tenures was called a tenure in capite, but about Henry VIII.'s reign the term in capite ceased to be applied to tenure ut de honore and ut de personâ,<sup>5</sup> and became appropriated to tenure in capite ut de coronâ, and it is this tenure to which the act 12 Car. 2 refers when it abolishes tenure in capite. At the present day, therefore, there is no distinction between tenures of the crown.<sup>6</sup>

**IN FORMÂ PAUPERIS.**—Under the statutes 11 Hen. 7, c. 12, and 23 Hen. 8, c. 15, s. 3, every poor person desirous of bringing an action who can swear that he has not property worth 5*l.*, except his wearing apparel and the subject-matter of the intended action, is to be allowed to bring his action without payment of the Court fees, and is to have an attorney and counsel assigned to him who act for him without payment.<sup>7</sup> The practice of the Common Law Courts, under these acts, was adopted by the Courts of Equity, and was extended by them to the case of defendants.<sup>8</sup> It would, therefore, appear that the rule as thus extended is the practice of the High Court. (See *Dispauper*; *Dives*.)

<sup>1</sup> See *Nagle Gillman v. Christopher*, 4 Ch. D. 173.

<sup>2</sup> Madox, Bar. Ang. 164.

<sup>3</sup> Britton, 100 a.

<sup>4</sup> Co. Litt. 108 a; Wright's Tenures, 161.

<sup>5</sup> So where the king was lord of an ancient borough, the tenants in burgage were not called tenants in socage in capite (Co. Litt. 77 a).

<sup>6</sup> See Co. Litt. 77 a, 108 a, and Hargrave's notes. Mr. Madox's remarks on this subject are singularly narrow-minded.

<sup>7</sup> Smith's Action, 96; Chitty's Pr. 1289. As to the mode of obtaining leave, see Coe's Pr. 170.

<sup>8</sup> Daniell's Ch. Pr. 38. As to the practice in divorce cases, see Browne on Divorce, 249, and in criminal cases, Archbold Cr. Pl. 150.

**IN GROSS**, as applied to a right, means that it is not appendant, appurtenant, or otherwise annexed to land. Thus, if A. grants to B. the right of feeding a certain number of cattle on his (A.'s) lands, B. has a common of pasture in gross.<sup>1</sup> (See *Common*, § 9; *Easement*, § 1, note (4); *Profit*.)

§ 2. In the old books, money payable by a mortgagor of land is said to be in gross, as opposed to a rent issuing out of the land: and hence a mortgagor must tender the money to the person of the mortgagee, while it is sufficient to tender rent on the land itself.<sup>2</sup>

As to powers in gross, see *Power*.

**IN LOCO PARENTIS.**—§ 1. A person is said to be in loco parentis towards an infant when he assumes towards the latter the moral obligation of making such a provision for him as his father would in duty be bound to make. The assumption of the character may be, and generally is, implied from the acts of the person putting himself in loco parentis, as where he pays for the maintenance and education of the infant or establishes him in life.<sup>3</sup> The fact that the father of the child is living does not prevent another person putting himself in loco parentis, but if the child resides with the father and is maintained by him it affords an inference, though not a conclusive one, against the assumption of the character by another person.<sup>4</sup>

§ 2. A person in loco parentis is for many purposes treated as if he were the parent of the infant. Therefore the presumption in favour of advancement (as to which see *Advancement*, § 4), and the presumption in favour of maintenance out of a contingent or deferred portion, apply to such persons.<sup>5</sup>

**IN PAIS**, as applied to a legal transaction, primarily means that it has taken place without legal proceedings. Thus a widow was said to make a request in pais for her dower when she simply applied to the heir without issuing a writ.<sup>6</sup> So conveyances are divided into those by matter of record and those by matter in pais (see *Conveyances*).<sup>7</sup> § 2. In some cases, however, "matters in pais" are opposed not only to "matters of record," but also to "matters in writing," that is, deeds, as where estoppel by deed is distinguished from estoppel by matter in pais.<sup>8</sup> (See *Estoppel*, §§ 3, 4.)

**ETYMOLOGY.**—*Pais* means "country." It is not clear whether the phrase originally signified that the transaction in question took place on the spot, as in the case of a feoffment, which required livery of seisin on the land itself, or whether it denoted any place not being a Court. See *Country*.

Roman law.

**IN PERSONAM—IN REM.**—I. § 1. In the Roman law, from which they are taken, the expressions *in rem* and *in personam* were always

<sup>1</sup> Elton, *Common*, 76; Co. Litt. 122 a.

<sup>2</sup> Co. Litt. 210 a; Litt. § 341.

<sup>3</sup> *Powys v. Mansfield*, 3 My. & C. 359; Simpson on Infants, 250.

<sup>4</sup> Simpson, 252.

<sup>5</sup> Simpson, 176, 246.

<sup>6</sup> Co. Litt. 32 b.

<sup>7</sup> See also a similar distinction between forfeitures in Co. Litt. 251 a.

<sup>8</sup> *Ibid.* 352 a.

opposed to one another, an act or proceeding *in personam* being one done or directed against or with reference to a specific person, while an act or proceeding *in rem* was one done or directed with reference to no specific person, and consequently against or with reference to all whom it might concern, or "all the world."<sup>1</sup> The phrases were especially applied to actions, an *actio in personam* being the remedy where a claim against a specific person arose out of an obligation, whether *ex contractu* or *ex maleficio*, while an *actio in rem* was one brought for the assertion of a right of property, easement, status, &c., against one who denied or infringed it.<sup>2</sup>

II. § 2. From this use of the terms they have come to be applied to signify the antithesis of "available against a particular person" and "available against the world at large." Thus, *jura in personam* are rights primarily available against specific persons, *jura in rem* rights only available against the world at large. (See *Right*.) § 3. So a judgment or decree is said to be *in rem* when it binds third persons; such is the sentence of a Court of Admiralty on a question of prize, or a decree of nullity or dissolution of marriage<sup>3</sup> (see *Judgment*), or a decree of a Court in a foreign country as to the status of a person domiciled there.<sup>4</sup>

III. § 4. Lastly, the terms are sometimes used to signify that a judicial proceeding operates on a thing or a person. Thus it used to be said of the Court of Chancery that it acted *in personam* and not *in rem*, meaning that its decrees operated by compelling defendants to do what they were ordered to do, and not by producing the effect directly. Hence the Court had (and therefore the High Court now has) jurisdiction to deal with a question affecting land situate in a foreign country, if the question can be settled by enforcing the decree or order against a person within the jurisdiction.<sup>5</sup> § 5. It is in this sense that admiralty actions are divided into actions *in rem* and *in personam*, an action *in rem* being one in which the ship or other property out of which the cause of action arises (the *res*) is arrested as security for the performance of an obligation, while in an action *in personam* the performance of the obligation can only be enforced against the defendant personally.<sup>6</sup> (See *Action*, § 11; *Information*, § 11.)

IN VENTRE SA MÈRE.<sup>7</sup>—§ 1. An unborn child, or infant *en ventre sa mère*, is for many purposes supposed to be born. It may take property by will or grant, and may have a guardian assigned; and if an

<sup>1</sup> Savigny, Syst. v. 24, n. (a), citing Dig. ii. 14, fr. 7, § 8, fr. 57, § 1; xxxix. 1, fr. 10; iv. 2, fr. 9, § 1.

<sup>2</sup> Just. Inst. iv. 6, § 1; Gaius, iv. 1; Savigny, v. 13 *et seq.*; Vangerow, Pand. § 113.

<sup>3</sup> Smith's L. C. ii. 699; *Castrigue v. Imrie*, L. R., 4 H. L. 414.

<sup>4</sup> *Doglioni v. Crispin*, L. R., 1 H. L. 301.

<sup>5</sup> *Penn v. Lord Baltimore*, 1 Ves. 444; *White & Tudor's L. C.* ii. 837. The Court

has gone so far as to foreclose a mortgagor's equity of redemption in land situate abroad; *Paget v. Ede*, L. R., 18 Eq. 118. See also *Brinsmead v. Harrison* (L. R., 6 C. P. at p. 588), deciding that an action of trover is not a proceeding *in rem*.

<sup>6</sup> See *The Charkieh*, L. R., 4 A. & E. 59.

<sup>7</sup> The proper term is *en ventre sa mère* (Co. Litt. 390 a), but the title was overlooked in its proper place, at page 310, until after that page was in type.

estate is limited to A. for life and after his death to his eldest son, and A. dies leaving his wife enceinte of a son, the posthumous son will take the estate, notwithstanding the rules as to contingent remainders.<sup>1</sup> (See also *Gestation*.)

Criminal law. § 2. If means be used to kill a child in the womb, and the child is born alive and afterwards dies by reason of the means so used, this is murder.<sup>2</sup> As to procuring abortion, see *Miscarriage*.

**INADEQUACY** of consideration for a contract, conveyance, or the like, does not affect the validity of the transaction, except as supporting a charge of fraud, undue influence or the like. (See *Consideration*, § 1; *Expectant Heir*; *Fraud*; *Reversion*.)

**INCAPABLE—INCAPACITY.**—Incapacity is the opposite of "capacity" (*q. v.*), and therefore equivalent to disability (*q. v.*).

**INCENDIARISM.** See *Arson*.

**INCIDENT** is "a thing appertaining to or following another."<sup>3</sup> Thus, fealty is incident to every tenure, and cannot be separated from it; so a rent may be incident to a reversion, though it may be separated from it, that is, the one may be conveyed without the other. Hence incidents are divisible into separable and inseparable.<sup>4</sup>

Tenure. § 2. Formerly, every tenure had one or more of the following incidents, most of which no longer exist; namely, fealty, homage and other services, aids, reliefs, primer seisin, wardship, marriage, fines, escheat, forfeiture, and heriots (see the various titles).

**INCIPITUR**, in the old common law practice, was a copy on plain paper of the first words of a proceeding in an action. Thus, in entering a judgment for the purpose of issuing execution, it was sufficient to enter an incipitur, that is, the commencement of the proceedings, instead of the whole.<sup>5</sup>

**INCITE—INCITEMENT.**—Every one who incites any person to commit a crime is guilty of a misdemeanor, whether the crime is committed or not.<sup>6</sup>

**INCLOSURE—INCLOSURE COMMISSIONERS.**—§ 1. Inclosure is the act of freeing land from rights of common, commonable rights, and generally all rights which obstruct cultivation and the productive employment of labour on the soil,<sup>7</sup> by vesting it in some person as absolute owner.

<sup>1</sup> Steph. Comm. i. 139; Williams' R. P. 272.

<sup>2</sup> Steph. Comm. i. 140.

<sup>3</sup> Co. Litt. 151 b.

<sup>4</sup> *Ibid.* 93 a.

<sup>5</sup> Common Law Proc. Act, 1852, s. 206.

<sup>6</sup> Stephen, Crim. Dig. 29.

<sup>7</sup> See General Inclosure Act, 1845, preamble; Cooke, Incl. 162, n.; Elton, Comm. 27; Steph. Comm. i. 655; and see *Common*; *Commonable*.

§ 2. Inclosure may be effected in three manners:—

(1) In the case of manorial wastes (a) by the lord of the manor alone under his right of approvement (*q. v.*); (b) by the lord under a special custom enabling him, with the consent of the homage, to grant parcels of the waste, to be held of him by copy of court-roll;<sup>1</sup> (c) by the tenants themselves under various special customs<sup>2</sup> (see *Intakes*); (d) by encroachments, or unauthorized inclosures legalized by lapse of time.<sup>3</sup>

Approve-  
ment.

Customary  
inclosures.

(2) By agreement between the commoners and the owner of the soil. By agreement.

(3) By act of parliament. § 3. Formerly every statutory inclosure was effected by a private act appointing a commissioner and authorizing him to parcel out the land among the persons interested (the commoners and the owners of the soil); but since the passing of the General Inclosure Act, 1845, inclosures are now generally effected by permanent commissioners called the Inclosure Commissioners, who inquire into the expediency of proposed inclosures; if they approve of a proposed inclosure, they make a provisional order setting forth the manner in which it is to be carried out, and, if parliament thinks fit, a general act authorizing the inclosures so recommended, or some of them, is passed;<sup>4</sup> each inclosure is then carried out by a valuer.<sup>5</sup> (See *Allot*, § 2.)

By act of  
parliament.

General  
Inclosure Act.

§ 4. By the Commons Acts, 1876 and 1879, the powers of the Inclosure Commissioners are extended to cases where it is desirable to regulate, improve, stint and otherwise deal with commons, without wholly enclosing and allotting them in severalty; thus they may provide for the drainage or levelling of a common, the planting of trees on it, and its general management.

Commons  
Acts.

· II. § 5. Formerly whenever a person entitled to a rent was prevented by gates or other erections from coming on the land to demand or distrain for it, this was called enclosure, and operated as a disseisin of the rent.<sup>6</sup> (See *Disseisin*.) The term is now obsolete.

**INCOME TAX** is a tax on the yearly profits arising from property, professions, trades, and offices.<sup>7</sup> In the case of land, the tenant or occupier is primarily liable to pay the tax, but he is entitled to deduct a proportionate part from his rent, and he cannot by any agreement with his landlord deprive himself of this right.<sup>8</sup>

**INCOMPETENCY—INCOMPETENT.** See *Competence; Capacity; Disability*.

**INCONSISTENCY.**—§ 1. In construing deeds and wills, the first rule is that every part of the instrument may, if possible, take effect, and none be rejected. If, however, this cannot be done on account of an inconsistency, then the rules differ according as the instrument is a deed or a will. In a deed, if two clauses or parts be repugnant, the first part

<sup>1</sup> Elton, 255.

<sup>2</sup> *Ibid.* 277.

<sup>3</sup> Cooke, 89.

<sup>4</sup> Of late years no general inclosure acts have been passed.

<sup>5</sup> Cooke, Incl. Ch. vii.

<sup>6</sup> Litt. §§ 237—239; Co. Litt. 161 a.

<sup>7</sup> Steph. Comm. ii. 573.

<sup>8</sup> Stat. 5 & 6 Vict. c. 35, s. 73.

shall be received and the latter rejected, except there be some special reason to the contrary.<sup>1</sup> In a will, on the other hand, the rule is that the latter of two inconsistent provisions prevails; therefore if a testator in one part of his will gives a person an estate of inheritance, and in a subsequent part refers to it as an estate for life, the prior gift is restricted accordingly.<sup>2</sup>

§ 2. Inconsistency in pleading is forbidden.<sup>3</sup> (See *Departure*.)

Corporations.

**INCORPORATION.**—I. § 1. As applied to corporations, incorporation is the process of forming a corporation (*q. v.*).

Documents.

II. § 2. As applied to acts of parliament, wills, agreements, and other documents, incorporation means that one document is made to form part of another by being referred to in the latter.<sup>4</sup> Thus almost every act of parliament for the construction of a railway or other public work incorporates the provisions of the Railways Clauses Consolidation Act, or other Clauses Consolidation Act (see *Act of Parliament*, § 5). So where a testator expressly refers to any deed, letter, or other document as carrying out or containing his own testamentary dispositions, the document (if it exists) is considered as incorporated in or forming part of the will, and is included in the grant of probate accordingly.<sup>5</sup>

**INCORPOREAL HEREDITAMENTS.** See *Hereditaments*, § 3.

**INCUMBENT.** See *Induction*.

**INCUMBRANCE.** See *Encumbrance*.

**INDECENCY.**—It is a misdemeanor to do any grossly indecent act in any open or public place.<sup>6</sup> As to indecent assaults, see stats. 24 & 25 Vict. c. 100, ss. 52, 62; 43 & 44 Vict. c. 45. (See *Obscenity*.)

**INDEMNIFY—INDEMNIFICATION.**—§ 1. To indemnify is to make good a loss which one person has suffered in consequence of the act or default of another,<sup>7</sup> and the operation of making good the loss is called indemnification.<sup>8</sup> Thus, if A. fails to pay a debt which he owes to B., and a surety, C., pays it, he is said to indemnify B., and B. is said to obtain indemnification. So, if A. wrongfully causes a loss to B., A. is liable to indemnify B. for the loss which he has sustained.<sup>9</sup> § 2. A promise to indemnify is the same thing as an indemnity or guarantee (*q. v.*), and hence “to indemnify” sometimes signifies “to give an indemnity,” that is, “to promise to indemnify;” thus, a person to whom an indemnity is given is said to be indemnified. (See *Damnify*.)

ETYMOLOGY.]—Latin, *in*, in the sense of taking away, and *damnum*, loss.

<sup>1</sup> Shepp. Touch. 87, 88; Bl. Comm. ii. 381; Co. Litt. 112 b; *Burchell v. Clark*, 2 C. P. D. 88.

<sup>2</sup> Jarman on Wills, ch. xv.; *Greenwood v. Greenwood*, 5 Ch. D. 954.

<sup>3</sup> See *Hawkesley v. Bradshaw*, 5 Q. B. D. 302.

<sup>4</sup> This is sometimes called “incorporation by reference,” to distinguish it from the case of one document being set out in

full in the other, which is actual incorporation.

<sup>5</sup> Coote's Probate Pr. 60; Browne's Probate Pr. 104.

<sup>6</sup> Stephen's Crim. Dig. 104.

<sup>7</sup> See *Ferguson v. Gibson*, L. R., 14 Eq. 379.

<sup>8</sup> See 19 & 20 Vict. c. 97, s. 5.

<sup>9</sup> *Heritage v. Paine*, 2 Ch. D. 594.



**INDEMNITY.**—§ 1. An indemnity is a collateral contract or security to prevent a person from being damnified by an act or forbearance which he does at the request of the indemnitor. Thus, if A. agrees not to sue B. for a debt during a certain period in consideration of a promise by C. to repay him any loss which he may suffer from not suing B. at once, C.'s promise constitutes an indemnity.

§ 2. Settlements and wills usually contain a provision that the trustees shall not be liable for the acts or defaults of their co-trustees, or of any agent, banker, &c., but shall only be liable for what they actually receive, and for their own acts and neglects. Such a clause now forms part of every instrument creating a trust.<sup>1</sup> (See *Indemnify*; *Guarantee*; *Express*; *Implied*.)

Indemnity clause.

**INDENT—INDENTURE.**—§ 1. To indent a document is to cut the top of the first page or sheet in a toothed or waving line. The most usual instance of this is in the case of a deed indented or indenture (*infra*, § 2), but it is also done in other cases: thus the inquisition under an elegit (*q.v.*) is indented.

§ 2. An indenture is a deed made between two or more parties, *e.g.*, an ordinary conveyance, lease, mortgage, settlement, &c. Formerly it was usual when a deed was made between two parties to write two copies of it on one piece of parchment or paper, and then to cut it in two in an indented or toothed line, so that each copy of the deed fitted the other and could thus be identified.<sup>2</sup> Now a deed purporting to be an indenture has the effect of an indenture, although not actually indented.<sup>3</sup>

Indentures were formerly called bipartite, tripartite, quadripartite, &c., according as they were made in two, three, or four parts: all the parts of an indenture are but one deed in law.<sup>4</sup>

See *Deed*; *Counterpart*; *Covenant*.

**INDICTMENT** is a written accusation of one or more persons of a crime, presented on oath by a grand jury. The indictment is preferred (that is, laid before) the grand jury under the technical name of a bill; the witnesses in support of the charge are then examined, and if the offence appears to a majority of the jury (consisting of twelve at least) to be sufficiently proved to put the offender on his trial, they indorse on the indictment "true bill"; the indictment is then said to be found, and the offender stands indicted and must be arraigned (*q.v.*). If the majority think that the offence has not been sufficiently proved, they indorse "No true bill" on the indictment, and the accused person is then discharged. Strictly speaking, the indictment is not so called until it has been found a true bill.<sup>5</sup> (See *Presentment*; *Information*; *Inquest*; *Jury*; *Venue*; *Ignoramus*.)

<sup>1</sup> Stat. 22 & 23 Vict. c. 35, s. 31.

<sup>2</sup> Britton, 99 a.

<sup>3</sup> Stat. 8 & 9 Vict. c. 106, s. 5.

<sup>4</sup> Litt. § 370; Co. Litt. 229 a; Shepp. Touch. 50. Blackstone (Comm. ii. 296) says that the part which is executed by the grantor is called the original, and the rest

are counterparts; this, however, in practice is rarely said except of a lease (*q.v.* § 10).

<sup>5</sup> Archbold, Crim. Pl. 78. As to the form of the indictment, see *ibid.* 25; Pritchard, Q. S. 143; stat. 14 & 15 Vict. c. 100, s. 24. As to indictments in the Queen's Bench, see Grady & Scotland, 43.

**INDORSE—INDORSEMENT.**—§ 1. To indorse is to write something on the back of an instrument. "Indorsement" signifies either the act of indorsing, or the writing itself.

Deed.

§ 2. When a deed to be executed has reference to a transaction already embodied in a deed between the same parties, or some of them, or their predecessors in title, it frequently saves the repetition of many recitals and provisions to make the terms of the new deed refer to those of the former one, and to indorse it on that instrument: thus, the reconveyance of mortgaged property is frequently indorsed on the mortgage, and an appointment of new trustees on the settlement or other instrument creating the trust.

Bills of exchange.

§ 3. Indorsement is also an important mode of transferring bills of exchange, cheques, bills of lading, and similar documents, and is effected by the person to whose order the document is payable, writing his name on the back and delivering it to the transferee.<sup>1</sup>

In blank.

An indorsement consisting merely of the indorser's name, is called an indorsement in blank: when it specifies the name of the person (the indorsee) to whom the document is transferred or indorsed, it is called a special indorsement, or an indorsement in full.<sup>2</sup> An indorsement in blank makes the instrument payable to bearer: a special indorsement makes it payable to the order of the person named in the indorsement. As to the liability of an indorser, see *Bill of Exchange*, § 4.

Special.

The following kinds of indorsement seem, in practice, to be peculiar to bills of exchange and promissory notes.

Sans recours.

§ 4. An indorsement without recourse (*sans recours*) is where an indorser declares that he shall not be liable if the bill, &c. is dishonoured by the antecedent parties.<sup>3</sup> A conditional indorsement is one made before acceptance, in such a form as to impose on the drawee accepting the bill

Conditional.

a liability not to pay the bill except in a particular event.<sup>4</sup> A restrictive indorsement is where the bill is expressed to be indorsed to a person for a particular purpose (*e.g.*, "Pay to A. B. for my account"), and prevents him from negotiating it.<sup>5</sup>

Restrictive.

As to indorsements on writs of summons, see that title.

**ETYMOLOGY.**—Low Latin, *indorsare*, from Latin, *dorsum*, the back.<sup>6</sup>

**INDUCTION**, in ecclesiastical law, is the ceremony by which an incumbent who has been instituted to a benefice is vested with full possession of all the profits belonging to the church, so that he becomes seised of the temporalities of the church and is then complete incumbent. It is performed by virtue of a mandate of induction directed by the bishop to the archdeacon, who either performs it in person, or directs his precept to one or more other clergymen to do it.<sup>7</sup> (See *Institution*; *Collation*.)

<sup>1</sup> Smith's Merc. Law, 233; Byles on Bills, i, 151.

<sup>2</sup> Byles, 149.

<sup>3</sup> *Ibid.* 152.

<sup>4</sup> *Ibid.* 153.

<sup>5</sup> *Ibid.* 157.

<sup>6</sup> Ducange, s. v.

<sup>7</sup> Phillimore, Eccl. Law, 477, where the ceremony is described; Bl. Comm. i. 391.

**INDUSTRIAL AND PROVIDENT SOCIETIES** are societies formed for carrying on any labour, trade or handicraft, whether whole-sale or retail, including the buying and selling of land and also (but subject to certain restrictions) the business of banking.<sup>1</sup> Such a society (which must consist of seven persons at least) when registered under the act becomes a body corporate with limited liability, and with the word limited as the last word in its name,<sup>2</sup> and is regulated by rules, providing for the amount of the shares, the holding of meetings, the mode in which the profits are to be applied, &c.<sup>3</sup>

§ 2. Industrial and provident societies originated in the adoption of *Objects of.* the principle of co-operation by working men for the purpose of buying goods for their own consumption at wholesale prices and dividing them among themselves at a price sufficient to pay the expenses and realize a small profit. Many such societies also offer inducements for saving, by having the capital divided into shares of a small amount payable by weekly or monthly instalments.<sup>4</sup> Sometimes part of the profits is applied in paying interest at a certain rate on the shares, and the balance for any purpose authorized by the Friendly Societies Acts.<sup>5</sup> Sometimes also the shares are not transferable, but the investment of each member is accumulated for the benefit of his family.<sup>6</sup> No member can hold more than 200*l.* in the society.<sup>7</sup>

See *Building Societies; Friendly Societies; Dissolution; Nomination.*

**INFANT** is a person under the age of twenty-one years.

Infants are subject to various disabilities imposed on them for their protection: thus an infant cannot, as a rule, aliene his lands, or make a deed or contract binding on him, and he cannot make a valid will under any circumstances. He may, however, contract for necessities (*q. v.*). Formerly the contracts of an infant not binding on him were voidable only, and therefore capable of being ratified by him after attaining majority: but this is no longer so, the Infant Relief Act, 1874, having made such contracts absolutely void.<sup>8</sup> So an infant under the age of seven years cannot be guilty of felony; and between the ages of seven and fourteen he is presumed to be *doli incapax* (incapable of discerning between good and evil) until the contrary is shown.<sup>9</sup> An infant of

<sup>1</sup> I. and P. Soc. Act, 1876, s. 6.

<sup>2</sup> *Ibid.* ss. 7, 11.

<sup>3</sup> *Ibid.* s. 9.

<sup>4</sup> Davis on Industrial and Provident Societies, 3; Friendly Societies Act, 1850; I. & P. Soc. Acts, 1852, 1854, 1856, 1862, 1867, all now repealed.

<sup>5</sup> See the form of rules in Davis, 95.

<sup>6</sup> *Ibid.* 97.

<sup>7</sup> I. and P. Soc. Act, 1876, s. 6.

<sup>8</sup> Bl. Comm. i. 463 *et seq.*; Steph. Comm. ii. 303; Infants Relief Act, 1874. This act provides that all contracts after the 7th August, 1874, entered into by infants for the repayment of money lent or for goods supplied (other than contracts for necessities), and all accounts stated by in-

fants, shall be absolutely void; and (sect. 2) no action shall be brought to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. As to the construction of these somewhat inconsistent provisions, see *Coxhead v. Mulis*, 3 C. P. D. 439; *Northcote v. Doughty*, 4 C. P. D. 385; *Ditcham v. Worralh*, 5 C. P. D. 410; *Reg. v. Wilson*, 5 Q. B. D. 28.

<sup>9</sup> Steph. Comm. iv. 24.

fourteen years, if a male, and of twelve years, if a female, may give the consent required (among other things) to make a valid marriage: but a promise to marry at a future time is not binding on an infant under twenty-one.<sup>1</sup>

§ 2. An infant may in some cases act in a representative capacity or in *auter droit*, in the same manner as a person *sui juris*. Thus an infant may act as an agent or as an attorney under a power, and it seems that an infant may also exercise a power of appointment over personal estate, although not over real.<sup>2</sup> (See *Executor*; *Grant*, § 8; *Guardian*, § 13; *Trustee*.)

§ 3. In probate practice an infant is a person under the age of seven years, as opposed to a minor, who is a person between the age of seven and twenty-one years. (See *Guardian*, § 13.)

See *Ward of Court*; *Settlement*; *Necessaries*; *Fooffment*, § 1; *Guardian*; *Habeas Corpus*.

**INFORMATION.**—§ 1. An information is in the nature of a pleading. It is the step by which several civil and criminal proceedings are commenced.

*Civil.*

I. Civil proceedings by information were formerly brought either in Chancery or in the Court of Exchequer, according to the nature of the remedy sought.

Chancery.

A. As to informations in Chancery. § 2. When a suit in Chancery was instituted on behalf of the crown or of persons partaking of its prerogative or under its particular protection (*e.g.*, a charity), the matter of complaint was offered to the Court by a document called an information, which was a statement of facts by the Attorney-General or other proper officer (the informant), resembling a bill of complaint (*q.v.*), except that it was not in the form of a petition. § 3. If the suit did not immediately concern the rights of the crown, its officers depended on the relation of some person whose name was inserted in the information, and who was termed the relator (*q.v.*). § 4. It sometimes happened that this person had an interest in the matter in dispute, of the injury to which interest he had a right to complain. In this case his personal complaint was incorporated with the information given to the Court by the officer of the crown; under the old practice they formed together an information and bill, and were so termed.<sup>3</sup> § 5. When an information was filed by the Attorney-General upon his own authority it was sometimes called an information *ex officio*, as opposed to an information at the relation of a private individual.<sup>4</sup>

Relator.

Information and bill.

Ex officio.

§ 6. At the present day proceedings by information in the Chancery Division assume the form of an action by the Attorney-General, either *ex officio* or at the relation of some person or corporation.<sup>5</sup>

<sup>1</sup> Steph. ii. 244.

<sup>2</sup> *In re D'Angibau*, 15 Ch. D. at p. 246; Stokes on Powers of Attorney, 10.

<sup>3</sup> Mitford on Pl. 22, 99; Daniell, Ch. Pr. 8.

<sup>4</sup> *A.-G. v. Cockermouth Local Board*, L. R., 18 Eq. at p. 176.

<sup>5</sup> Rules of Court, i. 1; *A.-G. v. Shrewsbury Bridge Co.*, W. N. (1880) 23; *A.-G. v. Gas Light and Coke Co.*, 7 Ch. D. 217; *A.-G. v. Mayor of Brecon*, 10 Ch. D. 207; *A.-G. v. Great Eastern Rail. Co.*, 11 Ch. D. 449.

§ 7. There was also a proceeding called an English information in the Exchequer Division, under the equitable jurisdiction of the Court of Exchequer, so called because it was in the nature of a bill of complaint in equity, which was formerly called an English bill.<sup>1</sup> English information.

B. As to informations at common law:—§ 8. The prerogative process of information was in the nature of a civil action at the suit of the crown, and was instituted for the purpose of obtaining satisfaction in damages for some injury to crown possessions, or to recover money due to or goods claimed by the crown. The information was not founded on any writ, but merely on the intimation of the Attorney-General, who “gave the Court to understand and be informed of” the matter in question. The party was then put to answer by plea, which the crown might traverse or demur to, &c., and trial was had as in suits between subject and subject. Informations were of three principal kinds:—§ 9. An information of intrusion was in the nature of an action of trespass quare clausum fregit, and was brought for any trespass committed on the lands of the crown. Exchequer.

§ 10. An information of debt (or information in personam) was brought upon any contract for moneys due to the crown (though process by extent was more usual in such cases), or for any forfeiture due to the crown upon the breach of a penal statute, especially when the revenue was concerned. Intrusion.

§ 11. An information in rem, or real information, lay where any goods were supposed to become the property of the crown as derelict, and no man appeared to claim them, or where goods were forfeited for non-payment of excise duties, &c.<sup>2</sup> Debt (in personam).

§ 12. An information of devenerunt lay to recover goods belonging to the crown which “have come into the hands” of a subject; it was in the nature of an action of detinue, and was either wholly or partly in rem.<sup>3</sup> In rem.

Under the new practice it would seem that informations of the kinds mentioned above (§§ 7 *et seq.*) should be assigned to the Queen’s Bench Division. (See *High Court of Justice*.) Devenerunt.

II. In criminal procedure, informations are of three kinds:

A. § 13. Those brought partly at the suit of the crown and partly at that of a subject, to enforce a penalty or forfeiture under a penal statute; these are a sort of *qui tam* actions, only carried on by a criminal instead of a civil process.<sup>4</sup> (See *Action*, § 8.) Criminal.

B. Informations brought in the Queen’s Bench Division in the name of the crown alone; these are of two kinds. § 14. Informations by the crown, filed *ex officio* by the Attorney-General, are employed in the case of crimes which peculiarly tend to disturb or endanger her government, or to molest or affront her in the regular discharge of her royal functions. For penalties, &c.

§ 15. Informations filed by the Master of the Crown Office upon the complaint or relation of a private subject, are applicable for the punish- Queen’s Bench.

Ex officio.

Ex relatione.

<sup>1</sup> Crown Suits Act, 1865, ss. 6 *et seq.*; see *Bill of Complaint*, § 7; *A.-G. v. Halling*, 15 M. & W. 687; *Corporation of London v. A.-G.*, 1 H. L. C. 440.

<sup>2</sup> 3 Bl. 261; Chitty, *Prer.* 332; Manning’s *Exchequer*, 142; Crown Suits Act,

1865, ss. 31 *et seq.*

<sup>3</sup> Manning, 165. For an instance of an information and protest in an Admiralty action, see *The Parlement Belge*, 4 P. D. p. 130.

<sup>4</sup> Bl. Comm. iv. 308; stat. 31 Eliz. c. 5.

ment of any gross and notorious misdemeanors, such as riots, batteries, libels, bribery, misconduct by magistrates, &c. The defendant pleads or demurs to the information, and the trial and subsequent proceedings resemble those on an ordinary prosecution by indictment in the Queen's Bench Division, except that the preliminary inquiry by a grand jury is absent.<sup>1</sup> (See *Pleading*; *Trial*; *Queen's Bench*; *Quo Warranto*.)

Justices of  
the peace.

C. § 16. Proceedings before justices of the peace in matters of a criminal nature are commenced by an information, which is a statement of the facts of the case made by the informant or prosecutor, sometimes verbally, sometimes in writing, and either with or without an oath; in the latter case the information is said to be exhibited.<sup>2</sup> (See *Complaint*.)

Common.

**INFORMER** is a person who brings an action or takes some other proceeding for the recovery of a penalty of which the whole or part goes to him. § 2. A common informer is a person who sues for a penalty which is given to any person who will sue for it, as opposed to a penalty which is only given to a person specially aggrieved by the act complained of.<sup>3</sup> (See *Penalty*; *Action*, § 8.)

**INFRINGEMENT.**—When a person does an act which he has no right to do, and thereby interferes with the right of another person, he is said to infringe that right. Thus, when a person manufactures an article protected by a patent, or prints a book protected by copyright, or makes use of a trade mark without having the right to do so, he is said to infringe the patent, copyright, or trade mark. The remedy is an injunction to restrain future infringements, and recovery of the damages caused or profits made by the past infringements.<sup>4</sup>

**INHABITANT.** See *Custom*, § 4; *Court Leet*; *Easement* (p. 303, note); *Hundred*, § 2; *Poor*; *Recreation*; *Residence*.

**INHABITED HOUSE DUTY** is an assessed tax on inhabited dwelling-houses, according to their annual value,<sup>5</sup> and is payable by the occupier, the landlord being deemed the occupier where the house is let to several persons.<sup>6</sup> Houses occupied solely for business purposes are exempt from duty, although a caretaker may dwell therein, and houses partially occupied for business purposes are to that extent exempt.<sup>7</sup>

**INHERITABLE** is that which is capable of inheriting, that is, of taking land by descent.<sup>8</sup> Thus, "blood inheritable," in the old books,

<sup>1</sup> Bl. Comm. iv. 308; Grady & Scotland's Crown Side Pr. *passim*; Archb. Crim. Pl. 112 *et seq.*

<sup>2</sup> Stone's Justice of the Peace, 75.

<sup>3</sup> Bl. Comm. iii. 161; *Guardians of St. Leonard's v. Franklin*, 3 C. P. D. 377; *Girdlestone v. Brighton Aquarium Co.*, 3 Exch. D. 137.

<sup>4</sup> Steph. Comm. ii. 32; but not both damages and profits: *Neilson v. Betts*, L. R., 5 H. L. 1.

<sup>5</sup> Stats. 14 & 15 Vict. c. 36; 32 & 33 Vict. c. 14, s. 11.

<sup>6</sup> Stat. 48 Geo. 3, c. 55, schedule B.

<sup>7</sup> Customs and Inland Revenue Act, 1878, s. 13.

<sup>8</sup> Co. Litt. 10 a.

means a capacity of inheriting by reason of consanguinity.<sup>1</sup> (See *Blood*.) "Inheritable" is applied to the person, "descendible" to the estate or property. (See *Freehold*, § 3.)

**INHERITANCE** is that which descends to the heir of the owner on his death intestate.<sup>2</sup> The term is not often used except in the expression "estate of inheritance" (see *Estate*), and in the following phrases:—

§ 2. "No man can institute a new kind of inheritance not allowed by the law."<sup>3</sup> (See *Descent*.)

§ 3. "If a man buy divers fishes . . . and put them in his pond, and dyeth, in this case the heire shall have them, and not the executors, but they shall goe with the inheritance."<sup>4</sup>

§ 4. "Inheritance" is also used in the old books where "hereditament" is now commonly employed; thus, Coke divides inheritances into corporeal and incorporeal,<sup>5</sup> into real, personal and mixed,<sup>6</sup> and into entire and several;<sup>7</sup> as to these divisions, see *Hereditament*. § 5. The phrase "several inheritance," however, seems to be used in three senses: (i) in the sense explained under *Hereditament*, § 7; (ii) in the sense of a sole estate, as opposed to an estate of coparcenery or other joint estate: thus, "if a partition be made betweene two coparceners of one and the selfe-same land, that the one shall have the land from Easter untill Lammas to her and her heires, and the other shall have it from Lammas till Easter to her and her heires, or the one shall have it the first yeare, and the other the second yeare, *alternis vicibus*, &c., there it is one selfe-same land wherein two persons have severall inheritances at severall times;"<sup>8</sup> (iii) to denote an estate free from the incident of survivorship, as opposed to joint tenancy: thus, "if lands be given to two men and to the heires of their two bodies begotten, in this case, the donees have a joint estate for term of their two lives, and yet they have severall inheritances."<sup>9</sup> As to the meaning of this, see *Estate Tail*, § 4.

"Inheritance" = "hereditament."

Several inheritance.

**INHERITANCE ACT.** See *Descent*, § 5.

**INHERETRIX** is the old term for "heiress."<sup>10</sup>

**INHIBITION.**—§ 1. Under the Land Transfer Act, 1875, regulating the registration of land, an inhibition is an order or entry on the register inhibiting or forbidding for a given time, or until further order, any dealing with lands or charges registered under the act.<sup>11</sup> It resembles an injunction.<sup>12</sup> (See *Caution; Restriction*.)

Land Registry.

§ 2. In ecclesiastical law, an inhibition is (1) a writ forbidding a judge

Ecclesiastical law.

<sup>1</sup> Co. Litt. 12 a.

<sup>2</sup> Fee simple "is called in Latin *feodum simplex*, for *feodum* is the same that inheritance is." Litt. § 1; see also § 9, and *Fee*.

<sup>3</sup> Co. Litt. 13 a.

<sup>4</sup> *Ibid.* 8 a.

<sup>5</sup> *Ibid.* 47 a.

<sup>6</sup> *Ibid.* 1 b.

<sup>7</sup> *Ibid.* 164 b.

<sup>8</sup> *Ibid.* 4 a.

<sup>9</sup> Litt. § 283.

<sup>10</sup> Co. Litt. 13 a.

<sup>11</sup> Sect. 57.

<sup>12</sup> Charley's Real P. Acts, 216.

from further proceeding in a case depending before him, as where an appeal is brought against a sentence pronounced by him;<sup>1</sup> (2) an order inhibiting or forbidding an incumbent to perform any service of the church or otherwise exercise the cure of souls for a certain period or until he obeys a certain monition or order.<sup>2</sup>

Inhibition and citation.

§ 3. Under the former practice of the Privy Council in admiralty appeals, as soon as the petition of appeal had been lodged, an inhibition and citation might be issued prohibiting the Court below and the respondent from proceeding in the cause pending the appeal, and citing the respondent to enter an appearance to the appeal.<sup>3</sup> Relaxation of the inhibition was a kind of writ dissolving the inhibition in cases where the appeal had not been prosecuted with due diligence.<sup>4</sup> Admiralty appeals now lie to the Court of Appeal,<sup>5</sup> and this practice is therefore obsolete.

**INJUNCTION** is an order or judgment by which a party to an action is required to do, or refrain from doing, a particular thing.<sup>6</sup>

Restrictive: mandatory.

§ 2. Injunctions are either restrictive (preventive) or mandatory. Thus, an injunction restraining a defendant from causing nuisance, or disturbing an easement, or committing waste, or infringing a patent, is a restrictive injunction, while an injunction ordering a defendant to take down or remove a wall or other obstruction is a mandatory injunction, or mandatory order, or more accurately a mandamus.<sup>7</sup>

Provisional (interlocutory).

§ 3. Injunctions are either interim, provisional (interlocutory) or perpetual. Provisional injunctions are such as are granted on interlocutory applications, and continue until a certain period, *e.g.*, until the trial of the action. The object of an interlocutory injunction is to preserve the property in dispute with the least injury to all parties, until their rights can be finally determined. Perpetual injunctions are such as form part of the judgment or order made at the trial or hearing of the action, and, as their name denotes, are not restricted as to time.

Perpetual.

Interim order.

§ 4. Formerly, in cases of great urgency, an injunction might be obtained *ex parte*, but this is not now usually done, the practice in such cases being to grant what is called an interim order or injunction, by which the defendant is restrained until after a particular day named, liberty being given to the plaintiff to serve notice for an injunction for the day before the day so named.<sup>8</sup>

§ 5. Formerly, if a person was sued at law under circumstances which gave him a defence sustainable only in a court of equity, the Court of Chancery would give effect to this defence by granting an injunction restraining the plaintiff from continuing his action. This mode of proceeding was abolished by the Judicature Act, the provisions of that act

<sup>1</sup> Phillimore, *Eccl. Law*, 1274. In appeals to the Privy Council the inhibition and monition for process (see *Process*) issue simultaneously; Macpherson, *Privy C. Pr.* 175.

<sup>2</sup> Public Worship Regulation Act, 1874, s. 13; Order in Council (28th June, 1875), form 25.

<sup>3</sup> Williams and Bruce's *Admiralty*, 314.

<sup>4</sup> *Ibid.* 318.

<sup>5</sup> Judicature Act, 1873, s. 18; Jud. Act,

1875, s. 4.

<sup>6</sup> Rules of Court, lii. 8, abolishing writs of injunction.

<sup>7</sup> Judicature Act, 1873, s. 25, § 8; *Krehl v. Burrell*, 7 Ch. D. 551; *Beddoe v. Beddoe*, 9 Ch. D. 89; *Costa Rica v. Strousberg*, 11 Ch. D. 323; *Aslatt v. Corp. of Southampton*, 16 Ch. D. 143. As to the old rule, see Daniell's Ch. Pr. 1462; Haynes's Eq. 259; Snell's Eq. 451.

<sup>8</sup> Daniell, 1518; Hunter's Suit, 140.



relating to equitable defences having rendered it inapplicable<sup>1</sup> (see *Equity*, § 7).

See *Undertaking*; *Restraining Order*; *Mandamus*; *Copyright*; *Easement*; *Patent*; *Infringement*; *Specific Performance*; *Cairns' Act*.

**INJURIA—INJURY.**—§ 1. In the technical sense of the word an injury is where a right has been infringed. Hence “injury” is opposed to “damage,” because a right may be infringed without causing pecuniary loss (*injuria sine damno*): thus “the pollution of a clear stream is to a riparian proprietor below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury without damage, which would however at once become both injury and damage on the cessation of the other pollutions.”<sup>2</sup> (See *Damnum absque Injuriâ*.)

§ 2. Injuries are either legal or equitable. Legal injuries, or those formerly cognizable by the common law, are divided into breaches of contracts and torts (see those titles). Equitable injuries, or those formerly cognizable only by Courts of Equity, include breaches of trust, equitable waste, and certain kinds of fraud.<sup>3</sup>

**INLAND.** See *Bill of Exchange*, § 10; *Commissioners of Inland Revenue*.

**INNKEEPER.**—§ 1. A common innkeeper—including the keeper of every tavern or coffeehouse in which lodging is provided—is bound to receive and entertain every traveller who presents himself for that purpose and is ready to pay his expenses, provided there be sufficient room in the inn, and no impropriety of conduct in the traveller himself. § 2. He is also responsible for the goods and chattels brought by any traveller to his inn, unless they are stolen from the traveller's own person, or by his own servant, or are lost by his own negligence. By the stat. 26 & 27 Vict. c. 41, no innkeeper is liable for the loss or injury of any goods (not being a horse or carriage) to a greater amount than 30*l.*, except they are stolen, lost or injured through the wilful act, default or neglect of himself or his servant, or unless they have been deposited with him expressly for safe custody. A copy of the act must be conspicuously exhibited in the inn.<sup>4</sup> (See *Bailment*; *Carrier*; *Carriers Act*.)

§ 3. An innkeeper has a lien on his guest's goods for payment of charges incurred by him, and he may sell them in satisfaction if they are left for six weeks without the charges being paid, provided he advertises notice of the intended sale.<sup>5</sup> (See *Lien*.)

**INNOCENT**, as applied to conveyances, is the opposite of tortious (*q. v.*).

<sup>1</sup> Jud. Act, 1873, s. 24.

<sup>2</sup> *Pennington v. Brinsop Hall Coal Company*, 5 Ch. D. p. 772.

<sup>3</sup> Equitable injuries must be distinguished from equitable remedies: thus specific performance and injunction were

formerly equitable remedies for legal injuries, while damages were the ordinary legal remedy.

<sup>4</sup> Steph. Comm. ii. 84.

<sup>5</sup> Innkeepers Act, 1878.

**INNOTESCIMUS.** See *Inspeximus*.

**INNS OF CHANCERY** are the buildings known as Clifford's Inn, Clement's Inn, New Inn, Staples' Inn, and Barnard's Inn. They were formerly a sort of collegiate houses, in which law students learnt the elements of law before being admitted into the inns of court (*q. v.*), but they have long ceased to occupy that position.<sup>1</sup>

**INNS OF COURT** are certain private unincorporated associations in the nature of collegiate houses, having the exclusive privilege of calling to the bar, that is, conferring the rank or degree of barrister (*q. v.*). They are:—the Inner Temple, the Middle Temple, Lincoln's Inn, and Gray's Inn. They have a Common Council of Legal Education for giving lectures and holding examinations.<sup>2</sup> (See *Bencher*; *Moot*; *Inns of Chancery*.)

**INNUENDO** is that part of an indictment in a criminal proceeding for libel, or of a pleading in an action for libel, which connects the alleged libel with its subject, or explains the meaning of words which are not on the face of them libellous. Thus if the libel complained of consisted of these words in a circular, "A. B. is a fit person to be a member of a certain society," and it was proved that the person who sent round the circular was the secretary of a society for the protection of tradesmen against swindlers, and that when he wrote to warn his correspondents against any person, he said, "He is a fit person to be a member of our society," it would be necessary in the declaration or statement of claim, after setting out the words "A. B. is a fit person to be a member of a certain society," to add, "meaning thereby 'He is a swindler.'" these words form the innuendo.<sup>3</sup>

**ETYMOLOGY.**—Latin, *innuere*, to nod to, hint, intimate.

**INQUEST** originally meant the same as inquisition<sup>4</sup> (*q. v.*), but at the present day it is almost exclusively used to signify an inquiry held by a jury before a coroner as to the death of a person who has been slain, or has died suddenly, or in prison,<sup>5</sup> or under suspicious circumstances. It is held *super visum corporis*, that is, after the jury have viewed the body of the deceased, and the evidence is given on oath. If the jury by their verdict or inquisition find a person guilty of murder or other homicide, such an inquisition is in all respects equivalent to an indictment<sup>6</sup> (*q. v.*).

**ETYMOLOGY.**—Norman French, *enqueste*, from *enquerre*, to inquire into.<sup>7</sup>

**INQUEST OF OFFICE**, or simply "office," as it is termed in the old books, is a prerogative remedy for the benefit of the crown, which was formerly much in use. It is an inquiry made by a jury before a

<sup>1</sup> Stephen's Comm. i. 16 *et seq.*; Fortescue, ch. xlix.

<sup>2</sup> Stephen's Comm. i. 19 *et seq.*

<sup>3</sup> Shortt on Copyright and Libel, 515, 547; *Craft v. Boyle*, 1 Wms. Saund. 246 b.

<sup>4</sup> Littleton (§ 368) also uses it in the sense of "jury."

<sup>5</sup> See Prison Act, 1877, s. 44.

<sup>6</sup> Steph. Comm. ii. 637; iv. 360; Archbold, Crim. Pl. 121.

<sup>7</sup> Britton, 3 b.

sheriff, coroner, escheator, or other officer of the crown, or by commissioners specially appointed, concerning any matter that entitles the crown to the possession of lands or tenements, goods or chattels, *e.g.*, by reason of an escheat, forfeiture, idiocy, &c. (See *Inquisitio post Mortem*; *Inquisition*.) These offices are of two sorts, either of entitling, or of instruction.

§ 2. An office of entitling (which formerly issued out of the Chancery) is used where the crown does not become entitled to the property until after an office has been taken;<sup>1</sup> thus, if the crown claims the land of an idiot, the person must first be found an idiot by office.<sup>2</sup>

§ 3. The office of instruction (which formerly issued out of the Exchequer) is used in cases where an office is not necessary to entitle the crown, but merely for the better instruction of the officer before seizure, and to prevent hasty measures being adopted against the subject.<sup>3</sup>

§ 4. As to the remedy of any person aggrieved by an office found, see *Traverse*; *Monstrans de Droit*; and Crown Suits Act, 1865, s. 52.

**INQUIRY.**—I. § 1. In actions in the High Court it frequently happens that certain facts subsidiary to the main question in issue can be conveniently ascertained out of Court by a person appointed or directed to inquire into them. By the Judicature Acts general power is given to the Court to refer any question in a cause to a referee for inquiry and report<sup>4</sup> (see *Referee*), and this power is sometimes exercised by referring technical questions to architects, engineers, &c. But in the cases where an inquiry is usually directed, the practice differs according as the action is in the Chancery or the Queen's Bench Division.

§ 2. In the Chancery Division an inquiry is usually directed in every action in which, after the Court has pronounced an order, judgment or decree, it becomes necessary to ascertain in detail the facts of the case or the rights of persons interested. In such a case the order, decree, &c. directs an inquiry on those points to be taken in chambers. Thus, in an action for the administration of the estate of an intestate, the administration order almost invariably directs inquiries as to the heir at law, next of kin, real and personal estate, debts, &c. of the deceased; and in an action to restrain the continuance of an injury (*e.g.*, the infringement of a patent), there is commonly an inquiry either as to the amount of damages sustained by the plaintiff, or as to the amount of profits made by the defendant in consequence of the acts complained of. The inquiries are taken before the Chief Clerk, who investigates the evidence adduced by the parties, and embodies the result in his certificate (*q.v.*, and see *Account*, §§ 5 *et seq.*).<sup>5</sup>

§ 3. In the Queen's Bench Division the procedure by inquiry is used in cases where the plaintiff has obtained judgment by

Office of  
entitling.

Office of  
instruction.

Inquiries in  
Chancery  
actions.

Inquiries in  
Q.B. Division.

<sup>1</sup> Chitty, *Prer.* 246.

<sup>2</sup> *Ibid.* 250; Staunf. 55. Formerly in cases where the crown became entitled to the possession of land under such circumstances that a common person could not have obtained possession without making an entry on the land (as where a tenant committed a forfeiture giving the lord a

right of re-entry), the crown could not obtain possession without an inquest of office. This, however, is no longer necessary. (Stat. 22 & 23 Vict. c. 21, s. 25.)

<sup>3</sup> Chitty, *Prer.* 247.

<sup>4</sup> Jud. Act, 1873, s. 56; Rules of Court, xxix. 4.

<sup>5</sup> See *Hunter's Suit*, 110.

default against the defendant for an unliquidated claim (*e. g.*, for damages), so that it is necessary to ascertain what is due to him; if the amount is substantially a matter of calculation (as in an action for the arrears of an annuity), an inquiry as to the amount is directed to be taken by a master of the Court;<sup>1</sup> in other cases, a writ of inquiry (*q. v.*) must issue.<sup>2</sup>

Inquiries in lunacy.

II. § 4. In lunacy practice an inquiry is the proceeding in which the unsoundness of mind of an alleged lunatic and his incapacity to manage his affairs are investigated by the evidence of witnesses and the personal inspection of the alleged lunatic. The inquiry, which resembles the trial of an action (see *Trial*), is held before a Master in Lunacy (with a jury if the alleged lunatic demands one), by virtue of the Lord Chancellor's order for inquiry, which is now issued in each case of alleged lunacy in lieu of a special commission. § 5. But the Lord Chancellor may, under the Lunacy Regulation Act, 1862, s. 4, direct an issue whether the alleged lunatic is of unsound mind, &c. to be tried in one of the superior Courts of common law (now in the High Court) and the verdict of the jury has the same force as an inquisition.<sup>3</sup> (See *Commission*, § 8; *Inquisition*, § 3; *Traverse*.)

Board of Trade.

§ 5. There are many cases in which the Board of Trade holds inquiries. Thus when any persons have been killed or injured by any wrongful act, neglect or default in the management of a ship, the Board of Trade may institute an inquiry before a sheriff and jury, in which the Board is plaintiff and the shipowners defendants. The Board distributes the damages recovered by the inquiry in such manner (not exceeding 30*l.* for each person killed or injured) as it thinks fit. Any person dissatisfied with the amount recovered by him may repay it and commence an action against the shipowner. (See *Limitation of Liability*.)

§ 6. As to inquiries under the Lands Clauses Act, 1845, see *Inquisition*, § 2.

**INQUISITIO POST MORTEM** was an inquest of office (*q. v.*) held upon the death of a tenant of the crown to inquire of what lands he died seised, who was his heir, and of what age, in order to entitle the crown to his marriage, wardship, livery, primer seisin, &c. After the abolition of the feudal tenures the inquisitiones post mortem were held to inquire into cases of escheat, forfeiture, &c. of crown lands,<sup>4</sup> but they have now fallen into disuse, principally owing to the abolition of forfeiture (*q. v.*).

**INQUISITION** means (i) an inquiry by a jury, held before an officer or commissioner of the crown; and (ii) a formal document recording the result of the inquiry. § 2. The commonest instances of extrajudicial inquisitions at the present day are coroner's inquests and inquisitions to assess the value of land taken by a railway or other company under compulsory powers: these latter are held before the sheriff (or in some cases the coroner) of the county in which the lands are situated.<sup>5</sup>

<sup>1</sup> Day's C. L. P. Acts, 121.

<sup>2</sup> Smith's Action (12), 144.

<sup>3</sup> Pope on Lunacy, 44, 64.

<sup>4</sup> Chitty, Prer. 247; Bl. Comm. ii. 68.

<sup>5</sup> Lands Clauses Consolidation Act, 1845, ss. 39 *et seq.*; Hodges on Railways, 271.

§ 3. Inquisitions are also held in the course of judicial proceedings, *e.g.*, under writs of elegit and extent (*q. v.*), and in lunacy. In lunacy, "inquisition" sometimes means the same as "inquiry" (*q. v.*), but more generally it denotes the formal statement and finding, under the hands and seals of the master and jury (if there was one) before whom the inquiry was held, giving the result of it, *e.g.*, stating that the alleged lunatic is of unsound mind, and "not sufficient for the government of himself, his manors, messuages, lands, tenements, goods and chattels," and the lunatic is then called a "lunatic by inquisition."<sup>1</sup>

See *Inquest*; *Inquest of Office*; *Inquisitio post Mortem*; *Traverse*.

**INROLMENT.** See *Enrolment*.

**INSANITY** is not strictly speaking a legal term, but it is commonly used to denote that state of mind which prevents a person from knowing right from wrong, and therefore from being responsible for acts which in a sane person would be criminal.<sup>2</sup> Insanity may be total, or partial (where it is confined to certain subjects), or intermittent (where the attacks are separated by lucid intervals), and the question of responsibility depends upon whether the act was done under the influence of insanity or not.<sup>3</sup> § 2. The term is also sometimes used with reference to the question whether a person has the mental capacity for entering into a contract, making a will, or the like. (See *Delusions*; *Lunatic*.)

§ 3. "Insane person," within the meaning of the acts relating to the Commissioners in Lunacy, is a person who is either "a lunatic, an idiot or a person of unsound mind and a proper person to be taken charge of and detained under care and treatment" in a house, hospital or other place for the reception of such persons.<sup>4</sup>

See *Lunatic*; *Commissioners in Lunacy*.

**INSOLVENT—INSOLVENCY.**—§ 1. A person is said to be insolvent when he is unable to pay all his debts in full; insolvency is the condition of such a person. Generally it results in bankruptcy, liquidation, or composition proceedings, or if the person dies before they are taken, his estate may be administered in an action in the Chancery Division.<sup>5</sup>

§ 2. Formerly when none but traders were included in the bankruptcy law, occasional acts of parliament, called Acts of Insolvency, or Insolvent Acts, were frequently passed, *Insolvency Acts*. "whereby all persons whatsoever, who are either in too low a way of dealing to become bankrupts, or not being in a mercantile state of life are not included within the laws of bankruptcy, are discharged from all suits and imprisonments, upon delivering up all their estate and effects to their creditors upon oath, at the sessions or assizes."<sup>6</sup> Subsequently various statutes were passed, providing for the discharge of persons imprisoned for debts, on their making a *cessio bonorum* for the benefit of their creditors, and by the act

<sup>1</sup> Elmer, *Pr. in Lunacy*, 20; Pope on *Lunacy*, 66.

<sup>2</sup> Pope on *Lunacy*, 6, 19, 356.

<sup>3</sup> *Ibid.* 15; Maudsley on *Mental Disease*, *passim*.

<sup>4</sup> See 16 & 17 Vict. c. 96, schedules; Pope on *Lunacy*, 19.

<sup>5</sup> See *In re Yglesias*, L. R., 10 Ch. 635.

<sup>6</sup> Bl. Comm. ii. 484.

Insolvent  
Debtors  
Court.

53 Geo. 3, c. 102, and subsequent acts, the principle was made into a system, administered by a court of record called the Court for the Relief of Insolvent Debtors. The first step was a petition by the prisoner for his discharge, or a petition by a creditor for the administration of the debtor's property; in either case a vesting order was made, by which all the debtor's property was vested in one or more assignees (see *Assignee*, § 2), and in due time the prisoner obtained his discharge.<sup>1</sup> (See *Protection*.) The Court for the Relief of Insolvent Debtors was abolished and its jurisdiction transferred to the Court of Bankruptcy by the Bankruptcy Act, 1861, which made non-traders subject to the bankruptcy law. (See *Bankruptcy*, § 10.) It seems that the estates of some insolvent debtors are still in process of being wound up.<sup>2</sup>

Documents.

**INSPECTION.**—§ 1. Inspection of documents. When a party to an action, or other proceeding in the High Court, has by his pleadings or by an affidavit of documents admitted that he has in his possession any documents relating to the matters in question between the parties, any other party to the proceeding may give him notice to produce them for inspection. If he fails to comply with the notice, the party requiring production may apply to the judge for an order for inspection.<sup>3</sup> (See *Affidavit*, § 3; *Confidential Communications*; *Discovery*; *Privilege*; *Sealing up*.)

Property.

§ 2. Inspection of property. The Court may make an order for the detention, preservation, or inspection of any property being the subject of an action, and for that purpose may authorize any person to enter on or into any land or building.<sup>4</sup> (See *Trial*; *View*.)

§ 3. As to the inspection of mines, see *Boundaries*, § 4; *Bounds*.

**INSPECTOR.**—When the members of a partnership have been adjudicated bankrupt, although the separate creditors of each partner have no voice in the choice of a trustee under the joint adjudication, still they may apply to the Court for the appointment of an inspector to protect their interests, *e.g.*, by getting in the separate effects, inspecting books and papers relating to the separate estates, &c.<sup>5</sup> (See *Joint*; *Separate*.)

**INSPECTORS—INSPECTORSHIP DEEDS.** See *Letter of Licence*.

**INSPEXIMUS** is the name given in the old books to an exemplification of letters patent or other record, because it begins with a recital in the name of the crown that "We have inspected the enrolment of certain letters patent," and then sets it out verbatim. A Constat was a somewhat similar kind of exemplification, beginning with the words "Constat nobis," but was only granted where the party made affidavit that the original was lost. An Innotescimus or Vidimus was a copy of a charter of feoffment or other instrument not of record granted by the crown.<sup>6</sup> (See *Exemplification*.)

**INSTANCE COURT.** See *High Court of Admiralty*; *Prize Court*.

<sup>1</sup> Bl. Comm. ii. 488, note (6).

<sup>2</sup> 32 & 33 Vict. c. 83; Second Report of Legal Dep. Comm. 76.

<sup>3</sup> Rules of Court, xxxi. 11 *et seq.*

<sup>4</sup> *Ibid.* lii. 3. See also the Common

Law Procedure Act, 1854, s. 58, the Merchandise Marks Act, 1862, s. 21; Ludlow & Jenkins on Trade Marks, 39.

<sup>5</sup> Robson's Bankruptcy, 614.

<sup>6</sup> *Page's Case*, 5 Rep. 53 b.

**INSTITUTION**, in ecclesiastical law, is the ceremony by which the bishop of a diocese, when a clerk has been presented to him, commits to his charge the care of the souls of the parish: it is a kind of investiture of the spiritual part of the benefice.<sup>1</sup> (See *Induction*; *Collation*; *Presentation*.)

**INSTRUMENT OF APPEAL** is the document by which an appeal is brought in a matrimonial cause from the President of the Probate, Divorce, and Admiralty Division to the full Court. It is analogous to a petition.<sup>2</sup>

**INSUFFICIENT**.—When a person is required to make an answer or affidavit, and makes one which does not in form comply with the requirement, it is said to be insufficient. Affidavits of documents and answers to interrogatories are frequently insufficient by reason of their not containing a proper traverse (*q. v.*). Insufficiency differs from incompleteness, for a party may make an affidavit of documents which is in form sufficient and is nevertheless incomplete by the omission of documents which ought to have been included, and vice versa.

Where an affidavit is insufficient, the opposite party may obtain an order requiring the deponent to make a further one.<sup>3</sup>

**INSURANCE** is an agreement between two persons (the insurer and the assured) that in consideration of a comparatively small payment (called the premium) by the assured, the insurer will, on a certain event happening during a given time, pay to the assured either an agreed sum or the amount of the loss caused to the assured by the event. (See *Premium*, *Interest*, § 7.) The amount of the premium is calculated with reference to the risk incurred by the insurer (see *Risk*). The instrument by which the contract is entered into is called a policy (*q. v.*). Insurance is a contract *uberrimæ fidei* (*q. v.*). Policy.

Contracts of insurance are of two kinds, viz., those which are, and those which are not, in the nature of contracts of indemnity.<sup>4</sup>

I. To the first class belong fire and marine (or maritime) insurances. Fire insurance.

§ 2. By a fire insurance the insurer, in consideration of a certain premium, paid either in gross (*i. e.*, once for all) or at stated intervals, undertakes to indemnify the assured against damage to his property by fire during a limited portion of time.<sup>5</sup> Fire insurances are sometimes divided into "common," "hazardous," "double hazardous," and insurances of "extraordinary risk," according to the nature of the property insured and the purposes for which it is used.<sup>6</sup> § 3. Marine insurance is a contract of indemnity against certain perils or sea risks to which the ship, freight or cargo, and the interests connected therewith, may be exposed Marine insurance.

<sup>1</sup> Bl. Comm. i. 390; Phill. Eccl. Law, 471.

<sup>2</sup> Browne on Divorce, 322.

<sup>3</sup> Rules of Court, xxxi. 10.

<sup>4</sup> *Godsall v. Boldero*, 9 East, 72; Smith's

L. C. ii. 260; *Dalby v. India, &c. Ass. Co.*, 15 C. B. 365, and reporter's note; Smith's L. C. ii. 271.

<sup>5</sup> Smith, Merc. Law, 411.

<sup>6</sup> Ellis, Insur. 11.

Nature of indemnity.

during a particular voyage, or a fixed period of time.<sup>1</sup> The insurer in marine insurances is usually either an underwriter (*q. v.*) or an insurance company. As to the varieties of marine insurances, see *Policy*.

§ 4. Insurances of this class being contracts of indemnity, the assured is only entitled to be paid once, and if he obtains payment of his loss from any other source, he is not entitled to claim against his insurer. Moreover, the insurer, upon paying the loss, is entitled to be put in the place of the assured; therefore if the assured had a claim which he might have enforced in respect of the property (*e. g.*, against a person whose negligence or wrongful act caused the loss), the insurer will thenceforth be entitled to enforce that claim for his own benefit; or if after the insurer paid the assured's claim, the latter receives compensation from other sources, the insurer is entitled to recover from the assured any sum which he may have received in excess of his actual loss.<sup>2</sup> (See *Subrogation*.)

Double insurance.

§ 5. Double insurance takes place when the same interest and the same risk are insured twice; a second insurance being often necessary where the precise value of the interest is not at first known. But if it appears, when the value of the interest becomes known, that there has been an over-insurance, that is to say, that the sum of the two or more insurances exceeds the interest of the assured, the excess cannot be recovered.<sup>3</sup> And if the same person insures the same property with two insurers, and it turns out that there has been an over-insurance, then the insurers are entitled to make one another contribute rateably, so that they may all bear the loss in proportion to the amounts for which they have respectively insured the property, instead of the loss being thrown on one.

Over-insurance.

§ 6. In addition to fire and marine insurances there are several varieties of insurance belonging to the same class, whose names explain themselves, such as plate-glass and cattle insurance (see *Cattle Insurance Societies*) and insurance against damage by hail.

II. To the second class belong life and accident insurances.

Life insurance.

§ 7. Insurance upon a life is a contract by which the insurer, in consideration of a certain premium, either in a gross sum or by annual payments, undertakes to pay to the person for whose benefit the insurance is made, a certain sum of money or annuity on the death of the person whose life is insured; the latter is sometimes called the *cestui que vie* or "the life." If the insurance be for the whole life, the insurer undertakes to make the payment whenever the death happens; if otherwise, he undertakes to make it in case the death should happen within a certain period, for which period the insurance is said to be made. The utility of this contract is obvious. A creditor is enabled thereby to secure his debt; an annuitant, the continuance of his income after the grantor's decease; a father, a provision for his family, available in case of his own death.<sup>4</sup> Policies may also form the subject of settlements and mortgages.

<sup>1</sup> Maude & Pollock, *Merch. Sh.* 330; Smith, *Merc. Law*, 336. It is not a perfect indemnity, but only approximate: see *Aitchison v. Lohre*, 4 App. Ca. 755.

<sup>2</sup> *North British Co. v. London, L. & G. Co.*, 5 Ch. D. 569; *Darrell v. Tibbetts*, 5 Q. B. D. 560.

<sup>3</sup> Maude & Pollock, 346.

<sup>4</sup> Smith, *Merc. Law*, 403.



§ 8. An accident insurance is a contract to pay a fixed sum on death resulting from accident, either generally, or limited to accidents of a particular kind, *e. g.*, railway accidents. Some policies also provide for payment of a fixed weekly sum during incapacity caused by an accidental injury. Accident insurance.

See *Risk*; *Reinsurance*; *Salvage*; *Suing and Labouring*; *Warranty*; *Urrimæ Fidei*.

**IN-TAKES** are temporary inclosures made by customary tenants of a manor under a special custom authorizing them to inclose part of the waste until one or more crops have been raised on it.<sup>1</sup>

**INTENDMENT.**—"Intendment of the law," in the old books, signifies a presumption, and "common intendment" signifies a rule of law or *præsumptio juris et de jure*.<sup>2</sup> (See *Presumption*.)

**INTENTION.**—§ 1. In civil or private law, the general rule is that a person is responsible for the consequences of his acts, whether he intended them or not. Hence if A. in defending himself against B. unintentionally strikes C., he is liable to an action of battery by C. (See *Battery*.) In such actions, however, the question of intention is generally taken into consideration by the jury in assessing the damages (see *Damages*, § 4). As to actions of libel, see *Apology*. Civil.

§ 2. In criminal law, intention is an essential part of every crime or offence. Criminal.

See *Delusions*; *Duress*; *Fraud*; *Insanity*; *Lunacy*; *Malice*; *Negligence*; *Overt Act*; *Remote*; *Undue Influence*.

**INTERCOMMON.** See *Common*, § 8.

**INTERESSE TERMINI** ("interest of a term") is the interest which a lessee under a lease at common law has before he enters or takes possession of the land demised.<sup>3</sup> But a term limited to commence immediately by a bargain and sale or other conveyance operating under the Statute of Uses passes an estate without the necessity of entry.<sup>4</sup>

An *interesse termini* is merely the right to an estate, and therefore can neither prevent nor be the subject of merger.<sup>5</sup>

**INTEREST.**—I. § 1. In the most general sense of the word, a person is said to have an interest in a thing when he has rights, advantages, duties, liabilities, losses or the like, connected with it, whether present or future, ascertained or potential: provided that the connection, and in the case of potential rights and duties, the possibility, is not too remote. The question of remoteness depends upon the purpose which the interest is to serve. INTEREST IN PROPERTY.

§ 2. Interest also signifies, *par excellence*, an advantageous or beneficial

<sup>1</sup> Elton, *Comm.* 277.

<sup>2</sup> *Co. Litt.* 78 b; as to "intent," see *Co. Litt.* 303 a.

<sup>3</sup> *Litt.* § 459; *Co. Litt.* 270 a.

<sup>4</sup> Williams, *R. P.* 396.

<sup>5</sup> See *Hyde v. Warden*, 3 *Ex. D.* 72; *Co. Litt.* 338 a.

interest: thus declarations by deceased persons against their own interest are receivable in evidence in proceedings between third persons, by exception to the general rule against hearsay evidence.<sup>1</sup>

Interests may be considered from the following aspects:—

Property.

§ 3. Interest as applied to property is used in a wide sense to include estates (legal and equitable), charges, easements, profits à prendre, licences, equities of redemption, and generally every right in respect of property which entitles or may in future entitle the holder to make use of it in some way, as opposed to bare powers, uses, authorities, possibilities, expectations, rights of presentation and the like.<sup>2</sup> Hence “interest” is used in conveyances, &c. to denote every beneficial right in the property conveyed.<sup>3</sup> § 4. In a narrower sense, interest is used as opposed to estate, and therefore denotes rights in property not being estates; *e.g.*, an *interesse termini* (*q.v.*):<sup>4</sup> the quasi-reversion of a lord which entitles him to the land on an escheat or forfeiture:<sup>5</sup> the interest which the lord of a manor has in copyhold land between a surrender by the old tenant and the admittance of the new:<sup>6</sup> the interest of executors under a devise of land for the payment of debts:<sup>7</sup> interests resembling estates but not recognized as such by the common law, *e.g.*, executory interests in land (see *Executory Interest*) and interests in personalty; these interests in personalty so closely resemble estates that they are frequently called estates; and the terms “absolute,” “limited,” “vested,” “contingent,” “sole,” “joint,” &c. are applied to interests in the same senses in which they are applied to estates. (See *Estate; Tenant.*)

§ 5. “Interest” is used by real property lawyers in several technical senses: thus at one time it may denote certain rights intimately connected with the soil of land, such as commons and other profits à prendre, licences for profit certain, &c. as opposed to “matters of easement and discharge,” such as a right of way or a mere authority to enter upon land;<sup>8</sup> while in another sense “interest” is used to denote an exclusive right to land, namely, that arising from ownership, as opposed to rights in alieno solo, such as commons.<sup>9</sup> § 6. “Interest” is also opposed to “possession,” as when we say that an estate is vested in interest, meaning that the right has accrued, but that the possession is deferred: thus a vested remainder is an estate vested in interest. (See *Estate*, § 10.)

Insurable interest.

§ 7. In the law of insurance a person is considered to be interested in property or in the life of a person, when the destruction or injury of the property, or the death of the person, would expose him to pecuniary loss:<sup>10</sup> this

<sup>1</sup> Best on Evidence, 635. See *Declaration*, § 5.

<sup>2</sup> Co. Litt. 265 b; 5 Rep. 19 a; Viner's *Abr. Interest*; Rolle, *Abr. Graunt*.

<sup>3</sup> Interest “extendeth to estates, rights and titles, that a man hath of, in, to or out of lands; for he is truly said to have an interest in them; and by the grant of *totum interesse suum* [all his interest] in such lands, as well reversions as possessions in fee simple, shall passe.” Co. Litt. 345 b.

<sup>4</sup> Co. Litt. 345 b.

<sup>5</sup> Watkins, *Descents*, 2.

<sup>6</sup> *Minton v. Kirwood*, L. R., 1 Eq. 455.

<sup>7</sup> Co. Litt. 42 a.

<sup>8</sup> *Potter v. North*, Ventris, 383; *Godley v. Firth*, Yelv. 159; *Weekly v. Wildman*, 1 Ld. Raym. 407; *Web v. Paternoster*, Palmer, 71.

<sup>9</sup> Burton's Comp. §§ 1158 *et seq.*

<sup>10</sup> *Halford v. Kymer*, 10 B. & C. 725; *Reed v. Royal Exchange Ass. Co.*, Peake, Add. Ca. 70; Smith's L. C. ii. 290.

is an "insurable interest." Thus a creditor has an insurable interest in the life of his debtor, because if the debtor died his money might be lost; and a shipowner has an insurable interest in the goods on board his ship to the extent of his freight, because if the goods were lost the freight would not be paid: à fortiori of course the owner of the goods has an insurable interest in them.<sup>1</sup> § 8. When a person insures for an amount exceeding the value of his interest (as where part only of an insured cargo is put on board) the excess is called short interest, and part of the premium proportionate to the excess is returnable by the underwriter.<sup>2</sup> (See *Risk*.)

Short interest.

§ 9. It is a rule of equity that a person cannot maintain a suit or action unless he has an "interest" in the subject of it, that is to say, unless he stands in a sufficiently close relation to it as to give him a right which requires protection or has been infringed, and for the protection or infringement of which he brings the action; and "want of interest" is a ground of demurrer:<sup>3</sup> thus, if a testator bequeaths property in trust for his daughters and their issue, and on their death without issue, in trust for his next of kin, during the daughters' lives the next of kin have only an expectation and not an interest, and cannot maintain an action for the administration of the estate.<sup>4</sup>

Suit.

§ 10. So in the law of probate and administration, a person has an interest for the purpose of obtaining a grant of probate when he is the executor of the deceased, and for the purpose of obtaining a grant of letters of administration when he is a relation, legatee, or creditor of the deceased; for the purpose of opposing a grant of probate or administration any person has an interest whose rights will or may be affected by the proposed grant.<sup>5</sup> When a person has such an interest as to entitle him to a grant in priority to another person, the former is said to have a superior, the latter an inferior interest.<sup>6</sup> § 11. An interest action (or cause) is one in which the legal interest of a person in the estate of the deceased is disputed: thus, where a person applying for a grant of probate or administration is stopped by a caveat, he issues a writ of summons against the caveator to have the question whether he is entitled to the grant determined.<sup>7</sup>

Probate.

Interest suit.

§ 12. One person may have an interest in another independently of the question of property. Thus a husband has an interest in his wife (see *Consortium*), a guardian in his ward, a master in his servant, and so on. (See *Right*.) The interest which a guardian in socage has in his ward has been called an interest of honour, as opposed to an interest of profit.<sup>8</sup> Similarly the interest which an executor has in the property vested in him is sometimes called an interest of office.<sup>9</sup> (See *Right*; *Estate*; *Possibility*; *Possession*; *Estoppel*.)

In persons.

Interest of office.

II. § 13. Interest also signifies a sum payable in respect of the use of

INTEREST ON MONEY.

<sup>1</sup> Maude & Pollock, Merch. Shipp. 332 et seq., 348 et seq.

<sup>2</sup> *Ibid.* 430; Smith's Merc. Law, 398.

<sup>3</sup> Mitford, Pl. 154.

<sup>4</sup> *Clowes v. Hilliard*, 4 Ch. D. 413.

<sup>5</sup> Browne's Probate Pr. 153 et seq., 265 et seq., 277.

<sup>6</sup> Coote's Probate Pr. 192, 199.

<sup>7</sup> Browne, 287; Rules of Court, i. 1; Forms, App. A. Part ii. sect. v. 4, App. C. 17.

<sup>8</sup> *Shaftsbury v. Shaftsbury*, Gilb. Eq. Rep. 172.

<sup>9</sup> Williams on Executors, 244.

another sum of money, called the principal. Interest is calculated at a rate proportionate to the amount of the principal and to the time during which the nonpayment continues; this rate is generally expressed as so much for every hundred pounds<sup>1</sup> ("per centum") during a year<sup>2</sup> ("per annum"). Thus a contract to pay five per cent. per annum on 1,500*l.* entitles the lender to 75*l.* for every year, 6*l.* 5*s.* for every month, and so on while the loan continues. Interest is considered as accruing from day to day (see *Apportionment*), although it is generally payable periodically, *e.g.*, at half-yearly intervals.

Agreed  
interest.  
Interest as  
damages.

§ 14. Interest is of two kinds, namely, that which is agreed to be paid on a loan, and that payable as damages for the nonpayment of a debt or other sum of money on the proper day.<sup>3</sup> Formerly the common law only allowed interest by way of damages where the debt was secured by a bill of exchange, or where a promise to pay interest was implied from a usage of trade or the like. But by stat. 3 & 4 Will. 4, c. 42, interest is recoverable on all debts payable by virtue of any written instrument. If no time of payment is fixed, the creditor must give the debtor notice before he can become entitled to claim interest. In equity interest seems to be allowed as damages in all cases where there has been a wrongful detention of money which ought to have been paid.<sup>4</sup> (See *Account*, § 9.) A judgment debt bears interest at four per cent. from the date on which the judgment is entered until it is paid.<sup>5</sup> If a person contracted to pay 100*l.* on the 1st January, 1877, with interest at five per cent. per annum in the meantime, and he failed to repay the 100*l.* on the day, the same rate of interest would generally be adopted by a Court or jury as the measure of damages for the delay in payment. If, however, the agreed rate were excessive and extraordinary, such as five per cent. per month, it would not be adopted, and only a reasonable rate, say four or five per cent. per annum, would be allowed as damages.<sup>6</sup> (See *Penalty*.)

Simple and  
compound.

§ 15. Interest is also either simple or compound. Compound interest is where each periodical amount of interest as it becomes payable is added to the principal, so that the next instalment of interest is calculated not only on the principal but also on the interest already accrued.<sup>7</sup> (See *Account*, § 9; *Accumulation*.)

Maritime  
interest.

§ 16. In the case of loans made on the security of bottomry bonds, &c., the lender, in consideration of the risk incurred, has always been allowed to stipulate for an extraordinary rate of interest called maritime interest, as an exception from the laws against usury; and this still applies in foreign countries.<sup>8</sup> (See *Usury*.)

ETYMOLOGY AND HISTORY.]—§ 17. *Interest*, in Latin = (1) "it concerns," (2) "it

<sup>1</sup> "To them that lend money my caveat is, that neither directly nor indirectly, by art or cunning invention, they take above ten in the hundred." Co. Litt. 3 b.

<sup>2</sup> Interest on exchequer bills is at so much per centum per diem.

<sup>3</sup> Cf. Dig. xix. 1, fr. 13, § 20.

<sup>4</sup> See *Hyde v. Price*, 1 C. P. Cooper, 193 and reporter's note; *Lowndes v. Collens*, 17 Ves. 27; *Webster v. British Empire Ass. Co.*, 15 Ch. D. 169.

<sup>5</sup> Williams, P. P. 126.

<sup>6</sup> *Cook v. Fowler*, L. R., 7 E. & I. App. 27; *Gordillo v. Weguelin*, 5 Ch. D. 287; *Howard v. Harris*, 1 Vern. 190. As to interest generally, see Chitty on Contracts, 595 *et seq.*; Leake, 584; Williams, P. P. 139.

<sup>7</sup> A covenant to capitalize arrears of interest so as to make it bear interest is lawful; *Clarkson v. Henderson*, 14 Ch. D. 348.

<sup>8</sup> Williams & Bruce's Admiralty, 48; Dig. xxii. 2; Steph. Comm. ii. 93.

concerns beneficially," "is of advantage" (Dig. ii. 11. fr. 14; x. 4, fr. 19); hence its primary meaning of "right." The word acquired its second meaning (*supra*, § 13) thus—In Roman law when a person brought an action against his debtor for non-payment of a sum of money he claimed, in addition to the debt, *id quod interest creditoris solutum esse*, that is, the benefit which he lost by the non-payment (Dig. xix. 1, fr. 1), and this was computed by calculating what profit he could have made by lending the money with a stipulation for the payment of a periodical sum for the use of it (*usura, fœnus*). Thus the damages for the wrongful detention of money (*interest, interesse*) became equivalent to the agreed payment for a loan (*usura, fœnus*). The word "interest" seems to have been introduced into England as a substitute for "usury" (*q. v.*) when that word had acquired its dyslogistic meaning.

**INTERLOCUTORY.**—§ 1. A proceeding in an action is said to be interlocutory when it is incidental to the principal object of the action, namely, the judgment. Thus, interlocutory applications in an action include all steps taken for the purpose of assisting either party in the prosecution of his case, whether before or after final judgment; or of protecting or otherwise dealing with the subject-matter of the action before the rights of the parties are finally determined; or of executing the judgment when obtained. Such are applications for time to take a step (*e. g.*, to deliver a pleading), for discovery, for an interim injunction, for the appointment of a receiver, for obtaining a garnishee order, &c. So an order giving a plaintiff leave to sign judgment is interlocutory, because he must sign judgment before he can issue execution.<sup>1</sup> The question whether an order is interlocutory is of importance with reference to the time during which it may be appealed against, three weeks being allowed for appeals from interlocutory orders, and one year for all other appeals.<sup>2</sup>

§ 2. As to interlocutory judgment, see *Judgment*, § 5; *Decree*, § 5.

**INTERNATIONAL COPYRIGHT.** See *Copyright*, § 6.

**INTERNATIONAL LAW** is of two kinds, public and private.

§ 1. Public international law is the body of rules which control the Public. conduct of independent States in their relations with each other. It is therefore altogether different in its nature from law in the narrower sense of the word, namely, law capable of judicial enforcement, for that implies a force superior to both the litigants or disputants; and as independent States have no recognized common superior, the rules by which their conduct is governed are incapable of enforcement except by war.<sup>3</sup>

§ 2. With reference to its sources, public international law is sometimes Natural and divided into natural and positive,—the natural consisting of those rules positive. which are (or are supposed to be) derived from the law of nature, and the positive consisting of rules based on usage or custom (customary international law), and on agreement (conventional international law).<sup>4</sup>

See *Blockade*; *Confiscation*; *Contraband*; *Embargo*; *Municipal*; *Postliminium*; *Pre-Emption*; *Privateers*; *Prize Courts*; *Reprisals*; *Retorsion*; *Search*; *Territorial*.

<sup>1</sup> Smith's Action, 88; *Standard Discount Co. v. La Grange*, 3 C. P. D. 67; *Smith v. Cowell*, 6 Q. B. D. 75.

<sup>2</sup> Rules of Court, lviii. 15.

<sup>3</sup> Manning's Law of Nations, 5; Austin, Jur. 89.

<sup>4</sup> Manning, 66—89.

Private.

§ 3. Private international law is that branch of municipal law which determines before the Courts of what nation a particular action or suit should be brought, and by the law of what nation it should be determined; in other words, it regulates private rights as dependent on a diversity of municipal laws and jurisdictions applicable to the persons, facts, or things in dispute, and the subject of it is hence sometimes called "The Conflict of Laws."<sup>1</sup>

Thus, questions whether a given person owes allegiance to a particular State where he is domiciled, whether his status, property, rights and duties are governed by the *lex situs*, the *lex loci*, the *lex fori*, or the *lex domicilii*, are questions with which private international law has to deal.

Bill of inter-  
pleader.  
Interpleader  
Act.

**INTERPLEADER.**—§ 1. When a person is in possession of property in which he claims no interest, but to which two or more other persons lay claim, and he, not knowing to whom he may safely give it up, is sued by one or both, he can compel them to interplead, *i. e.*, to take proceedings between themselves to determine who is entitled to it. Thus, where a seller of goods attempts to stop them in transitu, and the buyer or his assignees contend that he has no right to do so, the wharfinger in whose hands the goods are is liable to an action by each for their delivery. Before the Interpleader Act<sup>2</sup> he must either have defended both actions, or filed a bill in equity (called a bill of interpleader) to compel them to interplead,<sup>3</sup> but under that act (extended by the C. L. P. Act, 1860) as soon as either of them commences an action against him he may apply to the Court or a judge, and if there is really a question between the claimants, an order will be made directing it to be tried either by substituting the second claimant as defendant to the action in lieu of the stakeholder, or by a feigned issue or by a special case. In some cases the question may be disposed of summarily.

Sheriffs.

§ 2. The Interpleader Act also contains provisions for the relief of sheriffs against conflicting claim to goods taken in execution.<sup>4</sup>

See *Collusion*, § 2.

**INTERROGATORIES** are written questions to be answered on oath. Sometimes the answers are given verbally and taken down in writing, as when a person is examined by interrogatories before an examiner or commissioner,<sup>5</sup> but more generally the term is used to denote interrogatories delivered by one party to an action for the examination of the opposite party, who is compellable to answer them by affidavit.<sup>6</sup> By this means a plaintiff is enabled in many cases to ascertain whether he has a good cause of action, or obtain admissions in support of his case. (See *Answer*; *Discovery*.)

The practice of administering interrogatories is derived from the old practice in Chancery.<sup>7</sup>

<sup>1</sup> Westlake's Priv. Int. Law, 1 *et seq.*; Savigny, Syst. v. iii. *passim*; Story's Conflict of Laws.

<sup>2</sup> 1 Will. 4, c. 58; Rules of Court, i. 2.

<sup>3</sup> Snell's Eq. 478.

<sup>4</sup> Smith's Action (12th ed.), 167; Broom, Comm. 238; Day's C. L. P. Acts, 353;

Chitty, Pr. 1391; Coe's Practice, 152. As to the County Court practice of interpleader for the relief of the high bailiff, see Pollock's C. C. Pr. 206 *et seq.*

<sup>5</sup> Rules of Court, xxxvii. 1.

<sup>6</sup> *Ibid.* xxxi. 1—10, 20.

<sup>7</sup> Daniell, Ch. Pr. 404; Day, C. L. P. Acts.

**INTERRUPTION.**—§ 1. In the law relating to easements, profits à prendre, franchises and similar rights, interruption is where the continuity of enjoyment of a right is broken. Interruption of the possession is where the right is not enjoyed or exercised continuously; interruption in the right is where the person having or claiming the right ceases the exercise of it in such a manner as to show that he does not claim to be entitled to exercise it. Thus if a person who has for some time used a right of way simply ceases to use it, this is an interruption to the possession: if he asks the permission of the owner of the land before continuing to use the right, this is an interruption in the right, even if he then makes use of the way, because he does so not in exercise of his original right, but by virtue of the permission granted to him by the owner.<sup>1</sup>

§ 2. Interruption in the right may arise either from the act of the person having or claiming the right, or from the act of the servient owner, or other person, as where an adverse obstruction is erected to prevent the exercise of the right.<sup>2</sup>

§ 3. Interruption of the possession has no legal effect except as evidence of an interruption in the right.<sup>3</sup> Interruption in the right may prevent the acquisition of a right by prescription, or may cause the acquisition of a qualified right, or may destroy a right which has been acquired.<sup>4</sup> By the Prescription Act (*q. v.*) no act or other matter shall be deemed to be an interruption so as to prevent the acquisition of a right under the act unless it shall have been submitted to or acquiesced in for one year after notice.<sup>5</sup>

See *Enjoyment*; *Disturbance*.

**INTERVENE—INTERVENER.**—§ 1. An intervener is a person who voluntarily interposes in an action or other proceeding with the leave of the Court. Therefore a person who is cited (*q. v.*) is not an intervener, although sometimes so called.<sup>6</sup>

§ 2. In divorce practice any person can intervene in a suit for nullity or dissolution by showing cause against a decree nisi (see *Decree*, § 2), and at any time during the progress of such a suit and before the decree is made absolute, if the Queen's Proctor suspects that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce, he may by leave of the Court intervene in the suit, alleging the collusion, and retain counsel and subpoena witnesses to prove it.<sup>7</sup> (See *Collusion*.)

In divorce suits.

Proctor intervenes.

<sup>1</sup> Gale on Easements, 153, n. (*m*).

<sup>2</sup> *Ibid.* 154; Shelford, R. P. Stat. 20, and the cases there cited. See further as to interruption, Co. Litt. 245 b; Shelford, 180.

<sup>3</sup> See Gale, 209; Shelford, 20; Co. Litt. 114 b.

<sup>4</sup> Co. Litt. 113 b, 114 b; Gale and Shelford, l. c.

<sup>5</sup> Sect. 4. But an interruption for less than a year may prevent the acquisition of the right by showing that the enjoyment

was contentious: Gale, 176, citing *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 267; 15 Jur. 675; 20 L. J., Q. B. 482.

<sup>6</sup> *Kennaway v. K.*, 1 P. D. p. 150.

<sup>7</sup> 23 & 24 Vict. c. 144, s. 7; 36 Vict. c. 31, s. 1; Matrimonial Causes Act, 1878, s. 2; Browne on Divorce, 298. See also as to intervention on the custody, &c. of infants affected by a divorce suit, 20 & 21 Vict. c. 85, s. 35, and 22 & 23 Vict. c. 61, s. 4; Browne, 308.

Probate and  
Admiralty.

§ 3. In probate actions, and in admiralty actions in rem, any person may intervene who can show that he has 'an interest in the matter in dispute.'<sup>1</sup>

By appear-  
ance.

§ 4. The term "intervene" is sometimes applied to those cases where a person may, by leave of the Court, make himself a defendant in an action by entering an appearance: as in an action for the recovery of land.<sup>2</sup> (See *Appearance*, § 2.)

**INTESTATE.**—In the strict sense of the word, a person is said to die intestate when he leaves no will: but he is also said to die intestate, wholly or partially, if he leaves a will which does not dispose of his property at all, or only disposes of part of it, so that the whole or a part of it devolves on his heir at law or next of kin according to the rules governing the devolution of intestates' estates: as to which see *Descent*; *Distribution*.

**INTIMIDATION.**—Every person commits a misdemeanor, punishable with a fine of 20*l.* or imprisonment for three months (maximum), who wrongfully uses violence to, or intimidates, any other person, or his wife or children, with a view to compel him to abstain from doing, or to do, any act which he has a legal right to do or abstain from doing.<sup>3</sup> This enactment is chiefly directed against outrages by trades-unions (*q. v.*).

**INTRA VIRES.**—An act is said to be intra vires ("within the power") of a person or corporation when it is within the scope of his or its powers or authority. It is the opposite of ultra vires (*q. v.*).

**INTRODUCTION.**—The introduction of a deed consists of the words with which it begins. In an indenture the introduction consists of the words "This Indenture," followed by the word "witnesseth" after the date and parties and the recitals (if any). In a deed poll containing recitals the introduction is "To all to whom these presents shall come, A. B. of, &c. sends greeting:" followed by the recitals; when a deed poll contains no recitals it begins with the words "Know all men by these presents that I A. B. of &c."<sup>4</sup> (See *Deed*; *Premises*.)

**INTRUDER—INTRUSION.**—Intrusion, in the law of real property, occurs in the following cases:—

On heir.

§ 1. Where a person (A.) dies seised of an estate of inheritance expectant upon an estate for life, and then the tenant for life dies, and before A.'s heir enters on the land a stranger enters or "intrudes:"<sup>5</sup> A.'s heir has an action to recover possession of the land.

On crown.

§ 2. "He that entreth upon any of the king's demesnes and taketh the profits, is said to intrude upon the king's possession."<sup>6</sup> Similarly, if a tenant of crown land continues in possession after his estate has

<sup>1</sup> Coote's Probate Pr.; Browne's Probate Pr. 250; Probate Rules (1862, C. B.), 6; Rules of Court, xii. 16, 17.

<sup>2</sup> Rules of Court, xii. 18 *et seq.*

<sup>3</sup> Stat. 38 & 39 Vict. c. 86, s. 7.

<sup>4</sup> Davids. Conv. i. 33.

<sup>5</sup> Co. Litt. 277 a.



determined, he is an intruder on the crown, and not a tenant at sufferance (*q. v.*), "because there is no laches imputed to the king for not entring."<sup>1</sup> (See *Information*, § 8.)

§ 3. Formerly when an heir in wardship of chivalry ousted his lord by entering on the land during his minority, or if, after attaining majority, he entered on the land without making satisfaction for his lord's right of marriage (*q. v.*), he was said to intrude into the land.<sup>2</sup> On guardian in chivalry.

§ 4. In ecclesiastical law, intrusion is where a person without ecclesiastical authority takes possession of a benefice while it is full. Several ancient constitutions are directed against this offence.<sup>3</sup> On benefice.

**INVENTIONS.** See *Patent*; *Specification*.

**INVESTITURE**, in feudal law, was the delivery of corporal possession of land granted by a lord to his tenant. It answered to the more modern livery of seisin<sup>4</sup> (*q. v.*, and see *Dignity*). Land.

§ 2. In ecclesiastical law, investiture is one of the formalities by which the election of a bishop is confirmed by the archbishop.<sup>5</sup> Bishop.

**INVESTMENT.**—The securities upon which trustees may invest trust funds are usually enumerated in the settlement or will creating the trust. Independently of such an express power, they have a statutory power of investing on real securities in any part of the United Kingdom, or in stock of the Bank of England, or in East India Stock, unless expressly forbidden by the instrument creating the trust.<sup>6</sup> And trustees who are authorized to invest on government or parliamentary securities may invest in Bank Stock, East India Stock, Exchequer Bills, 2½ per cent. annuities, and mortgage of freehold and copyhold estates in England and Wales.<sup>7</sup> Under the latter act, the power of investing on the securities mentioned is not taken away, although the trust instrument forbids such investments.<sup>8</sup>

**IRREBUTTABLE.** See *Presumption*.

**IRREGULAR—IRREGULARITY.**—When a proceeding (judicial or extra-judicial) is done in the wrong manner, or without the proper formalities, it is said to be irregular or an irregularity—as opposed to a proceeding which is illegal or ultra vires. An irregularity may be waived by the consent or acquiescence of the opposite party or (in the case of judicial proceedings) will generally be allowed by the Court to be set right on payment of the costs occasioned by it; while a proceeding which is illegal or ultra vires is, as a rule, wholly null and void.<sup>9</sup>

<sup>1</sup> Co. Litt. 57 b.

<sup>2</sup> Fitz. N. B. 141.

<sup>3</sup> Phillimore, Eccl. Law, 507 *et seq.*

<sup>4</sup> Steph. Comm. i. 505.

<sup>5</sup> See Phill. Eccl. Law, 42 *et seq.*

<sup>6</sup> Stats. 22 & 23 Vict. c. 35, s. 32; 23 & 24 Vict. c. 38, s. 12.

S.

<sup>7</sup> Stat. 23 & 24 Vict. c. 38; General Order of the Court of Chancery, 1st Feb. 1861; Watson's Comp. Eq. 897.

<sup>8</sup> Wedderburn's Trusts, 9 Ch. D. 112.

<sup>9</sup> Archbold's Pr. 1192; Rules of Court, lix; Smith & Soden, L. & T. 220 (irregular distress); Lindley on Part. 261.

**IRREMOVABILITY** is the status of a pauper who cannot be legally removed from the parish or union in which he is receiving relief, notwithstanding that he has not acquired a settlement there; thus, a pauper who has resided in a parish during the whole of the preceding year is irremovable.<sup>1</sup> (See *Poor Law; Settlement; Removal; Residence.*)

**IRREPLEVIABLE—IRREPLEVISABLE.** See *Replevin.*

**ISSUABLE** in pleading signifies—I. That which is put in issue by the pleadings, *e. g.*, “a matter of fact issuable”<sup>2</sup>—this sense is now rare; II. A pleading is said to be issuable when it raises a substantial question of fact or law, a judgment or verdict on which would determine the action on its merits.<sup>3</sup> (See *Issue.*)

Of person. **ISSUE.**—I. § 1. The issue of a person consists of his children, grandchildren, and all other lineal descendants. The word is, however, sometimes used by testators in the sense of “children.”<sup>4</sup> (See *Heir.*)

Issues of land. II. § 2. “Issues” is the technical name for the profits of land taken in execution under a writ of distringas.<sup>5</sup> (See *Rent.*)

Issues in an action. III. § 3. When the parties to an action have answered one another’s pleadings in such a manner that they have arrived at some material point or matter affirmed on one side and denied on the other, and the party whose turn it is to plead adds nothing to his previous pleadings, the parties are said to be “at issue;” the last pleading is called a joinder in issue (*q. v.*), and the question thus raised is called the issue, or one of the issues, in the action.<sup>6</sup> Frequently issue is joined on one question in the case, and the pleadings continue as to the other questions; where the defendant sets up a counter-claim, issue is generally joined on the original claim before it is joined on the counter-claim.

Preparation of issues. § 4. If the pleadings do not succeed in sufficiently defining the issues in dispute between the parties, the judge may direct the parties to prepare issues, that is, to agree upon a written statement containing the questions between them, and, if they differ, the issues are settled by the judge.<sup>7</sup>

§ 5. The next step is the trial (*q. v.*, and see *Action*).

Common law practice. § 6. Under the old common law practice issues were either of fact or of law, the latter being where there was a joinder in demurrer. Under the new practice no joinder in demurrer is required, and the term “issue in law” is not now used.<sup>8</sup> (See *Questions of Law.*)

§ 7. A *general issue* was a peculiar kind of plea used in cases where the defendant wished to deny all the allegations in the declaration or the principal fact on which it was founded; thus, if an action was brought in respect of a contract or promise, the defen-

<sup>1</sup> Stat. 28 & 29 Vict. c. 79, s. 8; Steph. Comm. iii. 60.

<sup>2</sup> Co. Litt. 125 a.

<sup>3</sup> See Smith’s *Action at Law* (11th ed.), 101. A mere dilatory plea, or a plea not going to the merits of the action, as a plea in abatement, or of “alien enemy,” was considered a non-issuable plea under the old practice at common law; Chitty’s *Pr.* 247.

<sup>4</sup> Jarman on Wills, ii. 101; *Ralph v. Carrick*, 11 Ch. D. 873.

<sup>5</sup> Finch, *Law*, 352 *et seq.*; 3 Bl. 280; Rules of Court (April, 1880), form F. 12.

<sup>6</sup> Co. Litt. 126 a.

<sup>7</sup> Rules of Court, xxvi.; for a specimen of issues settled by the judge, see *West v. White*, 4 Ch. D. p. 636. As to issues in divorce cases, see Browne on Divorce, 231.

<sup>8</sup> Rules of Court, xxxiv.

dant might plead "that he did not promise as alleged," or to an action for a tort "that he is not guilty"; most of these general issues had short Latin or Norman names: *e. g.*, "Non assumpsit."

§ 8. When issue in fact had been joined, all the proceedings in the action from the writ to the award of a jury were set out in a document called the issue, which was delivered by the plaintiff to the defendant, generally endorsed with notice of trial.<sup>1</sup>

§ 9. In equity, joining issue was the mode of bringing on a suit for hearing on replication,<sup>2</sup> as opposed to motion for decree (*q. v.*).

Chancery practice.

§ 10. In criminal procedure a prisoner is said to plead the general issue when he pleads "Not guilty" to the indictment. This is done when he intends either to deny or justify the charge in the indictment;<sup>3</sup> the general issue, therefore, includes defences in the nature of confession and avoidance (*q. v.* and see *Plea.*)

Criminal practice.

IV.—§ 11. A writ, subpoena, or similar document, is said to be issued when it is delivered by the proper officer of the Court to the party at whose instance it is sued out, after having been sealed or otherwise marked to denote its official character.<sup>4</sup>

Issue of writs, &c.

See *Præcipe*.

ETYMOLOGY.]—Norman-French, *issu*, *issue*; Latin, *exitus*, from *exire*, to go forth. As used in pleading, the phrase "occurs at the very commencement of the Year-Books, viz., 1 Edw. II. . . . In some instances the expression *isser d'empler* occurs, which may be translated *to get out of*, or *finish the pleading*, and clearly marks the meaning and derivation of the word *issue*. In the reign of Edw. IV. we find the Latin term thus regularly defined:—'*Exitus idem est quod finis, sive determinatio placiti.*' Year-Book, 21 Edw. IV. 35."<sup>5</sup>

ITINERANT. See *Eyre*.

## J.

**JACTITATION OF MARRIAGE** is where a person boasts or gives out that he or she is married to someone, whereby a common reputation of their marriage may ensue;<sup>6</sup> in such a case the person aggrieved may present a petition in the Probate, Divorce and Matrimonial Division praying a decree of perpetual silence against the jactitator. These suits are of rare occurrence.<sup>7</sup>

**JEOFAIL.**—In the days of oral pleading, when a pleader perceived any slip in the form of his allegation, he acknowledged his error by the expression *j'ay faillé*, and thereupon obtained liberty to amend. The statutes passed to prevent formal objections being taken after a certain stage in the proceedings were hence called the Statutes of Amendment and Jeofail. (See *Aid*, § 3; *Arrest of Judgment*; *Demurrer*, § 13.)

<sup>1</sup> Smith's Action (11th ed.), 129; Chitty, Pr. 306. As to pleading the "general issue by statute," see *Not guilty*. This seems to be the only kind of "general issue by statute" which can now be pleaded.

<sup>2</sup> Hunter's Suit, 63.

<sup>3</sup> Steph. Comm. iv. 405; Archb. Crim. Pl. 144.

<sup>4</sup> See Rules of Court, v. 6.

<sup>5</sup> Stephen, Pl. (5), App. n. (10).

<sup>6</sup> Bl. Comm. iii. 93.

<sup>7</sup> Browne on Divorce, 85.

**JETSAM, FLOTSAM AND LIGAN.**—Jetsam is where goods are cast into the sea and there sink and remain under water; flotsam is where they continue swimming on the surface of the waves; ligam (or lagan) is where they are sunk in the sea, fastened to a cork or buoy, in order to be found again. In each of these cases the goods belong to the crown, unless the owner appears to claim them. § 2. Jetsam, flotsam and ligam do not fall within the original or common law meaning of "wreck," and therefore do not pass by a royal grant of wreck; but for the purposes of the Merchant Shipping Acts "wreck" includes them.<sup>1</sup> (See *Wreck*.)

**JETTISON** is the throwing overboard of goods from necessity to lighten the vessel in a storm, or to prevent capture, or for any other sufficient cause.<sup>2</sup> Jettison is the simplest and oldest instance of general average. (See *Average*, § 3.)

**JEWS.**—Practically the only disabilities to which Jews are now subject are, incompetence to fill certain high offices in the State (*e.g.*, that of lord chancellor), and inability to present to an ecclesiastical benefice attached to an office in her Majesty's gift.<sup>3</sup>

Causes of  
action.

**JOINDER.**—§ 1. Joinder of causes of action. The general rule in actions in the High Court is that the plaintiff may unite in the same action several causes of action, subject to separate trials being ordered where they cannot conveniently be tried together. No cause of action can (unless by leave) be joined with an action for the recovery of land, except claims for mesne profits or arrears of rent, or breach of contract in respect of the same property. Claims in autre droit cannot as a rule be joined with personal claims.<sup>4</sup>

Parties.

§ 2. Joinder of parties. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative; and the same rule applies to the defendants.<sup>5</sup> (See *Misjoinder*; *Non-joinder*; *Party*.)

Joinder of  
issue.

§ 3. Joinder of issue is where one of the parties joins issue upon the previous pleading, or upon certain parts of it; that is to say, where the party whose turn it is to plead denies every material allegation of fact in the previous pleading, or in a specified part of it, without alleging any new facts in support of his case, and thus puts an end to the pleadings, wholly or to a certain extent. In ordinary cases the reply (*q. v.*) is a simple joinder of issue on the statement of defence.<sup>6</sup> (See *Action*; *Issue*, § 3; *Pleadings*; as to joinder in demurrer, see *Issue*, § 6.)

Joinder of  
error.

§ 4. In proceedings on a writ of error in criminal cases, the joinder of

<sup>1</sup> Bl. Comm. i. 292; Steph. Comm. ii. 542; *Constable's Case*, 5 Rep. 106.

<sup>2</sup> Maude & Pollock, Merch. Shipp. 116, 320, 369.

<sup>3</sup> Steph. Comm. iii. 710.

<sup>4</sup> Rules of Court, xvii. The general rule as to joinder must, it would seem, be

treated as subject to the direction that certain actions can only be brought in certain divisions of the High Court. (See *High Court of Justice*.)

<sup>5</sup> Rules of Court, xvi.

<sup>6</sup> *Ibid.* xix. 21, App. C., Form No. 23.

error is a written denial of the errors alleged in the assignment of errors, and is in the name of the Attorney-General or the Queen's Coroner and Attorney.<sup>1</sup> It answers to a joinder of issue in an action. (See *Error*.)

**JOINT.**—I. § 1. As applied to property (other than choses in action), Property. "joint" signifies that it belongs to two or more persons in such a way that on the death of one of them without having disposed of his interest inter vivos, it passes to the survivors, and so on until they have all died but one, who then takes the whole by survivorship. This quality distinguishes a joint ownership from an ownership in common, and also, in the case of land, from the form of ownership known as coparcenary (*q. v.*). As to the rules relating to joint ownership and ownership in common, see *Joint Tenancy*; *Tenancy in Common*.

II. § 2. In the case of bonds, covenants, contracts and other choses in action, when the right of action is vested in two or more persons, so that they must all join in suing upon it, then the bond, covenant, &c. is said to be joint, as opposed to one which is several, namely, where each of the obligees has a separate interest, and may therefore sue alone. Whether a bond, covenant or the like is joint or several depends much more upon the subject-matter than upon the words employed, for if each of the obligees has a separate interest, the right of action will be several, although expressed to be joint and several. A bond, covenant, or the like, entered into with several obligees, cannot be joint or several at their election, but must be either one or the other.<sup>2</sup> § 3. If one obligee releases the obligor, this is sufficient to bar all the obligees; and if one of several joint obligees dies, his interest passes to the survivors. In the case of partners in trade, however, the share of a deceased partner devolves in equity on his personal representatives, and the surviving partners become trustees for them of his share.<sup>3</sup> The same rule applies where two or more persons advance money and take the security to themselves jointly. § 4. A joint ownership of a chose in action cannot be severed at law by either or both of the obligees, but the parties may make a severance which will be binding in equity.<sup>4</sup> (See *Tenancy in Common*.)

Joint ownership of choses in action.

§ 5. Two or more persons may be jointly liable to the same debt or demand, and though each is liable for the whole debt, yet they are all considered as together forming one person; they must therefore all be sued together, and a voluntary release to one will discharge them all. (See *Release*.) On the other hand, if one of them is compelled to pay the whole debt, he is entitled to contribution from the others to the extent of their shares.<sup>5</sup> (See *Contribution*.) On the death of one, his liability passes to the survivors, except in the case of partners, for on the death of a partner his estate remains liable in equity for all partnership debts then existing.<sup>6</sup> Hence it is sometimes said that though a partnership debt is joint at law, in equity it is joint and several: but the rule is only

Joint liability on choses in action.

<sup>1</sup> Archbold, Crim. Pl. 204.

<sup>2</sup> Williams, P. P. 356.

<sup>3</sup> *Ibid.* 354, 357.

<sup>4</sup> *Ibid.* 358.

<sup>5</sup> *Batard v. Hawes*, 2 Ell. & Bl. 287.

<sup>6</sup> Williams, P. P. 360, 364.

Joint and several.

true to the extent above mentioned.<sup>1</sup> § 6. A liability may, however, be both joint and several, so that the creditor may sue one or more of the debtors separately, or all of them jointly at his option.<sup>2</sup> And if one of them is compelled to pay the whole debt or more than his proportion, he is entitled to contribution from the others. (See *Contribution*.) If one of them dies, his estate remains liable in the same way that he was.<sup>3</sup> As to the release of such a liability, see *Release*.

In bankruptcy.

III. § 7. In the law of bankruptcy, when several persons are partners together, and all become insolvent, the petition and adjudication of bankruptcy against them may be either joint, that is, embracing all the members of the firm, or separate, that is, confined to each member individually.<sup>4</sup> When all the members of a firm, quâ partners, are adjudged bankrupt, the property of the members which vests in the trustee is divided into two parts, namely, the joint estate, or that of the firm, such as the capital, stock in trade, &c., and the separate estates consisting of the private property of each partner; and distinct accounts are also kept of the joint or partnership debts, and of the separate debts. This is necessary, because it is a rule that joint creditors (that is, creditors against the firm) are entitled to have their debts paid in full out of the joint estate before the separate creditors (that is, the creditors of each member) can receive anything from the joint estate, while the separate creditors of each partner are entitled to a similar priority of payment out of his separate estate as against the joint creditors.<sup>5</sup> § 8. A joint and several creditor is one for whose debt the firm is jointly, and all or some or one of its members are or is also separately liable.<sup>6</sup> Thus, if A. and B. are trading in partnership under the firm of A. and Company, and a bill of exchange is accepted by A. and Company, and indorsed by A., the holder of the bill would in the event of A. and B.'s bankruptcy be a joint and several creditor, and therefore entitled to prove against both the joint estate of the firm, and the separate estate of A.<sup>7</sup> (See *Conversion*, § 8; *Proof*.)

Land Transfer Act.

IV. § 9. In the case of land registered under the Land Transfer Act, 1875, "joint proprietors" mean any two or more persons who are registered as being together entitled to land, whether concurrently (*e. g.*, as joint tenants, tenants in common, &c.) or successively (*e. g.*, tenant for life and remainderman).<sup>8</sup>

**JOINT STOCK COMPANY** is a term which was originally applied to those unincorporated companies or large partnerships with transferable shares formed at the beginning of the last century (joint stock companies under the common law), and as to the legality of which doubts were

<sup>1</sup> *Kendall v. Hamilton*, 4 App. Ca. at p. 517.

<sup>2</sup> *Dicey on Parties*, 230 *et seq.*

<sup>3</sup> *Williams*, P. P. 363.

<sup>4</sup> *Robson's Bankr.* 572.

<sup>5</sup> *Ibid.* 583, 609; *Ex parte Cook*, 2 P.

W. 500; *Lindley*, 1145 *et seq.*; *Read v. Bailey*, 3 App. Ca. 94.

<sup>6</sup> *Robson*, 616.

<sup>7</sup> *Ex parte Honey*, L. R., 7 Ch. App. 178.

<sup>8</sup> *Sect.* 69.

and are entertained.<sup>1</sup> By various acts from 1825 to 1857, the principal of which were those of 1844, 1855, 1856 and 1857, the formation of joint stock companies was legalized and facilitated.<sup>2</sup> As to the acts now in force, see *Companies Acts; Dissolution*, § 3.

**JOINT TENANCY.**—§ 1. An estate in joint tenancy, in the strict sense of the phrase, is created where land or any other tenement is conveyed or given to two or more persons to hold in fee, for life, or other estate. Persons may also be joint tenants by wrong, as where two or more disseise another of any lands or tenements to their own use.<sup>3</sup> (See *Title*.)

§ 2. The term joint tenancy is also applied to personal property,<sup>4</sup> *e. g.*, stock in the funds, although it is not the subject of tenure; hence it is more correct to say that two persons are jointly entitled to stock, or that they have a joint ownership of it. As to choses in actions, see *Joint*, § 2 *et seq.*

§ 3. When two or more persons are joint tenants of property, they have, with respect to all other persons than themselves, the properties of a single owner. The principal incidents of joint tenancy are as follows:

§ 4. Every joint tenant is seised or possessed of the joint property *per my et per tout*, that is, by every part and by the whole;<sup>5</sup> by this is meant that the possession of each is indivisible, and that each has an equal right, so that no one can claim the exclusive possession of any particular part of the property, though each is entitled to his proportion of the rents or other income.<sup>6</sup> It also follows that one joint tenant cannot convey his interest to his co-tenants in the same way that one stranger conveys to another, and therefore the proper mode of conveyance from one joint tenant to another is by release, operating as an extinguishment of the interest conveyed.<sup>7</sup> (See *Release*.)

§ 5. Every joint tenancy is created by one and the same title (that is, the same devise or the same conveyance), and at one and the same time; hence if land is limited to A. for life, and after his death to the heirs of B. and C., and B. dies in A.'s lifetime, and afterwards C. dies also in A.'s lifetime, here B. and C.'s heirs are not joint tenants, because the remainder in one moiety of the land vested in B.'s heirs, while the remainder in the other was still contingent.<sup>8</sup> But under the Statute of Uses, or by a gift by will, two persons may be joint tenants, although they come to their estates at different times.<sup>9</sup>

§ 6. All the joint tenants must be owners in the same interest and in the same capacity; and, therefore, if land is given to two persons, to the one for life, and the other for years, they are not joint tenants (see *Estate Tail*, § 4). So if land is given to the king and to a subject, they are not joint tenants, because the king is seised in his royal or politic capacity *in jure coronæ*, while the subject is seised in his natural capacity.<sup>10</sup>

<sup>1</sup> See the Bubble Act of 1719 (6 Geo. 1, c. 18), passed to discourage these associations; Lindley on Partnership, 189 *et seq.*

<sup>2</sup> *Ibid.* 7.

<sup>3</sup> Litt. §§ 277, 278.

<sup>4</sup> Co. Litt. 182 a.

<sup>5</sup> Litt. § 288. It is not quite clear whether *my* or *mie* comes from the Latin *mica*, a little bit (French *mie*), or from the

Latin *medius*, half or part (French *mi*). The latter seems the more probable. See Littré, Dict. s. vv.; Diez. v. *Mezzo*.

<sup>6</sup> Williams, R. P. 134.

<sup>7</sup> *Ibid.* 137.

<sup>8</sup> Co. Litt. 188 a.

<sup>9</sup> *Ibid.* and note (13); Williams, R. P. 137; Williams, P. P. 355.

<sup>10</sup> Co. Litt. 188 a, 190 a.

the most important quality of a joint tenancy is that of survivorship; "as if three joyntenants be in fee simple, and the one hath issue and dieth, yet they which survive shall have the whole tenements, and the issue shall have nothing. And if the second joyntenant hath issue, and dye, yet the third which surviveth shall have the whole tenements to him and to his heires for ever."<sup>1</sup> But any joint tenant may by disposing of his share during his lifetime (though not by will) to a stranger, sever the joint tenancy, so far as that share is concerned, so that it will henceforth be held by the stranger as tenant in common with the remaining tenant or tenants, who will continue to be joint tenants as between themselves.<sup>2</sup> Joint tenants may also make partition (*q. v.*).<sup>3</sup>

§ 8. An exception to the right of survivorship between joint owners occurs in the case of partners in trade, for in this case the law vests in the executors or administrators of a deceased partner the share of the deceased in all personal chattels in possession (such as merchandise or ships) belonging to the partnership. But this rule does not apply to real estate or choses in action, which by law go by survivorship to the surviving partners. In equity, however, the share of the deceased partner in the real estate and choses in action of the partnership devolves on his executor or administrators, and the surviving partners are therefore trustees of it for his executors or administrators. (See also *Joint*, § 3.)

§ 9. The incident of survivorship being inconvenient where persons are beneficially entitled to property, joint tenancy seldom occurs except in the case of trustees; here the incident is useful, for on the decease of one of the trustees the property vests in the survivors by mere operation of law, without devolving on the representatives of the deceased trustee, and without being affected by any testamentary disposition by him.<sup>4</sup>

See *Estate*, § 11; *Joint*.

**JOINTRESS** is a woman entitled to a jointure (*q. v.*).

**JOINTURE.**—I. § 1. In the ordinary sense of the word, jointure is a provision made by a husband for the support of his wife after his death. It is either legal or equitable.

Legal jointure.

§ 2. A legal jointure is (or rather was, for it has long been practically obsolete) "a competent livelihood of freehold for the wife of lands or tenements, &c., to take effect presently in possession or profit after the decease of her husband for the life of the wife at the least,"<sup>5</sup> and was given to her either—(1) at common law, in which case it did not bar the wife's dower; or (2) by way of use before the Statute of Uses; or (3) under the provisions of the Statute of Uses—in which case, if the jointure was made in compliance with the act, it operated so as to bar the wife's dower, or to put her to her election whether she would take the

<sup>1</sup> Litt. § 280.

<sup>2</sup> *Ibid.* §§ 287, 294.

<sup>3</sup> *Ibid.* § 290; Co. Litt. 187 a; Williams, R. P. 138.

<sup>4</sup> Williams, R. P. 139; Watson's Comp. Eq. 452.

<sup>5</sup> *Vernon's Case*, 4 Rep. 2 b; Co. Litt. 36 b.



jointure or the dower, according as the jointure was made before or after the marriage.<sup>1</sup>

§ 3. An equitable jointure generally consists of a rent-charge or annuity payable by the trustees of a marriage settlement to the wife for her life if she should survive her husband, the rent-charge or annuity being generally secured by powers of distress and entry, and by the limitation of the settled lands to trustees for a long term of years.<sup>2</sup> If the settlement is made by a tenant in tail after attaining twenty-one, and during his father's lifetime, the land is disentailed and resettled on the father and son successively for life, with remainder in tail to the son's issue, with power for the son to charge a jointure rent-charge secured by powers of distress and entry in favour of any wife whom he may marry, and to limit a term for securing it. By a separate deed the son exercises these powers in favour of the lady whom he is about to marry.<sup>3</sup>

Equitable jointure.

Power of jointuring.

§ 4. The acceptance of an equitable jointure by a wife always operated as a bar to her dower.<sup>4</sup> Since the Dower Act, the doctrine of a jointure (legal or equitable), operating as a bar to dower, is of no practical importance.<sup>5</sup> (See *Dower*.)

II. § 5. Jointure is the old term for joint tenancy.<sup>6</sup>

ETYMOLOGY AND HISTORY.]—The derivation of jointure in the sense of joint tenancy is obvious. The word acquired its meaning of a provision for a wife after her husband's death from the practice of making a provision for a wife by limiting a "jointure" or estate in joint tenancy to her and her husband before marriage, so that the estate would pass to the survivor.<sup>7</sup>

**JUDGE** is an officer of the crown who sits to administer justice according to law. Judges are divided into judges of record, not of record, superior and inferior judges, &c. in the same way as the Courts of which they are members. (See *Court*; *Chambers*; *Justice*.)

§ 2. No action will lie against a judge of record for any act done by him in the exercise of his judicial functions; and even inferior justices, and those not of record, cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction.<sup>8</sup> If, however, a judge not of record exceeds his jurisdiction, he is liable to an action by the injured party.<sup>9</sup> (See *Coram non JUDGE*.)

§ 3. As to the removal of judges, see *Dum bene se gesserit*.

**JUDGE ADVOCATE GENERAL** is the adviser of the crown in reference to courts martial and other matters of military law.<sup>10</sup> He is generally a member of the House of Commons and of the government for the time being.

<sup>1</sup> *Ibid.*; Watson's Comp. 580.

<sup>2</sup> Elphinstone, Conv. 322, 332 *et seq.*

<sup>3</sup> *Ibid.* 420 *et seq.* See *Resettlement*.

<sup>4</sup> Williams, R. P. 226.

<sup>5</sup> *Ibid.* 227.

<sup>6</sup> Litt. § 280.

<sup>7</sup> Co. Litt. 187 b.

<sup>8</sup> *Garnett v. Ferrand*, 6 B. & C. 611; *Mostyn v. Fabrigas*, Smith, L. C., 652; *Scott v. Stansfield*, L. R. 3 Ex. 220; *Willis v. Maclachlan*, 1 Ex. D. 376.

<sup>9</sup> See *Crepps v. Durden*, Smith, L. C. i.

711.

<sup>10</sup> Steph. Comm. ii. 590, note.

**JUDGE ORDINARY.**—By stat. 20 & 21 Vict. c. 85, s. 9, the judge of the Court of Probate was made judge of the Court for Divorce and Matrimonial Causes created by that act, under the name of the Judge Ordinary; he was in effect judge of first instance in all matters within the jurisdiction of the Court. By the Judicature Acts, which transferred the jurisdiction of the Court to the High Court of Justice, the Judge Ordinary was made President of the Probate, Divorce and Admiralty Division of the High Court, and is now so called. (See *Court for Divorce and Matrimonial Causes*.)

**JUDGE'S NOTES.**—When evidence is given *vivâ voce* on the trial of an action, the judge usually takes notes of the evidence, which are used when it becomes a question what the evidence was, *e. g.*, on a motion for a new trial, or an appeal.<sup>1</sup> The judge is not bound either to take the notes or to allow them to be used, although in practice he does both.

Spoken judgment.

**JUDGMENT** is the decision or sentence of a Court on the main question<sup>2</sup> in a proceeding, or on one of the questions, if there are several. The judgment so pronounced is entered on the records of the Court<sup>3</sup> (see *Record*; *Enter*). The term "judgment," however, is also used to denote the reasons which the Court gives for its decision; so that where the Court consists of several judges it may and often does happen that each judge gives a separate judgment or statement of his reasons, although there can be only one judgment of the Court in the technical sense of the word. These judgments are reported as precedents in important cases. (See *Reports*.)

Civil.

In civil actions, judgments (in the technical sense) are of the following kinds:—

In rem.

§ 2. With regard to their conclusive effect, judgments are of two kinds, *in rem* and *in personam* (see *In Personam*). A judgment *in rem* is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, it concludes all persons from saying that the status of the thing or person adjudicated upon was not such as declared by the adjudication. Thus the Court of Exchequer having in certain revenue cases a right to condemn goods, its judgment is conclusive against all the world that the goods so condemned were liable to seizure.<sup>4</sup> So a declaration of legitimacy and (it would seem) a judgment of outlawry are in effect judgments *in rem*. A judgment of divorce pronounced by a foreign Court is in certain cases recognized by English Courts, and is then a judgment *in rem*.<sup>5</sup> (See *Divorce*, § 7.)

In personam or inter partes.

§ 3. A judgment *in personam* is more accurately called a judgment *inter partes*, for an adjudication upon the status of a particular person (as

<sup>1</sup> Rules of Court, lviii. 11.

<sup>2</sup> The obsolete judgment of *respondens* ouster (*q. v.*) is an exception to this definition; but as it was not really a judgment, but an interlocutory order, it has not been thought necessary to frame the definition

so as to include it.

<sup>3</sup> Rules of Court, xli. i, 1 a; xlii.

<sup>4</sup> Smith's L. C. ii. 785.

<sup>5</sup> *Ibid.* 784; *Harvey v. Farnie*, 5 P. D. 153.

in the cases mentioned above) is as much a judgment in rem as an adjudication on the status of a thing.<sup>1</sup> Judgments in personam are those which bind only those who are parties or privies to them; as in an ordinary action of contract or tort, where a judgment given against A. cannot be binding on B. unless he or some one under whom he claims was party to it.<sup>2</sup>

§ 4. A final judgment is one which puts an end to the action by Final. declaring that the plaintiff has or has not entitled himself to the remedy he sued for, so that nothing remains to be done but to execute the judgment. Thus, if the plaintiff in an action for damages obtains judgment for 500*l.* damages and costs, the judgment is final.

§ 5. An interlocutory judgment is one which does not terminate the Interlocutory. action, because it is not complete and definite. Thus, if judgment by default is signed against the defendant in an action for damages, it is an interlocutory one, because the amount of the damages has to be assessed, after which final judgment is signed<sup>3</sup> (see *Writ of Inquiry*); so judgment in a Chancery action for administration or account is in general interlocutory, because the accounts and inquiries remain to be taken and made. (See *Further Consideration.*)

§ 6. A judgment on the merits<sup>4</sup> is where the case has been argued and the Court has decided which party is in the right; such a judgment is Judgment on the merits. given on demurrer or after trial (*q. v.*; and see *Motion for Judgment; Verdict*).

A judgment is not given on the merits when it is founded on some technical rule of procedure; the following are the principal instances:—

§ 7. Judgment by default is obtained when one party neglects to take Judgment by default; a certain step in the action within the proper time, and the judgment so obtained is called according to the step which ought to have been taken, *e.g.*, judgment in default of appearance,<sup>5</sup> judgment in default of delivery of defence,<sup>6</sup> &c. § 8. Judgment of nonsuit is where the plaintiff fails to of nonsuit. appear on the trial, or throws up the action (see *Nonsuit*); like a judgment by default, it may be set aside on such terms as the Court thinks fit.<sup>7</sup> (See also *Discontinuance.*)

§ 9. Judgment by judge's order is obtained either by consent, or on Judge's order. failure by the defendant to satisfy the judge that he has a good or *prima facie* defence to an action for a liquidated demand.<sup>8</sup> To obtain this latter kind, commonly called "judgment under Order XIV.," the plaintiff takes out a summons supported by an affidavit verifying the cause of action, and stating that he believes the defendant has no defence. If the defendant fails to satisfy the judge that he ought to be allowed to defend the action, the judge either orders judgment to be signed, or allows him to defend on

<sup>1</sup> Smith's L. C. ii. 784 *et seq.*

<sup>2</sup> *Ibid.* 788.

<sup>3</sup> Rules of Court, xxix. 4; Archbold, Pr. 802.

<sup>4</sup> See Rules of Court, xli. 6.

<sup>5</sup> Rules of Court, xlii. 3.

<sup>6</sup> *Ibid.* xxix. 2. As to judgment by confession and agreement in County Court

actions, see Pollock's C. C. Practice, 96 *et seq.*

<sup>7</sup> Rules of Court, xxix. 14; xli. 6.

<sup>8</sup> *Ibid.* xiv. (Rules of May, 1877); Archbold's Pr. 784; *Thompson v. Marshall*, W. N. 1879, 213; *Crumph v. Cavendish*, 5 Ex. D. 211.

paying the money into Court or giving security. The writ must be specially indorsed. (See *Writ of Summons*.)

The following kinds of judgment are peculiar to the Queen's Bench Division of the High Court; some of them are rare in practice, if not obsolete:—

- By confession; § 10. Judgment by confession is where a defendant gives the plaintiff a cognovit or written confession of the action, by virtue of which the plaintiff signs judgment. (See *Cognovit*.) § 11. Where in an action against several persons for a joint tort, the jury by mistake sever the damages by giving heavier damages against one defendant than against the others, the plaintiff may cure the defect by taking judgment for the greater damages (de melioribus damnis) against that defendant and entering a nolle pros. (q. v.) against the others.<sup>1</sup> § 12. Judgment of assets in futuro or quando acciderint (shortly "judgment quando"); if an executor is sued for a debt of his testator and pleads *plene administravit* (q. v.), or if an heir is sued and pleads *riens per descent* (q. v.), the plaintiff in his reply may confess the truth of the plea and pray judgment of assets in futuro: or if an executor pleads *plene adm. præter*, the plaintiff may have immediate judgment of the assets acknowledged to be in the hands of the defendant, and of assets in futuro for the residue. A judgment of assets quando acciderint, or in futuro, is one to be levied when assets shall come to the hands of the heir or executor.<sup>2</sup>
- de melioribus damnis.
- Of assets in futuro.
- Special judgment against executor, &c.
- General judgment.
- (See *Scire facias*.) § 13. If an heir or executor pleads any other defence and fails, the judgment is usually special, viz., that the debt be levied of the goods or land of the testator as the case may be; but if he pleads a defence which is false to his own knowledge (e.g., ne unques executor or riens per descent) then the judgment may be general, viz., that the debt be levied as if the action had been brought against him for his own debt.<sup>3</sup>
- Chancery judgments.
- Personal.
- Married woman.
- Execution of judgments.
- § 14. In the Chancery Division judgments are generally known by names indicating their objects. Thus a judgment directing an account to be taken is called a judgment for an account, and a judgment entitling a mortgagor to redeem the mortgaged property is a judgment for redemption. In an action against a mortgagor, the judgment may be both a personal judgment directing the defendant to pay the mortgage debt, and a foreclosure judgment, or judgment of sale, enabling the plaintiff to foreclose or sell the mortgaged property on default in payment<sup>4</sup> (see *infra*, § 20). § 15. Judgment against the separate estate of a married woman on a covenant entered into by her is in a special form.<sup>5</sup> (See *Engagement*.)
- § 16. A judgment is enforced by execution against the person or property of the party<sup>6</sup> against whom it is given.<sup>7</sup> (See *Execution*, § 3.) Formerly a judgment for the payment of money operated as a charge

<sup>1</sup> Archbold, Fr. 406.

<sup>2</sup> *Ibid.* 1006 *et seq.*; Smith's Action (11th edit.), 363.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Greenough v. Littler*, 15 Ch. D. 93.

<sup>5</sup> *Pike v. Fitzgibbon*, 14 Ch. D. 837.

<sup>6</sup> Not necessarily the defendant, for on a counterclaim judgment may be given against the plaintiff (Rules of Court, xxii. 10).

<sup>7</sup> See *Birmingham Estates Co. v. Smith*, 13 C. H. D. 506.

upon all the lands, tenements, and hereditaments of the person against whom it was entered up, in the same way as if he had charged them by writing under his hand. Provision was made for registration of such judgments. (See *Registration*.) Now, however, no judgment entered up after the 29th July, 1864, affects any land until it has been actually delivered in execution; the writ is registered in the name of the debtor.<sup>1</sup>

§ 17. A judgment may in some cases be enforced in other Courts than that in which it was originally given: thus a judgment of a County Court or other inferior Court may in certain cases be removed into the High Court of Justice, and then execution may be issued as if it had been a judgment of the High Court.<sup>2</sup> § 18. Conversely an inferior Court may, in a proper case, commit a debtor to prison for nonpayment of a sum not exceeding 50*l.* due under a judgment of the High Court.<sup>3</sup> § 19. By the Judgments Extension Act, 1868, a judgment obtained in a superior Court of England, Scotland, or Ireland, may be registered in a superior Court of either of the other two countries, and then has the same effect as if it had been originally obtained in the latter Court. This is done for the purpose of issuing execution in England on a judgment obtained in Scotland or Ireland, and vice versa.<sup>4</sup>

Removal and enforcement of judgments.

Registration of Scotch and Irish judgments.

§ 20. A judgment may in some cases be transferred from one person to another; thus where in a foreclosure action against the mortgagor of land, and a person who had purchased the equity of redemption from him, personal judgment for the mortgage debt was given against the mortgagor, and a foreclosure judgment against the mortgagor and his purchaser, it was ordered that in the event of the purchaser redeeming the mortgage, the mortgagee (the plaintiff) should transfer to him the benefit of the personal judgment against the mortgagor, and that he should be at liberty to enforce it in the name of the plaintiff upon indemnifying him against his costs and expenses.<sup>5</sup> As to assigning judgments to sureties, see *Surety*.

Transfer of judgment.

§ 21. In some cases a judgment may give rise to a fresh cause of action. Thus, if it becomes necessary to enforce a judgment against persons who have succeeded to the liability of the original defendants, an action must be brought for that purpose.<sup>6</sup> So an action may be brought to set aside a judgment obtained by fraud.<sup>7</sup> At common law, every judgment for payment of a sum of money creates a debt on which the successful party may bring an action, and in some cases he could not enforce it in any other way, *e. g.*, if he had allowed a year and a day to

Action on judgment.

<sup>1</sup> Stats. 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 23 & 24 Vict. c. 38; 27 & 28 Vict. c. 112; Williams, R. P. 84 *et seq.*; Dart, V. & P. 456; Watson's Comp. Equity, 464; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.

<sup>2</sup> Stats. 1 & 2 Vict. c. 110, s. 22; 19 & 20 Vict. c. 108, s. 40; *Williams v. Bolland*, 1 C. P. D. 227; Chitty, Pr. 1332.

<sup>3</sup> Debtors Act, 1869, s. 5; *Washer v. Elliott*, 1 C. P. D. 169.

<sup>4</sup> The Judgments Office now forms part

of the Central Office of the Supreme Court (Judicature (Officers) Act, 1879). As to the duties of the Registrar of Judgments, see s. 14 and Rules of Court, Dec. 1879, and April, 1880.

<sup>5</sup> *Greenough v. Littler*, 15 Ch. D. 93. See however Rules of Court, xlii. 19.

<sup>6</sup> *Att.-Gen. v. Corporation of Birmingham*, 15 Ch. D. 423.

<sup>7</sup> *Flower v. Lloyd*, 6 Ch. D. 297; 10 Ch. D. 327; *Lancaster Banking Co. v. Cooper*, 9 Ch. D. 594.

elapse without issuing execution; but such a proceeding was never favoured if there was another remedy for enforcing the judgment. The stat. 13 Edw. 1, c. 45, enabled a plaintiff to bring a *scire facias* (*q. v.*) on his judgment after a year and a day.<sup>1</sup> And to discourage unnecessary actions on judgments, the stat. 43 Geo. 3, c. 46, directed that the plaintiff should not be entitled to costs, except by special order of the Court. Under the modern practice execution may be issued as of right within six years from the judgment, and by leave of the Court at any time afterwards,<sup>2</sup> without bringing an action on the judgment, and such actions therefore appear to be practically obsolete.

Foreign judgments.

§ 22. A judgment given in personam for an ascertained sum by a foreign Court of competent jurisdiction is considered in England as *prima facie* evidence of the defendant's liability to pay the amount to the plaintiff, and may therefore be the subject of an action in the English Courts. So if A. brings proceedings against B. in a foreign country and fails, and then sues B. for the same cause of action in an English Court, B. may defeat the second action by pleading the foreign judgment as *res judicata*.<sup>3</sup> In the latter case the judgment is conclusive. Where, however, an action is brought here to enforce a foreign judgment, it seems that our Courts will so far examine into it that if the proceedings by which it was obtained, or the law on which it is founded, are "repugnant to natural justice," or contrary to some principle of morality or public policy recognized by English law, they will refuse to enforce it.<sup>4</sup>

Criminal.

§ 23. In criminal proceedings, the judgment is the sentence of the Court on the verdict of the petty jury, or on the prisoner pleading guilty to the indictment.<sup>5</sup> Where the jury acquits the prisoner the judgment is that he be discharged of the premises: if he pleads guilty or is convicted the judgment declares the punishment which he has to suffer; *e.g.*, death, imprisonment, fine, &c.<sup>6</sup>

See *Appeal*; *Res judicata*; *Writ of Error*.

ETYMOLOGY.—Norman-French, *jugement*; low Latin, *judicamentum*, from Latin, *judicare*.

**JUDGMENT CREDITOR—JUDGMENT DEBTOR—JUDGMENT DEBTS.** See *Committal*, § 3; *Debt*, § 3; *Debtors Act*, 1869.

**JUDICATURE ACTS.** See *Central Office*; *Court of Appeal*; *High Court of Justice*; *Supreme Court of Judicature*.

**JUDICIAL.** See *Extrajudicial*; *Remedy*; *Writ*.

**JUDICIAL COMMITTEE OF THE PRIVY COUNCIL** was created by stat. 3 & 4 Will. 4, c. 41, for the purpose of hearing all appeals

<sup>1</sup> 2 Wms. Saund. notes to *Jefferson v. Morton and Underhill v. Devereux*.

<sup>2</sup> Common Law Proc. Act, 1852, ss. 128 *et seq.*; Rules of Court, xlii. 18 *et seq.*

<sup>3</sup> Westlake's Priv. Int. Law, 2nd edit. 301; *In re Boyse*, 15 Ch. D. 591; Piggott on Foreign Judgments; see 14 & 15 Vict. c. 99, s. 7.

<sup>4</sup> Westlake, 311.

<sup>5</sup> Arch. Crim. Pl. 249.

<sup>6</sup> *Ibid.* 183; Steph. Comm. iv. 443. Formerly judgment of death might be recorded without being pronounced where it was intended to relieve the prisoner, but this has been abolished: stats. 4 Geo. 4, c. 48; 24 & 25 Vict. c. 95.

or complaints in the nature of appeals which before the passing of the act could be brought before the king or the king in council, and also certain other appeals, which were previously heard by other tribunals.

§ 2. The Judicial Committee consists of the President of the Privy Council, the Lord Chancellor, and as a general rule all the members of the Court of Appeal constituted by the Judicature Act, 1875, and some other judges, whose attendance is not often required.<sup>1</sup> By the Judicial Committee Act, 1871, the crown was empowered to appoint and did appoint four salaried judges of the Judicial Committee; on their places becoming vacant they will not be filled up, but two additional Lords of Appeal in Ordinary will be appointed. (See *House of Lords*.)

§ 3. The following are the principal matters in which the Judicial Committee have jurisdiction:<sup>2</sup>—

i. Appeals from Courts in the colonies or dependencies of the United Kingdom, such as India, Canada, Australia, the Channel Islands, &c. In general the right to appeal is limited to cases involving a certain minimum value, unless special leave to appeal is obtained. (See *Appeal*, § 5.)

ii. Complaints of amotion from office. (See *Amotion*, § 2.)

iii. Ecclesiastical appeals. (See *Ecclesiastical Courts*.)

iv. Appeals from the Lord Chancellor in idiocy and lunacy cases.

v. Applications for the confirmation and extension of patents. (See *Patent*.)

**JUDICIAL SEPARATION.** A decree of judicial separation may be pronounced by the High Court in the Probate, Divorce and Admiralty Division, on the petition of either husband or wife (1) in all cases in which a divorce a mensâ et thoro (*q.v.*) might have been obtained in the Ecclesiastical Courts, and (2) on the ground of either adultery or cruelty, or desertion without reasonable cause for two years or upwards.<sup>3</sup> The decree has the same effect as a divorce a mensâ et thoro had, that is to say, it does not affect the marriage, but it puts an end to cohabitation, and places the wife in the position of a feme sole as regards her capacity of acquiring property, &c.<sup>4</sup> (See *Alimony*; *Protection Order*; *Settlement*.)

**JURAT** is a memorandum written at the end of an affidavit, stating the place where, and the date when, the affidavit was sworn, followed by the signature of the commissioner or other person before whom it was sworn and concluding with his description.<sup>5</sup> (See *Declarat*.)

**JURE CORONÆ.** See *Franchise*; *Prerogative*.

**JURE MARITI.** See *Jus Mariti*.

<sup>1</sup> Stats. 3 & 4 Will. 4, c. 41; 5 Vict. c. 5; 6 & 7 Vict. c. 38; 14 & 15 Vict. c. 83; 20 & 21 Vict. c. 77; Macpherson, Privy C. Pr. *passim*.

<sup>2</sup> Macpherson, *passim*.

<sup>3</sup> Browne on Divorce, 29; Macqueen's Husb. and Wife, 220; 20 & 21 Vict. c. 85, ss. 7, 16.

<sup>4</sup> Gibson, Codex, 445, n. (b).

<sup>5</sup> See Smith's Action, 83; Rules of Court, xxxvii. 3 b *et seq.* (April, 1880).

**JURIS UTRUM** was a writ or action by an incumbent to recover possession of land held by him in right of the church, &c.<sup>1</sup> It was so called because it raised the question whether the land was the lay fee of the tenant (defendant) or frankalmoigne belonging to the church.<sup>2</sup>

Exclusive,  
concurrent.

**JURISDICTION.**—I. § 1. Jurisdiction is the power of a Court or judge to entertain an action, petition or other proceeding. When a proceeding in respect of a certain subject-matter can only be brought in one Court, that Court is said to have exclusive jurisdiction; when it can be brought in any one of several Courts, they are said to have concurrent jurisdiction. Thus, as an action for the administration of an estate or trust property amounting in value to 400*l.* may be brought either in the High Court of Justice or in a County Court, they have concurrent jurisdiction; but if the value of the property amounts to 1,000*l.* the action can only be brought in the High Court, which has exclusive jurisdiction.

General,  
limited.

§ 2. Where the jurisdiction of a Court is limited either by the amount or value of the property in litigation, or with reference to the question where the cause of action arose, it is called a Court of limited jurisdiction, as opposed to a Court of general jurisdiction.<sup>3</sup>

Original,  
appellate.

§ 3. A Court is said to have original jurisdiction in a particular matter when that matter can be initiated before it; while a Court is said to have appellate jurisdiction when it can only go into the matter after it has been adjudicated on by a Court of first instance. (See *Appeal, Court.*)

Consultative,  
judicial.

§ 4. It is said that in some cases one Court may assist another by giving its opinion on a matter pending in the latter Court; in such a case the former Court is said to act in its consultative jurisdiction, as opposed to its ordinary or judicial jurisdiction.<sup>4</sup>

Auxiliary.

§ 5. While the different jurisdictions of the Common Law and Chancery Courts existed, the Court of Chancery, in addition to its exclusive and concurrent jurisdiction, was said to have an auxiliary or ancillary jurisdiction, by which was meant that it entertained suits for relief required to obtain complete justice in another Court; the principal instances of such suits were bills for discovery, bills for the perpetuation of testimony, and bills of peace<sup>5</sup> (*q.v.* and *De bene esse*; *Quia timet*).

As to the jurisdictions of the various Courts, see the respective titles.

II. § 6. Jurisdiction also signifies the district or geographical limits within which the judgments or orders of a Court can be enforced or executed. This is sometimes called territorial jurisdiction.<sup>6</sup> In the practice of the High Court it is not usual to allow an action to be brought if it is obvious that it cannot be enforced, such as an action to recover land in a foreign country;<sup>7</sup> nor will the Court allow an action to be brought against a person who is out of the jurisdiction, unless the property in question in the action (if any) is situate within the jurisdiction, or unless some part of the cause of action arose within the jurisdiction.<sup>8</sup> (See *Cause of Action*; *In Personam*; *Service.*)

<sup>1</sup> Litt. §§ 645 *et seq.*

<sup>2</sup> Britton, 234 b.

<sup>3</sup> *Mayor of London v. Cox*, L. R., 2 H. L. at p. 263.

<sup>4</sup> *Overseers of Walsall v. L. & N. H. R. Co.*, 4 App. Ca. 30.

<sup>5</sup> Haynes' Eq. 161.

<sup>6</sup> *In re Smith*, 1 P. D. 300.

<sup>7</sup> See notes to *Mostyn v. Fabrigas*, Smith, L. C. i. 689.

<sup>8</sup> Rules of Court, xi.



**JURISPRUDENCE.** See *Addenda*.

**JUROR—JURY.**—§ 1. A jury is a number of persons summoned to inquire on oath into a question of fact depending in a judicial proceeding. The members of the jury are called jurors or jurymen.

I. § 2. In actions in the High Court, when the trial takes place before a jury, the jurors are twelve men possessing the necessary qualification (*q. v.*). Common juries are summoned from the class of tradesmen, clerks, &c. : special juries consist of merchants, bankers, independent gentlemen, &c., and are only summoned for the trial of important or difficult cases, either party to an action being entitled to have the case so tried at the risk of having to bear the extra expense. (See *Certificate*, § 20.) The jurors are selected by ballot from the panel or list furnished by the summoning officer<sup>1</sup> (see *Panel*), subject to the right of challenge (*q. v.*) by the parties. As to the cases in which a trial by jury takes place, and the course which it generally follows, see *Trial*. As to the discharge of a jury and the withdrawal of a juror, see *Discharge*, § 6; *Withdrawal*.

§ 3. Juries are also summoned in actions for other purposes than that of trial. Thus a writ of inquiry (*q. v.*) requires a jury, as does the execution of a writ of elegit (*q. v.*). Civil actions.  
High Court.  
Common,  
special.

II. § 4. In County Court actions a jury consists of five persons.<sup>2</sup> County  
Courts.

III. § 5. As to other kinds of juries in civil matters, see *Court Leet*; *Extent*, § 1; *Homage*, § 1; *Inquest of Office*; *Inquisition*; *Jus Patronatus*; *Lunacy*.

IV. In criminal procedure the following kinds of jury exist :

§ 6. A grand jury is summoned for every commission of "oyer and terminer" and "general gaol delivery," and at every quarter sessions (see those titles), to inquire into, present, and do all those things which shall then and there be commanded them on the part of the Queen. Their principal duty is to inquire into bills of indictment, and to present them, if they think a *prima facie* case has been made out against the accused. (See *Indictment*; *Presentment*.) A grand jury consists of from twelve to twenty-three freeholders, and every presentment must be by twelve at the least. They sit in private.<sup>3</sup> Criminal  
cases.  
Grand jury.

§ 7. The jury by which criminal suits (indictments, informations, &c.) are tried, is sometimes called a petty jury, as opposed to the grand jury. It consists of twelve persons, who must be of the county where the indictment is found.<sup>4</sup> (See *Venue*.) They are liable to be challenged. (See *Challenge*.) Petty jury.

§ 8. In important cases of misdemeanor in the Queen's Bench Division a special jury may be obtained on the application of either prosecutor or defendant.<sup>5</sup> Special jury.

§ 9. Formerly every alien who was tried on a criminal charge in England De medietate  
linguæ.

<sup>1</sup> Juries Act, 1870; Smith's Action, 119.

<sup>2</sup> Pollock's C. C. Practice, 104.

<sup>3</sup> Steph. Comm. iv. 361; stats. 6 Geo. 4, c. 50; 5 & 6 Will. 4, c. 76, s. 121; 19 & 20 Vict. c. 54. The term grand jury in this

sense seems to be comparatively modern: in Britton they are called *presentors* (fol. 10 a).

<sup>4</sup> Steph. iv. 418.

<sup>5</sup> *Ibid.* 419; Archbold, Crim. Pl. 155.

was entitled to what was called a jury *de medietate linguæ*, that is, a jury one half of which consisted of aliens. This kind of jury is now abolished,<sup>1</sup> but it is said that where an indictment is found against a scholar or other person having the privilege of the University of Oxford, he is entitled to be tried in the University Court by a jury *de medietate*, half of freeholders, and half of matriculated persons.<sup>2</sup>

Jury of  
matrons.

§ 10. Where, in a criminal prosecution, a female prisoner alleges herself or appears to be pregnant, a jury of twelve matrons may be impanelled to try whether she is so or not. They choose one of their number to be fore-matron.<sup>3</sup>

See *Reprieve*.

ETYMOLOGY.]—"Jury," Norman-French *jurée* (Britton, 134 a), is derived from *jurata*, which seems to be a contraction for *assisa* or *recognitio jurata*, the sworn assise or recognition (*g. v.*),<sup>4</sup> from the oath taken by the members of the assise, who were called jurors, to try the cause justly. The modern jury, however, is not directly derived from the assise, which was a statutory mode of trial, but from the practice which grew up after the introduction of the assise, of suitors consenting that their actions should be tried by a *jurata* or jury, in preference to the trial by duel.<sup>5</sup>

**JUS ACCRESCENDI** is that right of survivorship which is peculiar to joint ownership, joint rights, and joint liabilities. (See *Joint*.) Survivorship does not occur in the case of merchants and other partners, the rule being—*Jus accrescendi inter mercatores pro beneficio commercii locum non habet*.<sup>6</sup> See, as to this, *Joint*; *Joint Tenancy*.

**JUS DISPONENDI**, "the right of disposing," is an expression used either generally to signify the right of alienation, as when we speak of depriving a married woman of the *jus disponendi* over her separate estate,<sup>7</sup> or specially in the law relating to sales of goods, where it is often a question whether the vendor of goods has the intention of reserving to himself the *jus disponendi*, that is, of preventing the ownership from passing to the purchaser, notwithstanding that he (the vendor) has parted with the possession of the goods. Such a question becomes of great importance when a vendor has despatched goods to a purchaser in a distant place, and the latter becomes insolvent before paying for them, because if the vendor has effectually reserved the *jus disponendi* he can reclaim the goods.<sup>8</sup> (See *Appropriation*, § 2; *Stoppage in Transitu*.)

**JUS DUPLICATUM.** See *Droit*.

**JUS GENTIUM.** See *Law of Nations*.

**JUS IN PERSONAM—IN REM.** See *In Personam*; *Right*.

**JUS MARITI.**—§ 1. The *jus mariti* (or "right of a husband") is that right to the chattels of a woman which, in the absence of special

<sup>1</sup> Naturalization Act, 1870, s. 5.

<sup>2</sup> Steph. Comm. iv. 327.

<sup>3</sup> Archbold, Crim. Pl. 187.

<sup>4</sup> F. H. B. 165 E. "Quia barones regni nostri in assisis juratis," &c.

<sup>5</sup> Reeves' Hist. i. 335.

<sup>6</sup> Co. Litt. 182 a.

<sup>7</sup> Snell's Eq. 291.

<sup>8</sup> Benjamin on Sales, 288.

provisions, her husband acquires on their marriage; hence a gift to or settlement on the wife of property to her separate use is said to exclude the *jus mariti*. § 2. If a married woman having personal estate settled to her separate use die without disposing of it, the husband will be entitled, *jure mariti*, to so much of it as consists of chattels in possession, that is to say, they vest in him as if they had not been settled on the wife; while to entitle himself to so much of it as consists of choses in action he must take out letters of administration to his wife's estate.<sup>1</sup>

**JUS PATRONATÛS** in ecclesiastical law signifies, I. the right of advowson (*q. v.*),<sup>2</sup> or more commonly, II. a proceeding to try the question who is entitled to a right of presentation which is claimed by different persons. It is an inquest of office, which is tried before the bishop, or commissioners appointed by him, by a jury of clerks and laymen.<sup>3</sup> The result of the trial does not conclude the question, but merely justifies the bishop in admitting the clerk for whose title the verdict is given.<sup>4</sup> (See *Disturbance*, § 2; *Quare impedit*.)

**JUS TERTII.**—When a person who is *primâ facie* liable to A., on being sued by him sets up as a defence that the money or property claimed does not belong to A., but belongs by a paramount title to B., he is said to set up the *jus tertii* (right of a third person).

§ 2. The general rule is, that a wrongdoer cannot set up the *jus tertii*. Therefore when A. seized goods in the possession of B., and on being sued by B. set up as a defence that B. had no title because the assignment from C. under which he claimed was fraudulent as against A., and that the goods belonged to A. under a valid assignment from C., it was held that A., being guilty of conversion, and therefore a wrongdoer, could not set up the *jus tertii* against B.<sup>5</sup> § 3. So an agent cannot refuse to account to his principal or otherwise dispute his title by setting up the *jus tertii*, unless he does so under the authority of the third person.<sup>6</sup>

**JUST ALLOWANCES.** See *Allowance*; *Costs*, § 10.

**JUSTICE.**—The judges of certain Courts are called justices. Thus, before the Judicature Act, the judges of the Queen's Bench and Common Pleas were called justices of those Courts, the principal judge of each Court being called respectively the Lord Chief Justice of England, and the Lord Chief Justice of the Common Pleas. The latter title has been abolished. (See *High Court of Justice*.) With the exception of the Lord Chancellor, the Lord Chief Justice of the Queen's Bench Division (*q. v.*), and the Master of the Rolls,<sup>7</sup> all the judges of the High Court appointed since the act came into operation are called justices of the High Court.<sup>8</sup> (See *Baron*.)

<sup>1</sup> Snell's Eq. 285.

<sup>2</sup> Phillimore, Eccl. Law, 329.

<sup>3</sup> *Ibid.* 447.

<sup>4</sup> *Ibid.* 451.

<sup>5</sup> *Jefferies v. Great Western Rail. Co.*

<sup>6</sup> Ell. & Bl. 802. See *Freshney v. Carrick*,

<sup>7</sup> H. & N. 653.

<sup>8</sup> Russell, Merc. Agency, 34, 224.

<sup>9</sup> Judicature Act, 1873, ss. 5, 32.

<sup>10</sup> Judicature Act, 1877, s. 5.

As to the Lords Justices of Appeal, and the justices of the peace, see those titles. As to justices of assize, see *Assize*, § 3; also *Eyre*.

ETYMOLOGY.]—The word *justitia*, in the sense of judge, occurs in our oldest books; otherwise one might suppose “justice” to be derived from *justiciarius*.<sup>1</sup>

**JUSTICES OF THE PEACE** are judges of record appointed by the crown to be justices within a certain district (*e. g.*, a county or borough) for the conservation of the peace, and for the execution of divers things, comprehended within their commission and within divers statutes, committed to their charge.<sup>2</sup>

Ministerial  
duties.

§ 2. Their authority is either ministerial or judicial. They are said to act ministerially in cases of felony or misdemeanor, where they merely initiate the proceedings by issuing a warrant of apprehension, taking the depositions, and committing for trial; and also in appointing parish officers and allowing parish rates, &c.

Judicial.

§ 3. They act judicially in quarter sessions (*q. v.*), and in all cases where they have summary jurisdiction, whether criminal, as in cases of common assaults, drunkenness, &c.; or civil, as where they have to adjudicate between master and servant, or landlord and tenant, and in affiliation cases, &c.<sup>3</sup> (See *Petty Sessions*.)

Breaches of  
the peace.

§ 4. By virtue of their commission, justices of the peace have jurisdiction in all matters relating to the preservation of the public peace; and in case of an actual or apprehended breach of the peace within their own view, they may commit the offender without warrant or information. Most commonly however their jurisdiction is exercised by binding over persons to keep the peace.<sup>4</sup> (See *Breach of the Peace*, § 4.)

Admiralty.

§ 5. Justices now have a limited jurisdiction in admiralty matters, namely, in cases of damage, salvage and wages (*q. v.*), where the amount in question does not exceed a certain sum.<sup>5</sup>

§ 6. It will be remembered that the Queen's Bench Division of the High Court on its crown side takes cognizance of breaches of the peace, and that judges of assize sit under a commission of the peace as well as under commissions of nisi prius, &c. (See *Assize*, § 3.) Consequently the judges of these Courts are justices of the peace.

As to licensing justices, see *Licence*; and as to visiting justices, see *Prison*. See also *Commission*, §§ 10, 11; *Recorder*.

Torts and  
crimes.

**JUSTIFIABLE—JUSTIFICATION—JUSTIFY.**—I. § 1. In the law of torts and crimes, justification is where the defendant in an action or prosecution shows that the act complained of was justifiable, that is, lawful. Thus, a derogatory statement is not defamatory if it is true; an assault or battery is lawful if committed in self-defence, or in defence of

<sup>1</sup> Stubbs' Charters, 74; Co. Litt. 71 b; Britton, 8.

<sup>2</sup> Stone's Justice of the Peace, 2, citing Dalton.

<sup>3</sup> *Ibid.* 4, 240. When Quarter Sessions are held in a borough the recorder is the

sole judge. (See *Quarter Sessions*.)

<sup>4</sup> Steph. Comm. iv. 292. As to their qualification, see Pritchard, Q. S. 35.

<sup>5</sup> Roscoe's Adm. 76; stat. 10 & 11 Vict. c. 27; Merch. Shipp. Act, 1854, s. 460; M. S. Am. Act, 1862, ss. 49 *et seq.*

one's property, or for the purpose of proper correction or discipline, &c.<sup>1</sup> A defendant who sets up such a defence is said to justify. It is obvious that such a defence is inadmissible in a prosecution for an obscene, blasphemous, or seditious libel; and even in the case of a prosecution for a defamatory libel, it is only available where it is for the public benefit that the matter complained of should be published.<sup>2</sup>

As to justifiable homicide, see *Homicide*, § 4.

II. § 2. In procedure, bail or sureties for the defendant in an action are said to justify when they satisfy the plaintiff or the Court that they are sufficient, that is, that they will be able to perform their obligation if the plaintiff is successful. When bail or security is given, the sureties usually make affidavits of justification, stating that they are housekeepers or freeholders, and that they are worth double the amount claimed in the action. If, however, bail are excepted to, and in certain other cases, they have to justify or attend before a judge at chambers and be examined on oath as to their sufficiency.<sup>3</sup> (See *Bail*; *Except.*)

Bail or  
sureties.

**JUVENILE OFFENDERS.** See *Education Acts*.

## K.

**KEEPER OF THE GREAT SEAL.** See *Lord Keeper*; also *Privy Seal*.

**KEEPING HOUSE** is an act of bankruptcy (*q. v.*). It is confined to traders, and takes place when a debtor denies himself to a creditor who has called for payment, or withdraws into a secret part of the house, or refrains from going to his house of business, or confines himself to the house during the day, for the purpose of avoiding and thus delaying his creditors.<sup>4</sup> (See *Act of Bankruptcy*, § 2.)

**KIDNAPPING.** See *Child*.

**KING.** See *Civil List*; *Debt*, § 7; *Demesne*, § 5; *Demise*; *Parliament*; *Prerogative*.

**KING'S BENCH** is the name given to the Queen's Bench (*q. v.*) when a king is on the throne of England.

**KING'S CHAMBERS** are those portions of the seas, adjacent to the coasts of Great Britain, which are inclosed within headlands so as to

<sup>1</sup> Underhill on Torts, 121.

<sup>2</sup> Shortt on Copyright and Libel, 528, 558; 6 & 7 Vict. c. 96, s. 6; Russell on Crimes, iii. 179; Stephen's Crim. Dig. 189.

<sup>3</sup> Smith's Action (11th ed.), 235; Chitty, Pr. 727.

<sup>4</sup> Robson's Bankr. 107 *et seq.*

be cut off from the open sea by imaginary straight lines drawn from one promontory to another. They appear to have always formed part of the territorial waters of the crown.<sup>1</sup> (See *High Seas*; *Territorial Waters*.)

**KNIGHT.**—§ 1. The dignity of knighthood ordinarily denotes that of a knight bachelor, which is the lowest title of dignity in this kingdom. (See *Dignity*.) There are other kinds of knights, such as knights of the garter and of the bath, who are of higher degree.<sup>2</sup>

§ 2. "Knights of the shire" is the technical name for those members of parliament who represent the counties, as opposed to the citizens and burgesses, or borough members, who represent the towns.<sup>3</sup>

**KNIGHT'S FEE.** See *Fee*, § 6.

**KNIGHT'S SERVICE.**—§ 1. Tenure by knight's service was where a man held land of another person or of the crown by military service, of which the principal varieties were escuage, grand serjeanty, castleward and cornage (*q. v.*).

Knight's service had five incidents, namely, aids, relief, wardship, marriage and escheat; the king's tenants in capite ut de coronâ were further liable to primer seisin and fines for alienation.<sup>4</sup> (See the various titles: also *Ousterlemain*; *Fealty*; *Homage*; *Tenure*; *Service*.)

Tenure by knight's service was converted into common socage by stat. 12 Car. 2, c. 24.

## L.

**LACHES** is negligence or unreasonable delay in asserting or enforcing a right. In the old books the term is chiefly used with reference to rights of entry. Thus, while the doctrine of "descent cast" was in force, if an infant was disseised of land, and the disseisor died in possession, the infant was not deprived of his right of entry, as a person of full age would have been, because no laches could be imputed to an infant in such a case.<sup>5</sup> (See *Disability*: also *Intrusion*, § 2, as to laches by the crown.)

§ 2. At the present day "laches" is generally used to denote unreasonable delay in enforcing an equitable right. Thus if a person discovers that he has been induced by fraud to enter into an instrument, and then waits an unnecessary time before taking proceedings to set it aside, this laches will disentitle him to relief. He is, however, entitled to a reasonable time for the purpose of making inquiries, and obtaining advice, &c.<sup>6</sup> Where an equitable right of action is analogous to a legal right of action,

<sup>1</sup> Coulson & Forbes on Waters, 12, n. (3).

<sup>2</sup> Steph. Comm. ii. 612.

<sup>3</sup> *Ibid.* i. 128.

<sup>4</sup> Litt. §§ 95, 103 *et seq.*; Bl. Comm. ii. 63.

<sup>5</sup> Litt. §§ 402, 726. As to laches of suit, laches of pleading, &c., see Perkins, §§ 374 *et seq.*

<sup>6</sup> See *Erlanger v. New Sombrero Co.*, 3 App. Ca. 1218.

and there is a Statute of Limitations fixing a limit of time for bringing actions at law to enforce such claims, a Court of Equity will, by analogy, apply the same limit of time to proceedings taken to enforce the equitable right.<sup>1</sup>

**LAMMAS LANDS** are open arable and meadow lands, which are held by a number of owners in severalty during a portion of the year, and which after the severalty crop has been removed are commonable not only to the owners in severalty but to other classes of commoners, *e.g.*, inhabitants of the parish, tenants and inhabitants of a manor, freemen or householders of a borough, or the owners or occupiers of ancient tenements within the parish, usually termed tofts.<sup>2</sup> They derive their name from the former practice of keeping them open from Lammas Day (Aug. 1), to Lady-Day next ensuing.<sup>3</sup> The date of opening them is now August 12.<sup>4</sup> (See *Common*, §§ 7, 18.)

**LANCASTER.** See *Duchy of Lancaster*.

**LAND.**—I. § 1. In its technical sense, as a word of description in conveyancing, pleading, &c., land “comprehendeth any ground, soile or earth whatsoever: as meadowes, pastures, woods, moores, waters, marishes, furses and heath. It legally includeth also all castles, houses and other buildings: for castles, houses, &c. consist upon two things, viz., land or ground, as the foundation, and <sup>5</sup> [the] structure thereupon, so as passing the land or ground, the structure or building thereupon passeth therewith. Also . . . waters . . . are not by that name demandable in a præcipe [that is, an action for the recovery of land]; but the land whereupon the water floweth or standeth is demandable; as for example, *viginti acras terræ aquâ coopertas* [twenty acres of land covered with water]. And lastly the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre [air] and all other things even up to heaven, for *cujus est solum ejus est usque ad cælum*.”<sup>6</sup>

§ 2. Land is divisible both horizontally (see *Close*) and vertically. Therefore one man may be entitled to the surface of land, and another to the minerals under it (see *Easement*, § 1); or one man may have a fee simple in one story of a house, while the rest may belong to another.

§ 3. Land is a tenement and a hereditament, and, therefore, belongs to the class of real property. (See *Hereditament*; *Tenement*; *Real Property*.)

§ 4. Rights in respect of land are of two kinds—(i) rights of ownership, although theoretically land is not the subject of ownership according to English law (see *Estate*, § 2; *Tenure*); and (ii) rights in alieno solo, which include easements and profits (*q.v.*).

<sup>1</sup> *Peele v. Gurney*, L. R., 6 H. L. p. 384.

<sup>2</sup> Cooke, Incl. 47; Elton, Comm. 36. See also *Baylis v. Tyssen-Amhurst*, 6 Ch. D. 500.

<sup>3</sup> Elton, 36.

<sup>4</sup> Stat. 24 Geo. 2, c. 23.

<sup>5</sup> In Hargrave's edition “and” is wrongly printed “or.”

<sup>6</sup> Co. Litt. 4 a; Bl. Comm. ii. 18; Dart, V. & P. 89.

II. § 5. In the old books, and in fines and the like, “the word ‘land’ strictly doth signify nothing but arable land;”<sup>1</sup> the reason given being that arable land was considered more beneficial to the country than pasture.<sup>2</sup>

See *Ejectment; Landlord and Tenant; Possession; Seisin; Vendors and Purchasers.*

**LAND CERTIFICATE.** See *Certificate*, § 10.

Registry of  
title,

assurances.

**LAND REGISTRIES**, or registries for officially recording the title to, dealings with and charges on land<sup>3</sup> are managed on two principles, namely, as registries of title and registries of assurances. § 2. A registry of title is an authentic and self-explanatory record of the state of the title to the land registered on it; that is to say, a piece of land appears on the register as belonging to A. B., and if it is subject to a mortgage or charge in favour of C. D., that also would appear. § 3. A registry of assurances or deeds, on the other hand, merely contains a statement of the existence of documents or assurances affecting the title to the land, by giving either a transcript or an epitome of each document (see *Memorial*), leaving the persons concerned to draw their own conclusions as to the effect of those documents on the title to the land.

As regards the district over which they extend registries are of two kinds, general and local.

General.

§ 4. A general Land Registry for England and Wales was established by the stat. 25 & 26 Vict. c. 53 (“Lord Westbury’s Act”); but owing to the fact that it imposed on persons desirous of making use of it the necessity of showing a marketable title to, and defining the boundaries of, the land to be registered (both expensive and tedious, and in many cases impossible, processes), the act was practically a failure,<sup>4</sup> and is no longer in operation, except as to land already registered under it.<sup>5</sup> § 5. The present act regulating the general registration of land is the Land Transfer Act, 1875, which created an office of Land Registry in London, consisting of a registrar, assistant registrars, &c., and, supplemented by the General Rules made under it, provides—(1) for the voluntary registration in six manners of existing titles to freehold land, and also leasehold land held on terms of a certain length (but not copyholds or customary freeholds); also of incorporeal hereditaments of freehold tenure, mines, fee farm grants, &c.; (2) for the transfer of registered land (see *Transfer*); (3) for the creation and transfer of charges on registered land (see *Charge*, § 6); (4) for the registration of titles, rights and interests to or in registered land acquired in consequence of the death, marriage, bankruptcy, &c. of a registered proprietor; (5) for the registration of notices as to the existence of leases and estates in dower or by the curtesy; and (6) for the protection

<sup>1</sup> Shepp. Touch. 92; Co. Litt. 19 b.

<sup>2</sup> Second Inst. 86.

<sup>3</sup> As to the theory of registration generally, see Markby’s *Elements of Law*, § 478.

<sup>4</sup> Report of Land Transfer Commissioners, 1869, cited in Charley’s *Real Prop.* Stat. 116.

<sup>5</sup> Land Transfer Act, 1875, s. 125; Dart, V. & P. 1142.



of rights arising from unregistered dealings with registered land (see *Caution; Restriction*). The act is not believed to have been put in force to any great extent.

§ 6. Local land registries are for the registration of land within defined Local districts.

By the Land Transfer Act, 1875, power is given to the Lord Chancellor to create district registries for the registration (under the act) of land within defined districts.<sup>1</sup> No such district registries have yet been created,<sup>2</sup> but local land registries, on the principle of registration of assurances (*supra*, § 3), exist in Middlesex, in each of the three ridings of Yorkshire, and in the Bedford Level. As soon as land in any of these districts is registered in the general Land Registry, it becomes exempt from the jurisdiction of the local registry.<sup>3</sup>

**LAND TAX** is a tax payable annually in respect of the beneficial ownership of land. If land subject to the tax is in lease, the tenant is primarily liable to pay the whole tax, but he is entitled (unless he has expressly agreed to pay it himself) to deduct from the rent so much of the tax as the landlord ought to bear in respect of the rent, so that if the rent is a rack-rent the landlord bears the whole tax.<sup>4</sup> § 2. The tax was originally levied annually at so much in the pound, but was afterwards imposed in fixed amounts on the various counties, boroughs, cities, towns and liberties in England, and these amounts were distributed or assessed at so much in the pound on the lands, tenements and hereditaments in each county, borough, &c. by commissioners appointed for the purpose.<sup>5</sup> *Assessment.* § 3. By stat. 38 Geo. 3, c. 60, the land tax was made redeemable; in ordinary cases the redemption is effected by the transfer to the National Debt Commissioners of so much consols or reduced 3 per cent. annuities as will yield a dividend exceeding the amount of the tax by one-tenth part of it.<sup>6</sup> *Redeemable.*

**LAND TRANSFER ACT.** See *Land Registries*, § 5.

**LANDLOCKED** is an expression sometimes applied to a piece of land belonging to one person and surrounded by land belonging to other persons, so that it cannot be approached except over their land.<sup>7</sup> (See *Easement*, §§ 9 *et seq.*)

**LANDLORD AND TENANT.**—The relation of landlord and tenant is created by one person (the landlord) allowing another (the tenant) to occupy the landlord's house or land for a consideration termed rent, recoverable by distress.<sup>8</sup>

<sup>1</sup> Sect. 118.

<sup>2</sup> Charley's Real P. Acts, 284.

<sup>3</sup> Land Transfer Act, 1875, s. 127.

<sup>4</sup> See *Ward v. Const*, 10 Barn. & C. 635, and other cases cited Stephen, Comm. ii. 559, n. (g).

<sup>5</sup> Stat. 38 Geo. 3, c. 5.

<sup>6</sup> Stats. 42 Geo. 3, c. 116, s. 22 *et seq.*; 1 & 2 Vict. c. 58; 24 & 25 Vict. c. 91.

<sup>7</sup> *Corporation of London v. Riggs*, 13 Ch. D. 798.

<sup>8</sup> Woodfall's Landlord and Tenant, lxvi.

In the absence of express agreement, the landlord impliedly contracts with the tenant to give him possession and guarantee him against eviction by any person having a title paramount to that of the landlord. On the other hand the tenant impliedly contracts with the landlord to pay the rent, not to commit waste, and to give up possession at the end of the tenancy.<sup>1</sup>

Usually, however, the tenancy is regulated by the terms of a document called a lease (*q. v.*).

See *Distress; Fixtures; Notice to Quit; Rent; Term.*

**LANDS CLAUSES CONSOLIDATION ACT** is the stat. 8 & 9 Vict. c. 18, and is one of those general acts described under *Act of Parliament*, § 5 (*q. v.*).

**LANDS, TENEMENTS AND HEREDITAMENTS** is the technical and most comprehensive description of real property, as "goods and chattels" is of personalty.<sup>2</sup> (See *Hereditament; Land; Tenement.*)

- LAPSE.**—§ 1. As a general rule, when a person to whom property has been devised or bequeathed dies before the testator, the devise or bequest fails or lapses, and the property goes as if the gift had not been made;—consequently, if a testator bequeaths 100*l.* to A. (or to A., "his executors or administrators"), and the residue of his property to B., then, if A. dies during the lifetime of the testator, the legacy lapses and falls into the residue, that is, it goes to B. on the testator's death.<sup>3</sup> There are, however, some exceptions to the rule. Thus if property is given to several persons as joint tenants, on the death of one during the lifetime of the testator the whole goes to the survivors. And if land is given to a person in tail who dies before the testator, leaving issue capable of taking under the entail, the land goes as if the devisee had died immediately after the testator.<sup>4</sup> And if a testator bequeaths (or devises) property to a child or other descendant of himself, and the legatee dies leaving issue, who survive the testator, the legacy (or devise) does not lapse, but takes effect as if the legatee had died immediately after the testator.<sup>5</sup>
- § 2. In ecclesiastical law, a lapse occurs when a benefice becomes void and the patron neglects to present within six months after the avoidance. In such a case the patronage devolves from the patron to the bishop, and on his neglect to the metropolitan, and on his neglect to the crown.<sup>6</sup>
- § 3. In criminal proceedings, "lapse" is used in the same sense as "abate" in ordinary procedure, that is, to signify that the proceedings came to an end by the death of one of the parties, or some other event. The death of the complainant or prosecutor does not cause a lapse.<sup>7</sup>
- Gift by will.**      **Joint tenants.**      **Gift in tail.**      **Testator's issue.**      **Benefice.**      **Criminal proceedings.**

<sup>1</sup> Woodfall's Landlord and Tenant, lxviii. See also Fawcett's L. & T.; Smith's L. & T.; Chitty on Contracts, 286 *et seq.*; Watson's Comp. Equity, 474.

<sup>2</sup> Williams' R. P. 5.

<sup>3</sup> Williams on Executors, 1118; Watson's Comp. Eq. 1196.

<sup>4</sup> Stat. 1 Vict. c. 26, s. 32.

<sup>5</sup> *Ibid.* s. 33.

<sup>6</sup> Phillimore, Eccl. Law, 487.

<sup>7</sup> *Reg. v. Truelove*, 5 Q. B. D. 336.

**LARCENY** in criminal law is the wrongful or fraudulent taking and carrying away, without colour of right, of the personal goods of another from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner.<sup>1</sup> This is sometimes called simple larceny, to distinguish it from Simple larceny in a dwelling-house, larceny from the person (see *Robbery*), larceny of horses, cattle, &c., and other varieties of larceny, which are subject to special punishments. Simple larceny is punishable with penal servitude for three years, or imprisonment for two years with or without hard labour, solitary confinement and whipping.<sup>2</sup>

§ 2. Formerly larceny was distinguished as grand or petty, according as the value of the property did or did not exceed twelve pence. This was abolished by stat. 24 & 25 Vict. c. 96, s. 2.<sup>3</sup>

See *Animals Ferae Naturæ*; *Embezzlement*.

ETYMOLOGY.]—Norman-French, *larcyn*; <sup>4</sup> Latin, *latrocinium*.

**LATENT.** See *Ambiguity*.

**LATHE** is a division or district of a county, consisting of three or four hundreds. They only occur in Kent under this name; but they also occur in Sussex under the name of rapes.<sup>5</sup> (See *County*; *Hundred*.)

**LAW** is used in two principal senses, the idea common to both of them being uniformity of action. In one sense the name "law" is merely the expression for a uniformity of action which has been observed: as when we speak of the laws of gravitation, or say that crystals are formed according to certain laws: here the law follows from the uniformity. In the other sense, the law produces the uniformity, that is, the law is a rule of action. § 2. To this latter class belong the Law of Nature (using that term in the sense of rules imposed on man by his Maker<sup>6</sup>) and laws of human origin. Human laws again are either (i) social (such as the so-called laws of honour, morality, &c.), or (ii) political, the latter being divisible into (a) international law, and (b) law capable of judicial enforcement, or law in the technical sense of the word. As to international law, see that title.

Law of Nature.

Law, as the subject of jurisprudence, is used in three senses.

I. § 3. In its widest sense, law is an aggregate of rules enforceable by judicial means in a given country; thus, we speak of the law of England as opposed to the law of France or the Roman law. This kind of law is called territorial or municipal law, to distinguish it from international law,<sup>7</sup> and is of the following kinds—

Territorial or municipal.

A. § 4. With reference to its origin, law is derived either from judicial precedents, from legislation or from custom. That part of the law of

<sup>1</sup> Russell on Crimes, ii. 123.

<sup>2</sup> Stat. 24 & 25 Vict. c. 96, *passim*; Greaves, Crim. Acts, 98 *et seq.* As to summary convictions for larceny, see Stone's Justice of the Peace, 350, 360.

<sup>3</sup> Steph. Comm. iv. 119.

<sup>4</sup> Britton, 22 a.

<sup>5</sup> Steph. Comm. i. 127.

<sup>6</sup> Black. Comm. i. 39. Rightly called by Austin (88) the law of God, to distinguish it from those natural laws which apply to animals and things.

<sup>7</sup> Black. i. 44; Savigny, Syst. viii. *passim*.

- Judicial precedents. England which is derived from judicial precedents is called common law, equity, or admiralty, probate or ecclesiastical law, according to the nature of the Courts by which it was originally enforced (see the respective titles). That part of the law which is derived from legislation is called the statute law: many statutes are classed under one of the divisions above mentioned, because they have merely modified or extended portions of it, while others have created altogether new rules. That part of the law which is derived from custom is sometimes called the customary law, as to which see *Custom*.
- Statutes.
- Written and unwritten. § 5. The ordinary, but not very useful, division of law into written and unwritten, rests on the same principle. The written law is the statute law, the unwritten law is the common law (*q. v.*).<sup>1</sup>
- Public, constitutional, administrative. B. § 6. With reference to its subject-matter, law is either public or private. Public law is that part of the law which deals with the State, either by itself or in its relations with individuals, and is called (1) constitutional, when it regulates the relations between the various divisions of the sovereign power; and (2) administrative, when it regulates the business which the State has to do; the most important branches of the latter class are (a) the criminal law and the law for the prevention of crimes; (b) the law relating to education, public health, the poor, &c.; (c) ecclesiastical law; and (d) the law of judicial procedure (courts of law, evidence, &c.).
- Private or civil. § 7. Private or civil law deals with those relations between individuals with which the State is not directly concerned: as in the relations between husband and wife, parent and child, and in the various kinds of property, contracts, torts, trusts, legacies, the rights recognized by the rules of Admiralty law, &c. (See *Common Law*; *Equity*; *Admiralty*.) Even here, however, the Courts take cognizance, to a certain extent, of the indirect effects of private conduct on the community in general; they accordingly refuse to sanction contracts which are immoral, or in restraint of trade or marriage, or are otherwise against public policy. (See *Public Policy*.)
- Substantive and adjective. C. § 8. Law is also divided by the Benthamite school into substantive and adjective. Substantive law is that part of the law which creates rights and obligations, while adjective law provides a method of enforcing and protecting them. In other words, adjective law is the law of procedure.<sup>2</sup>
- II. § 9. In a narrower sense, "law" signifies a rule of law, especially one of statutory origin; and hence,
- III. § 10. In its narrowest sense, "law" is equivalent to "statute," as when we speak of the Poor Laws, the Corn Laws, &c.
- As to the distinction between law and fact, see *Fact*.
- ETYMOLOGY.]—Scandinavian *lag*, Anglo-Saxon *lagu*, Norman-French *ley*. For details as to the history and etymology of the word "law," see two articles by the writer in the *Law Magazine* for June and July, 1874.
- LAW MERCHANT.** See *Custom*, § 6.

<sup>1</sup> Steph. Comm. i. 40, following Blackstone.

<sup>2</sup> Holland on Jurisprudence, 61, 238.

**LAW OF NATIONS** is the old-fashioned equivalent for "International Law," or, more strictly, "Public International Law"<sup>1</sup> (*q.v.*). It is a literal translation of the Latin phrase *jus gentium*, which, however, did not mean the law governing the conduct of States in their relations with one another, but those rules of law which are common to all civilized nations: "vocaturque jus gentium, quasi quo jure omnes gentes utuntur."<sup>2</sup>

**LAW OF NATURE.** See *Law*, § 2 and note (<sup>6</sup>).

**LAY DAYS** (or laying days), in the law of merchant shipping, are the days which are allowed by a charter-party for loading and unloading the ship. If the vessel is detained beyond the period allowed, demurrage (*q.v.*) becomes payable.<sup>3</sup> (See *Charter-party*.)

**LEAD.** See *Conveyance*, p. 205, note (<sup>1</sup>).

**LEADING CASE** is a judicial decision or precedent settling the principles of a branch of law. Thus *Coggs v. Bernard* is the leading case on the law of bailments (*q.v.*). Mr. J. W. Smith published an excellent selection of leading cases, principally illustrating rules of the common law. His example has been followed by Messrs. White and Tudor in their *Leading Cases in Equity*, and by Mr. Tudor in his *Leading Cases in Conveyancing and Mercantile Law*. Some excellent versions of the principal leading cases have been published anonymously under the title of "*Leading Cases done into English*."

**LEADING QUESTIONS**, on the examination of a witness, are questions which directly or indirectly suggest to him the answer he is to give. The general rule is that leading questions are allowed in cross-examination, but not in examination in chief.<sup>4</sup>

**LEASE.**—§ 1. A lease is in effect a conveyance or grant of the possession of property (generally but not necessarily land or buildings) to last during the life of a person, or for a term of years or other fixed period, or at will, and usually with the reservation of a rent. Leases for a life or lives are comparatively rare, and when a lease is spoken of, *primâ facie* a lease for years is meant. The person who grants the lease is called the lessor, the person to whom it is granted being the lessee; until he accepts the estate he has merely an *interesse termini* (*q.v.*), unless the lease takes effect under the Statute of Uses. It is essential to a lease that it should be for a less estate or term than the lessor has in the property, for if it comprises his whole interest it is a conveyance or assignment and not a lease.<sup>5</sup> Again if the intention of the parties is that the grantee is not to be entitled to exclusive possession of the property, the grant is a licence and not a lease.<sup>6</sup>

<sup>1</sup> See Manning's *Law of Nations*, 2.

<sup>2</sup> Just. Inst. I. ii.

<sup>3</sup> Steph. Comm. ii. 141.

<sup>4</sup> Best on Evidence, 799.

<sup>5</sup> Shepp. Touch. 266; Woodfall's *Landlord and Tenant*, 73, 113, 236.

<sup>6</sup> Smith & Soden's *Landlord & Tenant*, 68; Woodfall, 113.

§ 2. A lease for years or at will is a chattel interest (see *Chattel; Estate*, § 5; *Leaseholds*).

Underlease. § 3. Where a person who is himself a lessee grants a lease of the same property to another person for a shorter term, it is properly called an underlease or sublease or a derivative lease.<sup>1</sup>

Concurrent lease or lease of a reversion. § 4. A concurrent lease, or lease of a reversion, is one granted for a term which is to commence before the determination of a previous lease of the same land to another person. If under seal, it operates as an assignment of the reversion during the continuance of the previous lease, so that the new lessee is entitled to the rent and covenants under the previous lease; and after the expiration of that lease, it (the concurrent lease) operates as a lease in possession.<sup>2</sup>

Lease in reversion and reversionary lease. § 5. A lease in reversion is a lease which is not to take effect in possession immediately, and the term "reversionary lease" is sometimes used in the same sense: but strictly speaking a reversionary lease is one to take effect from the expiration or determination of a previous lease. It only creates an *interesse termini*.<sup>3</sup>

By virtue of estate. § 6. With reference to the right or authority under which they are granted, leases are made either (1) under a right or power incident to the lessor's estate; thus a tenant in fee has power to grant leases for any term: or (2) under a power of appointment or limitation to uses; as where land is limited to A. and his heirs, to such uses as B. shall by demise appoint<sup>4</sup> (see *Power*): or (3) under a statutory power, *e.g.*, under the Settled Estates Act (*q.v.*): or (4) by virtue of a custom; thus an infant seised of land holden in socage may, by the custom of some places, make binding leases at the age of 15:<sup>5</sup> or (5) by virtue of an authority given by the common law; thus a guardian in socage or by election may in some cases grant leases of the infant's lands.<sup>6</sup>

Estoppel. As to leases by estoppel, see *Estoppel*, § 4.

Forms of leases. § 7. Leases are made either by deed: or by writing not under seal (called by the old writers "leases parol"):<sup>7</sup> or without writing.<sup>8</sup> The only leases of land or other corporeal hereditaments which need not be made by deed are leases at will, or for a term not exceeding three years under the Statute of Frauds (*q.v.*),<sup>9</sup> and in practice the term lease commonly denotes a lease by deed.

By deed. § 8. A lease by deed in the ordinary form consists of the following parts: the premises, the habendum, the reddendum, the lessee's covenants, the proviso for re-entry, and the lessor's covenants<sup>10</sup> (see those titles). The covenants in a lease are generally much more important than those in a conveyance; they vary according to the nature of the lease, but ordinarily they include covenants by the lessee for payment of the rent,

<sup>1</sup> See *Camberwell, &c. Building Society v. Holloway*, 13 Ch. D. 754.

<sup>2</sup> *Woodfall*, 194.

<sup>3</sup> *Ibid.*; *Hyde v. Warden*, 3 Ex. D. 72.

<sup>4</sup> *Bythewood & Jarman*, v. 560.

<sup>5</sup> *Co. Litt.* 45 b.

<sup>6</sup> *Bythewood & Jarman*, iv. 226.

<sup>7</sup> *Shepp. Touch.* 267.

<sup>8</sup> *Woodfall*, 116; *Smith & Soden*, 42; *Fawcett*, 67.

<sup>9</sup> 29 Car. 2, c. 3.

<sup>10</sup> *Woodfall*, 127; *Fawcett*, 72; *Elphinstone's Conv.* 231.

and if the lease is one of a building, to repair and insure it, or if it is one of a farm or mine, to manage it in a proper manner; there is also generally a covenant by the lessee not to underlet, or assign the lease without the lessor's consent, and not to carry on certain trades or occupations, and a covenant by the lessor for the quiet enjoyment and possession of the property by the lessee.<sup>1</sup>

§ 9. The rent and covenants are always binding on the original lessee and his representatives, notwithstanding any assignment which he may make. On assigning leaseholds, therefore, the assignee is bound to enter into a covenant with the assignor to indemnify him against this liability. The assignee is himself also liable for rent unpaid or covenants broken during his tenancy (provided the covenants run with the land, as to which see *Covenant*, § 5); but when he assigns to another, his liability ceases so far as regards future rent or breaches of covenant.<sup>2</sup> As to the statutory provisions enabling executors and trustees in bankruptcy to get rid of liabilities under leases vested in them, see *Disclaimer*, § 3; *Executor*, § 9.

Liability of assignee.

§ 10. Leases are generally prepared in two parts, known as the lease and the counterpart: the lease is executed by the lessor alone, and is kept by the lessee; the counterpart is executed by the lessee alone, and is kept by the lessor.<sup>3</sup>

Lease and counterpart.

§ 11. Leases are in some cases subject to statutory provisions; such are leases at a rack-rent by tenants for life (as to which see *Emblements*), and leases subject to the Agricultural Holdings Act (*q. v.*).

See *Attornment*; *Demise*; *Distress*; *Game*; *Rent*; *Term*; *Use and Occupation*.

**LEASE AND RELEASE** is a mode of conveying freehold land which was in common use down to the year 1841. It was invented to evade the act 27 Hen. 8, c. 16, passed to prevent land from being conveyed secretly by bargain and sale. The act only required bargains and sales of estates of inheritance or freehold to be enrolled, and therefore it soon became the practice on a sale of land for the vendor to execute a lease to the purchaser for a year by way of bargain and sale, which under the Statute of Uses gave him seisin of the land without entry or enrolment, and then the vendor released his reversion to the purchaser by ordinary deed of grant, thus vesting in him the fee simple in possession without entry or livery of seisin. In 1841 a release was made effectual without the preliminary lease for a year, and in 1845 a deed of grant was made sufficient for the conveyance of all corporeal hereditaments.<sup>4</sup> (See *Bargain and Sale*, § 3; *Conveyance*, §§ 7, 8; *Grant*, § 2.)

**LEASEHOLDS** are lands held under a lease for years. They are personal estate, being chattels real, and therefore they pass to the personal representative of the lessee or tenant on his death intestate. But for the purposes of the Succession Duty Act (*q. v.*), Locke King's Act (*q. v.*), and the stat. 27 Eliz. c. 4 (see *Voluntary*), leaseholds are on

<sup>1</sup> Smith & Soden, 114 *et seq.*; Elphinstone, 240.

<sup>2</sup> Williams, R. P. 397.

<sup>3</sup> Fawcett, 102.

<sup>4</sup> Williams, R. P. 180; Williams on Seisin, 146. Conveyance by a release following on an ordinary lease perfected by entry is said to have been formerly employed; Steph. Comm. i. 527.

the same footing as real estate. And by the Wills Act, a general devise of land, or lands and tenements, or the like, will include the testator's leasehold estates, unless a contrary intention appears.<sup>1</sup>

**LEAVE TO MOVE** to set aside or vary a judgment might formerly be given by the judge at the trial of an action, when some point of law was raised, the decision of which affected the fate of the action; the motion was heard by a Divisional Court.<sup>2</sup> This practice seems to have been abolished.<sup>3</sup> (See *Motion for Judgment*; *Trial*.)

**LEET.** See *Court Leet*.

**LEGACY—LEGATEE.**—§ 1. A legacy is a gift of personal property by will. The person to whom the property is given is called the legatee, and the gift or property is called a bequest (*q. v.*). The legatee's title to the legacy is not complete until the executor has assented to it. (See *Assent*.)

Legacies are of three kinds, specific, demonstrative and general.

**Specific.** § 2. A specific legacy is a bequest of a specific part of the testator's personal estate. Thus, a bequest of "the service of plate which was presented to me on such an occasion," is specific, and so also is a bequest of "100*l.* consols standing in my name at the Bank of England." A specific legacy must be paid or retained by the executor in preference to the general legacies, and must not be sold for the payment of debts until the general assets of the testator are exhausted.<sup>4</sup> (See *Administration*, § 2.) On the other hand, a specific legacy is liable to ademption (*q. v.*), unless it is given in such a way as to refer to the state of the property at the testator's death; thus, a bequest of "the black horses which I shall be possessed of at my death," is specific; but it takes effect if the testator leaves property answering the description, although he may have sold the black horses which he had at the date of his will.<sup>5</sup>

**Demonstrative.** § 3. A demonstrative legacy is a gift of a certain sum directed to be paid out of a specific fund; thus, "I bequeath to A. B. the sum of 50*l.* to be paid out of the 100*l.* consols in my name," is a demonstrative legacy. Such a legacy is not adeemed by the testator selling or disposing of the fund in his lifetime, while it also has the advantage of being paid in priority to the general legacies if the fund is sufficient.<sup>6</sup>

**General.** § 4. A general legacy is one payable only out of the general assets of the testator: as where he bequeaths to A. 100*l.* sterling, or 100*l.* consols, without referring to any particular stock, although he may have 100*l.* consols standing in his name. So a legacy of a mourning ring of the value of 10*l.* merely amounts to a general legacy of 10*l.*, with a direction to the executor to purchase a ring. A general legacy is liable to abatement or total

<sup>1</sup> Williams, R. P. 404.

<sup>2</sup> Smith's Action, 140; Rules of Court, xxxvi. 22, xl. 2.

<sup>3</sup> Appellate Jurisdiction Act, 1876, s. 17; Rules of Court, xxxvi. 22 a.

<sup>4</sup> Williams, P. P. 401; White & Tudor, L. C. ii. 252; Watson's Comp. Eq. 1232.

<sup>5</sup> *Bothamley v. Sherson*, L. R., 20 Eq. 309.

<sup>6</sup> Williams, 401.



failure, if the residuary estate is not sufficient to pay the testator's debts and other legacies (see *Abatement*, § 3), unless it is given for valuable consideration, *e. g.*, to a wife in consideration of her releasing her dower.<sup>1</sup>

§ 5. Where personal property is bequeathed to trustees to be held Trust. upon trust, *e. g.*, to pay the income to A. B. for life—this is called a trust legacy.

§ 6. Where a legacy is given to an infant or person beyond the Infant. seas, the executor may pay the amount into Court in the Chancery Division, and when the legatee comes of age, or returns, he may have it paid out to him on making an application by petition or motion.<sup>2</sup> (See *Payment into Court*.)

See further as to legacies, titles *Cumulative*; *Executor*; *Lapse*; *Marshalling*; *Mortmain*; *Satisfaction*; *Will*.

**LEGACY DUTY.**—Every legacy (except legacies to the husband, wife or descendants of the testator) is liable to a duty at so much per cent., varying according to the degree of relationship which the legatee bore to the testator (see *Addenda*). The exemption from duty formerly enjoyed by legacies under 20*l.* has been abolished. The residue of the personal estate of a testator or intestate is liable to the same duties.<sup>3</sup> (See *Leaseholds*; *Probate*; *Succession Duty*.)

**LEGAL** is opposed (i) to that which is illegal or unlawful (see those titles); (ii) to that which is equitable (*q. v.*). As to legal memory, see *Memory*.

**LEGALIZE—LEGALIZATION.**—§ 1. When an act which is Nuisance, &c. *primâ facie* illegal becomes legal, it is said to be legalized: thus many acts done upon a man's own property, which are injurious to the adjoining land and consequently actionable as nuisances, may be legalized by prescription, and thus form easements<sup>4</sup> (*q. v.* § 12).

§ 2. When the execution of a document is attested by a notary, consul, Document. magistrate, or the like, it is sometimes said to be legalized. This expression is borrowed from the French;<sup>5</sup> it can hardly be said to be a technical term of law.

**LEGITIMACY—LEGITIMATE.**—§ 1. "Legitimate" signifies "lawful." The word is applied especially to children to signify that they have been born in lawful wedlock.<sup>6</sup>

§ 2. Under the stat. 21 & 22 Vict. c. 93, a natural-born subject of Great Britain may apply to the High Court, in the Probate, Divorce and Matrimonial Division, for a declaration that he is legitimate, or that his parents or grandparents were validly married, or that he himself is validly married, or that he is a natural-born subject of the Queen. A judgment made on such a petition is in rem, that is, binding on all the world.

Legitimacy  
Declaration  
Act, 1858.

See *Bastard*; *Child*; *Mulier*.

<sup>1</sup> Williams, P. P. 402.

<sup>2</sup> Williams, 399; Daniell's Ch. Pr. 1911.

<sup>3</sup> Williams, 398; Williams on Executors, 1433; stat. 55 Geo. 3, c. 184; Cus-

toms and Inland Rev. Act, 1881.

<sup>4</sup> Gale on Easements, 482.

<sup>5</sup> Saint Bonnet, Dict. s. v. *Législation*.

<sup>6</sup> Co. Litt. 244 a.

**LEIBNITZ.**—Gottfried Wilhelm Leibnitz was born on the 3rd July, 1646, in Leipzig, and died at Hanover on the 14th November, 1716. He wrote *Methodus nova jurisprudentiæ*, *Codex juris gentium diplomaticus*, *Observationes de principiis juris*, and numerous miscellaneous works.<sup>1</sup>

**LESSEE—LESSOR.**—In the most general sense of the words, “where a man letteth to another lands or tenements for terme of life, or for terme of years, or to hold at will, he which maketh the lease is called lessor, and he to whom the lease is made is called lessee.”<sup>2</sup>

In practice, however, the terms lessor and lessee are only used in the case of a lease for years, for occupation, building or mining purposes, or the like.

See *Lease*; *Term*; *Tenant for Life*; *Tenant for Years*.

**LETTER.**—With regard to contracts or agreements entered into by letter, the leading rule is, that a person who makes a proposal to another by letter is considered in law as making it during the whole time that the letter is travelling, and that as soon as the acceptor despatches his acceptance, he may treat the contract as complete. In other words, an acceptance by letter is complete as against the proposer from the date of posting the acceptance, if it arrives within the proper time. What is a “proper time” depends on whether the proposer has prescribed a mode and time of communicating the acceptance; if he has not, it depends on the nature of the business in hand. If, however, the communication of the acceptance is delayed by the fault of the proposer, or by accident, the delay is not to be reckoned against the acceptor. The true principle also is, that the acceptor is at liberty to revoke his acceptance at any time before it reaches the proposer (*e.g.*, by telegraph), but this principle does not yet seem to have been established by any decision. The result is that if a person makes a proposal by post and does not receive an answer as soon as he expected, he cannot assume that the proposal has been rejected, except at his own risk.<sup>3</sup>

**LETTER OF CREDIT.**—§ 1. A letter of credit is an authority by one person (A.) to another (B.) to draw cheques or bills of exchange (with or without a limit as to amount) upon him (A) with an undertaking by A. to honour the drafts on presentation. An ordinary letter of credit also contains the name of the person (A.’s correspondent) by whom the drafts are to be negotiated or cashed: when it does not do so it is called an open letter of credit.

Open letter.

§ 2. A letter of credit is in fact a proposal or request to the person named therein, or (in the case of an open letter) to persons generally, to advance money on the faith of it, and the advance constitutes an acceptance of the proposal, thus making a contract between the giver of the

<sup>1</sup> Holtz, *Encycl.* s. v.

<sup>2</sup> Litt. § 57.

<sup>3</sup> See *Adams v. Linsell*, 1 B. & Ald.

681; *Dunlop v. Higgins*, 1 H. L. C. 381; *British & A. T. Co. v. Colson*, L. R., 6 Ex. 108; Pollock on Contract, 13.

letter of credit and the person cashing or negotiating the draft, by which the former is bound to honour the draft.<sup>1</sup> (See *Agreement*.)

§ 3. Letters of credit are sometimes used in conjunction with circular notes, in which case the letter of credit is called a letter of indication.<sup>2</sup> Circular notes are forms of drafts, generally for some specific amount, given with the letter and requiring to be signed by the bearer. Circular notes are chiefly used by persons travelling abroad, and may be obtained from almost any banker.

**LETTER OF LICENCE** is an agreement between a debtor and his creditors that the latter shall for a specified time suspend their claims, and allow the debtor to carry on his business at his own discretion. It is, however, usually accompanied by a provision that the business shall be carried on under the inspection and control of persons nominated by the creditors, who are called inspectors, and the agreement then becomes, and is termed, a deed of inspectorship.<sup>3</sup>

The object of these instruments is to avoid bankruptcy proceedings.

See *Composition; Bankruptcy*.

**LETTER MISSIVE**, in ecclesiastical law, is a document sent with the congé d'élire to the dean and chapter, containing the name of the person whom they are to elect.<sup>4</sup> (See *Congé d'élire*.)

§ 2. Under the practice of the Court of Chancery, before a peer was served with the bill in a suit, he was entitled to be informed by a communication from the lord chancellor, termed a letter missive, of the fact of the bill having been filed.<sup>5</sup> This is now obsolete. (See *Bill of Complaint*).

**LETTERS OF ADMINISTRATION.**—§ 1. Where a person possessed of personal property dies intestate, or without an executor, the Court having jurisdiction in such matters<sup>6</sup> will grant to a proper person an authority under the seal of the Court, called letters of administration, by which the grantee, the administrator, becomes clothed with powers and duties similar to those of an executor<sup>7</sup> (*q. v.*). In addition to the oaths taken by the administrator, which are similar to those taken by an executor (see *Probate*), he enters into a bond. (See *Administrator*.)

§ 2. If the deceased died wholly intestate, simple letters of administration are granted to one of the next of kin (*e. g.*, the widow or children of the deceased), or, if they renounce, to a creditor or other person, according to certain rules.<sup>8</sup> § 3. If a will of the deceased exists, but no executor has been appointed, or the executor appointed predeceases the testator, or refuses or becomes incapable to act, the Court will grant (as a general rule, to the person having the greatest interest under the will, *e. g.*, the residuary legatee) letters of administration with

<sup>1</sup> Pollock on Contract, 181; Byles on Bills, 96; *Ex parte Asiatic Banking Corporation*, L. R., 2 Ch. 391.

<sup>2</sup> Byles on Bills, 95.

<sup>3</sup> Davids. Conv. v. (2), 519.

<sup>4</sup> Phill. Eccl. Law, 42.

<sup>5</sup> Daniell's Ch. Pr. 366.

<sup>6</sup> Formerly the Court of Probate, now the High Court of Justice in the Probate, Divorce and Admiralty Division (*q. v.*).

<sup>7</sup> Browne's Probate Practice, 206.

<sup>8</sup> *Ibid.* 163 *et seq.*

the will annexed (cum testamento annexo), a grant which is similar to probate of the will.<sup>1</sup>

As to limited grants of letters of administration, see *Grant*, §§ 5 *et seq.*

Letters of administration are liable to the same stamp duty as probates.

**LETTERS CLOSE** are letters or missives in the name of the sovereign, and sealed with the great seal, being directed to particular persons for particular purposes; they are closed up and sealed on the outside, whence their name.<sup>2</sup> (See *Letters Patent*.)

**LETTERS OF MARQUE** are extraordinary commissions issued, either in time of open war or in time of peace, after all attempts to procure legal redress have failed, by the Lords of the Admiralty, or the vice-admirals of a distant province, to the commanders of merchant ships, authorizing reprisals for reparation of the damages sustained by them through enemies at sea. They were formerly either *special*, to make reparation to individuals, or *general*, when issued by the government of one state against all the subjects of another;<sup>3</sup> the latter kind seems to be the same thing as privateering (*q. v.*), and therefore no longer allowed.<sup>4</sup> (See *Reprisals*.)

**LETTERS PATENT** are grants by the crown of lands, franchises, offices, &c. contained in charters or instruments not sealed up but exposed to open view with the great seal pendant at the bottom, and usually addressed to all the subjects of the realm.<sup>5</sup>

As to letters-patent for inventions, see *Patent*: see also *Grant*, § 4, *Great Seal*; *Letters Close*; *Warrant*.

**LETTERS OF REQUEST.**—§ 1. In ecclesiastical practice, where a diocesan Court (*q. v.*) has jurisdiction in a case, but the plaintiff wishes the cause to be instituted in the Provincial Court (*q. v.*), he may apply to the judge of the former Court for letters of request; and when the judge has signed them, and they have been accepted by the judge of the Provincial Court, a decree issues under his seal, calling upon the defendant to answer to the plaintiff in the suit.<sup>6</sup>

§ 2. Letters of request are sometimes issued for other purposes, *e. g.*, they are sent from one judge to another to request him to examine witnesses out of the jurisdiction of the former but in that of the latter: to enforce a monition, &c.<sup>7</sup>

Common of  
pasture.

**LEVANT AND COUCHANT.**—§ 1. When land to which a right of common of pasture is annexed can maintain during the winter by its

<sup>1</sup> Browne, 150; Coote's Probate Pr. 49.

<sup>2</sup> Bl. Comm. ii. 346; Steph. Comm. i. 619.

<sup>3</sup> Maude & Pollock, Merch. Shipping, 41 note, citing Beawes, Lex Merc. 311; 1 Bl. Comm. 258; Hallam's Middle Ages, ii. 96.

<sup>4</sup> Manning's Law of Nations, 147.

<sup>5</sup> Bl. Comm. ii. 346; Steph. Comm. i. 618.

<sup>6</sup> Phillimore, Eccl. Law, 1278.

<sup>7</sup> *Ibid.* 1279; see also stat. 3 & 4 Vict. c. 86; Phill. 1314 *et seq.*

produce, or requires to plough and compester it, a certain number of cattle, those cattle are said to be levant and couchant on the land. The origin of this double definition of levancy and couchancy probably was, that the number requisite to plough and compester was the limit to common appendant, and the capacity of wintering was the limit to common appurtenant. It appears that the Courts have adopted the latter admeasurement as the most liberal in both cases, but they have never denied the right of common appendant to be admeasured by its original standard.<sup>1</sup> It is therefore commonly said that cattle levant and couchant are such as the produce of the land will maintain during the winter, without reference to their being required for its tillage.<sup>2</sup> § 2. Levancy and couchancy is one of the standards for ascertaining the number of cattle which each commoner may put on the common. (See *Common*, §§ 5, 10.)

§ 3. If cattle escape from A.'s land into B.'s land by default of B. (as Distress. for want of his keeping a sufficient fence), they cannot be distrained for rent by B.'s landlord until they have been levant and couchant on the land, that is, until they have been at least one night there. If they escape by default of A., they may be distrained immediately.<sup>3</sup>

**LEVARI FACIAS** is a writ of execution which commands the sheriff to levy a judgment debt on the lands and goods of the debtor by seizing and selling the latter, and receiving the rents and profits of the lands until the debt is satisfied. This writ has been practically superseded by the writ of elegit (*q. v.*). The writ of sequestrari facias (*q. v.*) is in the nature of a levari facias, and is hence sometimes called a levari facias de bonis ecclesiasticis.<sup>4</sup>

**LEVY.**—To levy is to raise a sum of money, *e. g.*, by a writ of execution against the property of a judgment debtor. (See *Execution*, §§ 3 *et seq.*; *Fieri facias*.)

**LEX DOMICILII** is the law of the country where a person has his domicile<sup>5</sup> (*q. v.*).

**LEX LOCI** is late law-Latin for "the law of the place." It is chiefly used in the following phrases: the *lex loci* [*celebrati*] *contractus* is the law of the place where a contract was made; *lex loci solutionis* is the law of the place of payment, that is, of the place where, by the terms of the contract, payment is to be made: *lex loci actus* is the law of the place where a transfer of property or some similar formal act has been performed: *lex loci rei sitæ* is the same as *lex situs* (*q. v.*): *lex loci delicti* is the law of the place

<sup>1</sup> Cooke, Incl. 10.

<sup>2</sup> Elton, Comm. 56, citing *Whitelock v. Hutchinson*, 2 M. & Rob. 205. In the French feudal law the term was applied to villeins domiciled in a seignory (Loysel, Inst. Cout. gl. v. *Hommes Couchants et Levants*).

<sup>3</sup> Hargrave's note to Co. Litt. 47 b; see Steph. Comm. iii. 249.

<sup>4</sup> Chitty, Pr. 693; Smith's Action (11th edit.), 397.

<sup>5</sup> Savigny, Syst. viii.; and Westlake's Priv. Int. Law, *passim*.

where a tort or wrong has been committed: *lex fori* is the law of the place where judicial proceedings have been taken to enforce an obligation, &c.<sup>1</sup> (See *International Law*; *Jurisdiction*; *Locus regit Actum*.)

**LEX SITŪS** is modern law-Latin for "the law of the place where property is situated." The general rule is, that lands and other immovables are governed by the *lex sitūs*, that is, by the law of the country in which they are situated.<sup>2</sup> (See *Lex Loci*.)

**LIABILITY** is the condition of being actually or potentially subject to an obligation, and is used either generally, as including every kind of obligation, or, in a more special sense, to denote inchoate, future, unascertained or imperfect obligations, as opposed to debts, the essence of which is that they are ascertained and certain. (See *Debt*.) Thus when a person becomes surety for another, he makes himself liable, though in what obligation or debt the liability may ultimately result is unascertained: and when a person becomes a member of a company he makes himself liable for the debts of the company, to be ascertained when it is wound up.<sup>3</sup> (See *Limitation of Liability*.)

**LIBEL.**—I. § 1. In the widest sense of the word, a libel is a published writing, picture, or similar production, of such a nature as to immediately tend to occasion mischief to the public, or to injure the character of an individual.<sup>4</sup> Hence libels are of two kinds, public and private.

Public.

§ 2. A public libel is one which tends to produce evil consequences to society, because it is either blasphemous<sup>5</sup> (see *Blasphemy*), or obscene<sup>6</sup> (*q.v.*), or seditious<sup>7</sup> (*q.v.*). The publication of such a libel is a misdemeanor. To this class also belong libels on the Houses of Parliament, which are contempts or breaches of privilege: libels on Courts of justice, or on persons concerned in proceedings before Courts, which are contempts of Court (*q.v.*):<sup>8</sup> and libels on foreign rulers, ambassadors, &c.<sup>9</sup>

Private.

Defamatory.

Private libels are of two kinds. § 3. A defamatory libel, or a libel on the character of an individual, is a false and malicious writing, picture, or the like, published concerning a certain person, and which either brings him within the danger of the law by accusing him of a crime, or has a tendency to injure him in his profession or calling, or by holding him up to scorn, ridicule, hatred or execration, impairs him in the enjoyment of general society,<sup>10</sup> or by blackening the memory of one who is dead, tends to provoke a breach of the peace.<sup>11</sup> A defamatory libel is a civil injury,

<sup>1</sup> See Westlake's *Priv. Int. Law*, *passim*; Savigny, *Syst. viii. passim*.

<sup>2</sup> Westlake, *Priv. Int. Law*, 62.

<sup>3</sup> In *Williams v. Harding* (L. R., 1 H. L. 9), the House of Lords decided that the liability of a shareholder of a solvent company was a "debt" within the meaning of the Bankruptcy Act, 1861; the reasons given for this decision are somewhat technical.

<sup>4</sup> Starkie's *Law of Slander and Libel*, cited in Shortt on Copyright, 297, n. (a); *Bradlaugh v. Reg.*, 3 Q. B. D. at p. 627.

<sup>5</sup> Shortt, 297; Stephen, *Crim. Dig.* 97.

<sup>6</sup> Shortt, 311.

<sup>7</sup> Shortt, 319; Steph. 55.

<sup>8</sup> Shortt, 344, 357.

<sup>9</sup> Shortt, 379; Stephen, 59.

<sup>10</sup> Shortt, 384, 391.

<sup>11</sup> *Ibid.* 419; Russell on Crimes, iii. 178, 205; Steph. *Crim. Dig.* 184.

giving rise to a right of action for damages by the person defamed. It is also a misdemeanor, and makes the offender punishable criminally by fine and imprisonment.<sup>1</sup> The question whether a publication is libellous or not is one of mixed fact and law, and rests with the jury, subject to the judge's direction as to the law.<sup>2</sup> (See *Fact*, § 3.)

§ 4. A libel may be injurious to a person's property or trade. Thus, if a person falsely and maliciously publishes statements calculated to injure the property (*e.g.*, the business) of another, this is a libel, and not only gives rise to a right of action for damages, but may also be restrained by injunction.<sup>3</sup>

See *Innuendo*; *Justification*; *Malice*; *Privilege*; *Publication*; *Slander*.

II. § 5. In the Ecclesiastical Courts, the first plea in a plenary cause (not being a criminal cause) is termed the libel, and runs in the name of the party or his proctor, who alleges and propounds the facts on which his demand is based.<sup>4</sup> (See *Plea*.)

**LIBERATE.**—When execution has been issued on a statute staple by a writ in the nature of an extent, the lands, tenements and chattels of the conusor or debtor are not delivered to the conusee or creditor, but are seized by the sheriff "into the king's hands," and in order to get possession of them the conusee must sue out a writ called a *liberate*, which commands the sheriff to *deliver* them into his hands.<sup>5</sup> (See *Extent*.)

**LIBERTY.**—I. § 1. In its general sense, a liberty is an authority to do something which would otherwise be wrongful or illegal. Thus, if a man grants to another trees growing on land, that implies a liberty to cut them and carry them away.<sup>6</sup> (See *Free Entry*, *Egress and Regress*.) Such a liberty may be either personal to the grantee, or it may be inherent or annexed to property so as to pass with it on an assignment. (See *Licence*.)

II. § 2. "Liberty" is also used as equivalent to "franchise" (*q.v.*), both as denoting a right and as denoting the place where the right is exercisable. Thus, the Liberty of the Savoy is a place subject to a franchise.<sup>7</sup> As to writs of execution, see *Non omittas*.

**LICENCE.**—I. § 1. In its general sense, a licence is an authority to do something which would otherwise be inoperative, wrongful or illegal. (See *Authority*; *Liberty*.) Thus, a lease frequently contains a covenant by the lessee not to assign the term without the lessor's licence.

II. § 2. In the law of real property, a licence is generally an authority to do an act which would otherwise be a trespass. A licence passes no interest,<sup>8</sup> and therefore if A. grants to B. the right to fasten barges to moorings in a river, this does not amount to a demise, nor give the licensee an exclusive right to the use of the moorings, nor render him

<sup>1</sup> Shortt, 499; Stephen's Crim. Dig. 184 *et seq.*

<sup>2</sup> Fox's Act (32 Geo. 3, c. 60) made this rule applicable to criminal prosecutions for libel. See *Thomas v. Williams*, 14 Ch. D. 864.

<sup>3</sup> *Saxby v. Easterbrook*, 3 C. P. D. 339.

<sup>4</sup> Phillimore, Eccl. Law, 1254, 1289.

<sup>5</sup> Lidd's Pr. 1087; Williams' Saund. ii. 221.

<sup>6</sup> Rolle, Abr. *Graunt*, Z. 16.

<sup>7</sup> Viner, Abr. *Franchise*, B. 8.

<sup>8</sup> Gale on Easements, 15; Shelford, R. P. Stat. 59.

Revocable,  
irrevocable.

liable to be rated as the occupier of part of the bed of the river.<sup>1</sup> Hence, also, if a person by deed grants an exclusive licence for the use of land, this may amount to a lease, or to the grant of an incorporeal hereditament<sup>2</sup> (see *Lease*, § 1). § 3. A mere licence is always revocable, but when a licence comprises, or is connected with, a grant of an interest, it is generally irrevocable: thus a licence by A. to hunt in his park is revocable; but a licence to hunt and take away the deer when killed, is in truth a grant of the deer with a licence annexed to come on the land, and if the grant is good the licence is irrevocable.<sup>4</sup> So a licence may be irrevocable if granted for valuable consideration.<sup>5</sup>

Marriage  
licence.  
Special.

Ordinary.

Registrar's.

III. § 4. A marriage licence is an authority enabling two persons to be married. Such licences are of three kinds. A special licence is granted by the Archbishop of Canterbury, and enables the parties to be married in any church or chapel or other meet and convenient place.<sup>5</sup> An ordinary licence is granted by any archbishop or bishop for the marriage of persons within his diocese in a church or chapel in which banns may lawfully be published.<sup>6</sup> A superintendent registrar's licence is one granted by the superintendent registrar of the district in which the parties, or one of them, reside, authorizing the solemnization of a marriage between them according to the rites of the Church of England, or the usages of the Quakers or Jews, &c., or such form as they think fit to adopt.<sup>7</sup> (See *Marriage*; *Marriage Acts*.)

Intoxicating  
liquors, &c.

Justices'  
licence.

IV. Licences for the manufacture and sale of intoxicating liquors and refreshments are of three kinds, according to the authorities by whom they are granted. § 5. A magistrate's or justice's licence is granted as a kind of certificate that the applicant is a proper person to be intrusted with the sale of intoxicating liquors, and that the "premises" which he occupies are fit for the purpose. § 6. In counties, new licences are granted by the justices present at the meeting held by them every year, and called "the general annual licensing meeting," and must be confirmed (except in the case of outdoor licences) by a standing committee, appointed every year from among themselves by the justices at quarter sessions, and called "the county licensing committee."<sup>8</sup> In boroughs, licences are granted by "the borough licensing committee," appointed every year from among themselves by the borough justices, and confirmed by the whole body of borough justices, or if the borough has not ten justices, licences are granted by the borough justices, and confirmed by a "joint committee" composed of six borough and county justices.<sup>9</sup>

Excise licence  
founded on  
magistrates'  
licence.

§ 7. The magistrate's licence entitles the holder to take out the corresponding excise licence, which is granted by the Commissioners of Inland Revenue, and is a mode of levying a tax on the sale of liquors and refreshments.

<sup>1</sup> *Watkins v. Overseers*, 5 L. R., 3 Q. B. 350.

<sup>2</sup> *Hooper v. Clark*, 8 B. & S. 150; L. R., 2 Q. B. 200.

<sup>3</sup> *Wood v. Leadbitter*, 13 M. & W. 838; Gale, 61.

<sup>4</sup> Shelford, 60.

<sup>5</sup> Browne on Divorce, 56.

<sup>6</sup> *Ibid.* 56, 68.

<sup>7</sup> *Ibid.* 65.

<sup>8</sup> Act of 1828, s. 1; Act of 1872, s. 37; Act of 1874, s. 32.

<sup>9</sup> Act of 1872, s. 38.



§ 8. Both magistrates' and excise licences require to be renewed every year, and are of various descriptions, according to the number and kind of liquors authorized to be sold under them (the public-house licence, the beer licence; &c.), and to the question whether the liquor is to be consumed on or off the premises (indoor and out-door licences, shopkeepers' wine licence, &c.), and to the time during which they authorize the consumption (the six-day licence, *i. e.*, excluding Sundays: the early closing licence, &c.).<sup>1</sup> A provisional licence may also be granted in respect of premises about to be constructed or in course of construction.<sup>2</sup> An additional licence is one granted to the holder of a "strong beer dealer's wholesale excise licence," and authorizes him to sell beer by retail for consumption off the premises.<sup>3</sup>

Varieties of licences.

§ 9. There are also excise licences granted without the necessity of a magistrate's licence, *e. g.*, the refreshment house licence,<sup>4</sup> which does not authorize the sale of intoxicating liquors,<sup>5</sup> and the licences to brewers, wholesale beer dealers, maltsters, distillers, dealers in foreign wines, manufacturers of and dealers in tobacco, &c.<sup>6</sup>

Excise licences not founded on magistrates' licences.

§ 10. Among miscellaneous licences, or licences not granted in the usual way by justices or the excise authorities, may be mentioned the "occasional licence" in the strict sense of the word, namely, a licence granted by the excise authorities, on the written consent of a justice, to a person already licensed to sell liquors to be consumed on the premises, authorizing the sale of them at some other place between certain hours and on a special occasion (*e. g.*, a fair, race, ball, &c.) specified in the licence.<sup>7</sup> The term "occasional licence" is also applied to an exemption granted by the commissioners of police or other "local authority"<sup>8</sup> of the district, exempting the person to whom it is granted from the rules relating to the closing of premises on a special occasion (*e. g.*, a fête or ball) and during certain hours specified in the licence.<sup>9</sup>

Miscellaneous licences.

V. § 11. There are also numerous other varieties of licence, such as game licences (see *Game*), licences for making and selling gunpowder, fireworks, &c., licences for race-courses in the suburbs of London,<sup>10</sup> for the reception of lunatics, for retreats for habitual drunkards, &c.<sup>11</sup> (See *Drunkenness*, § 2.)

**LIEGE.** See *Homage*, § 3.

**LIEN**<sup>12</sup> is a right by which a person is entitled to obtain satisfaction of a debt by means of property belonging to the person indebted to him.

<sup>1</sup> For an enumeration of the various licences see Lely & Foulkes's *Licensing Acts*, 7.

<sup>2</sup> Act of 1874, s. 22.

<sup>3</sup> Stats. 26 & 27 Vict. c. 33, s. 1; 43 Vict. c. 6.

<sup>4</sup> 23 Vict. c. 27, s. 6.

<sup>5</sup> Lely & Foulkes, 10.

<sup>6</sup> Stat. 6 Geo. 4, c. 81, and the other acts mentioned in the index to the statutes, title "Brewer."

<sup>7</sup> 25 Vict. c. 22, s. 13; 26 & 27 Vict. c. 33, ss. 19, 20; 27 Vict. c. 18, s. 5.

<sup>8</sup> Act of 1872, s. 26.

<sup>9</sup> Act of 1872, s. 29. See form: Lely & Foulkes, 192. As to the hours of closing, see Act of 1874, s. 3.

<sup>10</sup> Stat. 42 & 43 Vict. c. 18.

<sup>11</sup> *Ibid.* c. 19.

<sup>12</sup> As to liens generally, see Smith's *Merc. Law*, 558 *et seq.*; Stokes's *Lien of Attorneys*; Fisher on *Mortgage*, 102 *et seq.*

A lien is therefore a species of security (see *Security; Right*), but differs from a mortgage, charge or the like in this respect, that in the case of a mortgage or charge the origin of the debt is immaterial (*e.g.*, it may be a loan, a debt for goods sold, &c.), while a lien is always a security on property which is or has been the subject of a transaction between the parties;<sup>1</sup> thus, if A. sells lands or goods to B., A. has a lien on them for the unpaid purchase-money, unless he expressly or impliedly waives his right.<sup>2</sup>

Liens by operation of law.

Legal, equitable and statutory liens.

Conventional liens.

I. With reference to their origin, liens arise either by operation of law or by agreement between the parties. § 2. Liens arising by operation of law (liens by implication, implied liens) are those which arise from the relation of the parties, without express or tacit stipulation, and either by the rules of the common law (as in the case of the vendor's lien for purchase-money mentioned above), by the rules of equity (equitable liens), or under the provisions of a statute (statutory liens), of which two latter classes examples will be found below. § 3. Liens by agreement between the parties (conventional liens) are those created intentionally in cases where the relation between the parties is not such as to give rise to a lien by operation of law, as where a carrier stipulates for a general lien (*infra*, § 4) on goods sent him for transmission.<sup>3</sup> The intention to create the lien may be express, or it may be implied, *e.g.*, from a previous course of dealings between the parties.<sup>4</sup> (See *Implied*, § 2.)

II. With reference to the nature of the right which they confer on the creditor, liens are of two kinds.

Retaining or possessory lien.

Particular lien.  
General lien.

§ 4. A retaining (or possessory) lien is the right of the creditor to retain possession of his debtor's property until his debt has been satisfied;<sup>5</sup> thus, if a person takes a watch to a watchmaker to be repaired, the watchmaker has a lien on the watch for his remuneration, *i.e.*, has the right of retaining it until his reasonable charges are paid. In this instance the lien is a particular lien, because it exists only as a security for the particular debt incurred in respect of the watch itself, while a general lien is available as a security for all debts arising out of similar transactions between the parties; thus, if a solicitor has possession of title deeds belonging to his client, he has a general lien on them, that is, he is entitled to retain them until he is paid not only his charges in respect of the deeds themselves, but also the whole amount owing to him from the client for professional services up to that time.<sup>6</sup> (See also *Charge*, § 5.) General liens exist only in pursuance of a usage to that effect in the particular trade or business, the principal instances being in the case of solicitors, bankers, innkeepers,<sup>7</sup> wharfingers and factors.<sup>8</sup>

<sup>1</sup> Hence the civilians call the debt giving rise to a lien a *debitum connexum*: Thibaut, Pand. § 224.

<sup>2</sup> Dart, V. & P. 729; Benjamin on Sales, 656.

<sup>3</sup> *Wiltshire Iron Co. v. G. W. R. Co.* L. R., 6 Q. B. 101, 776.

<sup>4</sup> Smith's Merc. Law, 561.

<sup>5</sup> As to the difference between a lien

and a pledge, see *Donald v. Suckling*, L. R., 1 Q. B. p. 604.

<sup>6</sup> Daniell, Ch. Pr. 1715. A solicitor's lien on a fund recovered in an action or suit extends only to the costs of that particular action or suit, and can be actively enforced. *Ibid.* 1729.

<sup>7</sup> *Mulliner v. Florence*, 3 Q. B. D. 484.

<sup>8</sup> Smith, Merc. Law, 562.

§ 5. A charging lien is the right to charge property in another's possession with the payment of a debt or the performance of a duty: an instance of this is the equitable lien of a vendor of land for the unpaid purchase-money.<sup>1</sup> A charging lien can be enforced by bringing an action (formerly by filing a bill in equity) for a sale of the property.<sup>2</sup> The important distinction between a possessory and a charging lien is that in the case of the former, if the creditor gives up possession of the property, he loses his lien, while it follows from the nature of a charging lien that the property need not be in the creditor's possession.

§ 6. There are also various forms of maritime lien, or lien on a ship, freight, &c.,<sup>3</sup> some of which are possessory, and some charging; thus, a shipowner has, independently of contract, a possessory lien on goods carried in his ship for the freight due in respect of them.<sup>4</sup> If a ship is injured in a collision by the negligence of the other ship, the owners of the former have a maritime (charging) lien on the latter for the damage;<sup>5</sup> so the master of a ship has a maritime (charging) lien on the ship and freight for his wages and disbursements;<sup>6</sup> this is an instance of a statutory lien, or lien created by statute. A maritime charging lien can be enforced by proceedings in the Admiralty Division, in which distress and sale of the ship may be ordered.<sup>7</sup>

See *Charge*.

ETYMOLOGY AND HISTORY.]—French, *lien*; Latin, *ligamen*, from *ligare*, to bind. Formerly it denoted *obligatio* generally. “Lien is a word of two significations—Personal lien, as a bond, covenant, or contract; and real lien, a judgment, statute, recognizance, or an original against an heir, which oblige and affect the land,”<sup>8</sup> or a warranty.<sup>9</sup> This sense is now obsolete.

**LIFE.** See *Death*; *Insurance*, § 7; *Tenant for Life*.

**LIGEANCE** is the old-fashioned equivalent for “allegiance” (*q. v.*).<sup>10</sup>

**LIGHT.**—§ 1. Where the owner of a building with windows, skylights, &c., has enjoyed the access of light to it for twenty years as of right without interruption, he acquires the right of preventing the owners of adjoining land from building or otherwise doing anything on their land to injuriously obstruct the access of light to his windows. (See *Enjoyment*.) This right is a negative easement.<sup>11</sup> It is also called the right of

<sup>1</sup> Wms. R. P. 414; White & Tudor's L. C. i. 263; Dart, V. & P. 729. As to liens of partners, see Lindley, 679.

<sup>2</sup> *Walker v. Wart, &c. Rail. Co., L. R.*, 1 Eq. 195.

<sup>3</sup> Fisher, 168 *et seq.*

<sup>4</sup> Maude & Pollock, Merch. Shipp. 294. As to the preservation of the shipowner's lien when he has landed and warehoused the goods, see Merch. Shipp. Act, 1862, ss. 67 *et seq.*; Maude & Pollock, 299.

<sup>5</sup> *The Charles Amelia*, L. R., 2 A. & E. 330.

<sup>6</sup> Merchant Shipping Act, 1854, s. 191; Maude & Pollock, Merch. Shipp. 91. See also *Kingston v. Wendt*, 1 Q. B. D. 367.

<sup>7</sup> Maude & Pollock, 189; Merch. Shipp. Act, 1854, s. 523.

<sup>8</sup> *Termes de la Ley*, s. v.

<sup>9</sup> Co. Litt. 376 b.

<sup>10</sup> *Ibid.* 129 a.

<sup>11</sup> Prescription Act, 1832, s. 3; Sheldford's R. P. Stat. 120; Gale on Easements, 319; Homersham Cox on Ancient Lights; Latham on Window Lights.

ancient lights, and the right of light and air; but the latter name is inaccurate, as the right to air stands on a different footing. (See *Air*.) The easement may also be acquired by express grant like any other easement.

§ 2. The right of ancient lights is not lost by the mere fact of the building on the dominant tenement having been pulled down for the purpose of erecting a new building in its place: for the easement attaches to windows in the new building occupying the same position as those of the old building, and it continues to exist while the land is vacant, if the right has not been abandoned.<sup>1</sup> The easement is also not lost where the windows in the building are enlarged or opened in a different situation; in such a case the adjoining owner may obstruct the additional or new window, but in so doing he must not obstruct the old windows.<sup>2</sup> (See *Encroachment*, § 2.)

#### LIMITATION OF ESTATES.

**LIMIT—LIMITATION.**—I. § 1. To limit an estate is to mark out the extreme period during which it is to continue, and the clause by which this is done in a conveyance, will, &c., is called a limitation. Thus, if I grant land to A. for life, and after his death to B. and his heirs, this is a limitation of a life estate to A., and of the remainder in fee to B.<sup>3</sup> (See *Words of Limitation*.) Hence a limitation is opposed to a condition or defeasance, which may put an end to an estate before the time fixed for its extreme duration, though the difference is sometimes one of form only; thus, if A. devises land to his widow for life, on condition that she does not marry again, the same result is produced as if he devised it to her during widowhood, which is a collateral limitation (*infra*, § 4).<sup>4</sup>

#### Conditional (I.)

§ 2. A conditional limitation (in the generic sense of the term) is where one estate is limited to end and another to commence on the doing of some act or the happening of some event. Thus, if I grant land to A. until B. returns from Rome, and on that event to C. in fee; or if I grant land to A., provided that when B. returns from Rome it shall immediately vest in C. in fee, in either case the limitation to C. is a conditional limitation. § 3. But in the specific and more accurate use of the term, a conditional limitation is where an estate is limited to commence in defeasance of a preceding estate, as opposed to a contingent remainder, which awaits the regular determination of the preceding estate; conditional limitations (in this sense) derive their name from their mixed nature: "they so far partake of the nature of conditions as they abridge or defeat the estates previously limited, and they are so far limitations as, upon the contingency taking place, the estate passes to a stranger."<sup>5</sup> The latter of the two example given in § 2 is a conditional limitation in this sense, the former being an instance of a collateral limitation (*infra*, § 4), or a determinable estate followed by a contingent remainder.<sup>6</sup> (See *Remainder*.)

#### Conditional (II.)

<sup>1</sup> *Eccl. Comm. v. Kino*, 14 Ch. D. 213.

<sup>2</sup> *Tapling v. Jones*, 11 H. L. C. 290; Gale, 606.

<sup>3</sup> See Williams, R. P. 139; Preston on Estates, 14.

<sup>4</sup> Fearn, Cont. Rem. 10 (note by

Butler). Littleton (§ 380) calls conditional and collateral limitations "conditions in law."

<sup>5</sup> Butler's note to Co. Litt. 203 b.

<sup>6</sup> Fearn, 5, 9, 14; Smith on Exec. Int. §§ 148 *et seq.*

§ 4. A collateral limitation is one which marks the extreme duration of an estate, and at the same time indicates an uncertain event, the happening of which will put an end to it before the expiration of that period. Thus, a limitation to a woman during widowhood, is a collateral limitation, because it gives her an estate for life, but makes it determinable on her marrying again.<sup>1</sup> § 5. At common law, no estate could be limited in expectancy on the determination of an estate in fee simple, however limited or conditional it might be (see *Reverter; Right of Entry*); but under the Statutes of Uses and Wills, such limitations may validly be created. A conditional or collateral limitation by way of use is sometimes called a shifting or springing use (see *Use*); when created by will it is called an executory devise.<sup>2</sup> (See *Executory Interests*.)

II. § 6. Limitation, as a measure of time, is a certain period prescribed by statute within which proceedings to enforce a right must be taken.<sup>3</sup> This is of two kinds, namely (1) where on the expiration of the time the right itself is barred, as in the case of a person who has been out of possession of land for twelve years,<sup>4</sup> although he may be ignorant of the fact that another is in possession;<sup>5</sup> and (2) where on the expiration of the time the remedy is barred, but not the right; thus, in the case of a debt which has remained unpaid and unacknowledged for six years, the creditor's right to bring an action to recover it is gone, but the debt exists for other purposes: hence he can exercise a right of lien to recover it,<sup>6</sup> but not a set-off or counter-claim, because that is in the nature of a cross-action.

§ 7. The period allowed in each case runs from the time when the right of action accrued. (See *Accrue*.) In certain cases, however, persons under disability have an extended time allowed them, calculated from the time the disability ceased, provided the whole time allowed does not exceed a certain maximum period. The disabilities recognized for this purpose are—infancy, coverture, and unsoundness of mind. As to the absence abroad of a plaintiff or defendant, see *Absence beyond Seas*.

§ 8. If the person liable to be sued gives the claimant an acknowledgment of his title, this has the effect of extending the period of limitation, so that it only runs from the acknowledgment, or the last acknowledgment, if there were several. (See *Acknowledgment*, § 1.)

§ 9. The Statutes of Limitation do not apply to trusts, except trusts created merely for the purpose of securing debts or legacies; nor to the engagements of a married woman;<sup>7</sup> nor to the crown (see *Nullum Tempus occurrit Regi*). And in the case of concealed fraud, the right of a person to bring an action to recover land or rents is deemed to have accrued at the time he discovered, or might have discovered, the fraud. The statutes do not interfere with the equitable doctrines of laches and acquiescence (*q. v.*).

LIMITATION  
OF RIGHTS OF  
ACTION, &c.

Disabilities.

Acknowledg-  
ment.

Trusts, &c.

Fraud.

<sup>1</sup> As to the accuracy of the expression, see Butler's note (*h*) to Fearn, 10; Smith, § 36.

<sup>2</sup> Butler's note to Fearn, 381.

<sup>3</sup> See Co. Litt. 114 b.

<sup>4</sup> 3 & 4 Will. 4, c. 27, ss. 2, 34.

<sup>5</sup> *Rains v. Buxton*, 14 Ch. D. 537.

<sup>6</sup> Shelford, R. P. Stat. 267; stats. 21 Jac. 1, c. 16, s. 3; 9 Geo. 4, c. 14.

<sup>7</sup> *Hodgson v. Williamson*, 15 Ch. D. 87.

The following are the periods allowed by the principal Statutes of Limitation :—

Statute.	Subject Matter.	Ordinary Limitation.	Extended Time for Persons under Disability.	Maximum Period.
3 & 4 Will. 4, c. 27 } 37 & 38 Vict. c. 57 }	Lands and rents.	Twelve years.	Six years.	Thirty years.
Same, and 7 Will. 4 & 1 Vict. c. 28.	Redemption of mortgage where mortgagee in possession.	Twelve years.	None. <sup>1</sup>	
3 & 4 Will. 4, c. 27 } 37 & 38 Vict. c. 57 }	Moneys charged on land.	Twelve years.	None.	
Same.	Legacies.	Twelve years.	None.	
23 & 24 Vict. c. 38.	Claims to estates of intestates.	Twenty years.	None.	
3 & 4 Will. 4, c. 27.	Arrears of dower or rent, or of money charged on land, or of interest on legacies.	Six years.	None.	
Same.	Land or rent belonging to an ecclesiastical or eleemosynary corporation sole.	Two incumbencies and six years, or sixty years, whichever is longer.	None.	
Same, and 6 & 7 Vict. c. 54.	Adwosons.	Three incumbencies or sixty years.	None.	One hundred years.
3 & 4 Will. 4, c. 42.	Bonds, covenants, recognizances, &c.	Twenty years.	Full period after removal of disability.	
Same.	Penalties under statute.	Two years.	Same.	
21 Jac. 1, c. 16, and 9 Geo. 4, c. 14.	Simple contracts, torts to property, and actions on the case, except those mentioned below.	Six years.	Same.	
21 Jac. 1, c. 16.	Assaults and other torts to the person.	Four years.	Same.	
Same.	Slander.	Two years.	Same.	

Companies. **LIMITATION OF LIABILITY.**—§ 1. As to companies with limited liability, see *Company*, § 4 *et seq.*; *Contributory*.

Shipowners. § 2. A shipowner is not liable at all for loss of or damage to goods on the ship in certain cases (*e. g.* when caused by fire),<sup>2</sup> and is not liable for loss of life or injury to persons or things caused by or on board the ship in other cases beyond a certain amount for each ton of the ship's tonnage, namely, 15*l.* per ton in respect of loss of life or personal injury, and 8*l.*

<sup>1</sup> *Kinsman v. Rouse*, 17 Ch. D. 104;  
*Forster v. Patterson*, *ibid.* 132.

<sup>2</sup> *Merch. Shipp. Act*, 1854, s. 503.

per ton for loss or damage to goods. If the damages actually sustained exceed the amount thus arrived at, it is paid into Court, and distributed among the claimants in proportion to their claims. The claimants are said to prove against the fund in Court just as creditors prove against an insolvent estate. (See *Proof*.) These limitations of liability only apply to cases where the loss or injury has not been caused by the shipowner's actual fault or privity.<sup>1</sup>

§ 3. Where two vessels are injured by collision, and both are to blame, so that the rule as to halving the damage applies (as to which see *Collision*), and one of them obtains a limitation of his liability under the M. S. Act, 1862 (*supra*, § 2), no set-off is allowed between the amounts of the respective damages. Thus, suppose the ships A. and B. come in collision, and both are to blame, and the half-damage payable by A. is 14,000*l.*, and that payable by B. is 2,000*l.*, then if there were no limitation of liability, A. would be liable to B. in the difference, namely, 12,000*l.* But if ship A. obtains a judgment limiting its liability to 5,000*l.*, the question arises, whether ship B. should be entitled to set off the 2,000*l.* against the 14,000*l.*, and prove against the 5,000*l.* for the balance of 12,000*l.*, or whether ship B. is bound to pay the 2,000*l.* in full to ship A., and prove for the 14,000*l.* against the 5,000*l.* It has been decided that the latter is the correct principle.<sup>2</sup>

Where damage is halved.

**LIMITED.**—As to limited companies, see *Company*, §§ 4 *et seq.* As to limited grants of administration and probate, see *Grant*, §§ 5 *et seq.*

**LINEAL.** See *Consanguinity*; *Descent*, § 10; *Warranty*.

**LIQUIDATED.**—A sum is said to be liquidated when it is fixed or ascertained. The term is usually employed with reference to damages (*q.v.* § 2). See also *Writ of Summons*.

**LIQUIDATION.**—I. § 1. Under the Bankruptcy Act, 1869, a debtor unable to pay his debts may present a petition stating that he is insolvent, and thereupon summon a general meeting of his creditors. If the meeting passes a special resolution declaring that the affairs of the debtor are to be liquidated by arrangement, and not in bankruptcy, the creditors appoint a trustee, with or without a committee of inspection, and the property of the debtor vests in the trustee and becomes divisible among his creditors, in the same way as if he had been made bankrupt. The subsequent proceedings generally follow the same course as those in an ordinary bankruptcy (see *Bankruptcy*, §§ 5 *et seq.*), except that the close of the liquidation and the discharge of the trustee are fixed by the creditors.<sup>3</sup> The theory of the proceeding is that the affairs of the estate are brought under the immediate control of the creditors, without the delays and

Insolvent debtor.

<sup>1</sup> Merch. Shipp. Amendment Act, 1862, s. 54; Maude & Pollock, Merch. Shipp. 51; Williams & Bruce's Admiralty, 68.

<sup>2</sup> *Chapman v. Royal Netherlands Co.*, 4 P. D. 157.

<sup>3</sup> Bankruptcy Act, 1869, s. 125; Bankruptcy Rules, 1870, rr. 252 *et seq.*

expenses caused by the supervision of the Court as in bankruptcy, but it cannot be said that this object is always attained. (See *Committee of Inspection*; *Composition*, § 4; *Discharge*, § 4.)

Companies. II. § 2. As to the liquidation of companies, see *Winding-up*.

**LIQUIDATOR** is a person appointed to carry out the winding-up of a company (see *Winding-up*). § 2. In the case of a voluntary winding-up with or without supervision, liquidators are appointed by the company;<sup>1</sup> but where a company is being wound up subject to supervision, the Court may appoint additional liquidators.<sup>2</sup> § 3. In the case of a compulsory winding-up, a provisional liquidator may be appointed by the Court as soon as a petition for winding-up has been presented: he resembles a receiver (*q. v.*).<sup>3</sup> After the winding-up order is made, official liquidators are appointed for the purpose of conducting the proceedings in the winding-up, subject to the directions of the Court.<sup>4</sup>

Provisional.

Official.

§ 4. The duties of a liquidator are to get in and realize the property of the company, to pay its debts, and to distribute the surplus (if any) among the members. The chief difference between an official liquidator and a liquidator appointed in a voluntary winding-up is, that the former cannot as a rule take any important step in the winding-up without the sanction of the Court, while the latter is not so restricted; he also does various things which, in a compulsory winding-up, are done by the Court, *e.g.*, settling the list of contributories and making calls.

**LIS ALIBI PENDENS** = "a suit pending elsewhere." The fact that proceedings are pending between a plaintiff and defendant in one Court in respect to a given matter is frequently a ground for preventing the plaintiff from taking proceedings in another Court against the same defendant for the same object and arising out of the same cause of action. As a general rule, the plaintiff is put to his election which suit he will pursue, and the other is either dismissed, or the proceedings in it are suspended until the other is decided.<sup>5</sup>

**LIS MOTA** is existing or anticipated litigation. The phrase is used chiefly with reference to declarations or statements made under such circumstances that they are admissible in evidence notwithstanding the rule against hearsay evidence; thus a pedigree drawn up by a member of a family is admissible after his death as evidence of the facts stated in it, unless it can be shown that it was drawn up post litem motam.<sup>6</sup> The phrase is also used in questions of privileged communications. (See *Confidential Communications*; *Privilege*.)

<sup>1</sup> Companies Act, 1862, s. 133; Lindley, 1413; Thring on Companies, 187.

<sup>2</sup> Companies Act, 1862, s. 150.

<sup>3</sup> *Ibid.* s. 85; Lindley, 1270; Thring, 181.

<sup>4</sup> Companies Act, 1862, s. 92; Lindley, 1271; Thring, 183.

<sup>5</sup> *Walsh v. Bishop of Lincoln*, L. R., A. & E. 242; *The Caterina Chiazzare*,

1 P. D. 368; Westlake's Priv. Int. Law.

<sup>6</sup> Per Lord Mansfield, *Berkeley Peerage Case*, 4 Camp. at p. 415; Best on Evidence, 633. "Prove that it [the pedigree] was made post litem motam, not meaning thereby a suit actually pending, but a controversy existing, and that the person making or concocting the declaration took part in the controversy. Shew me even that there



**LIS PENDENS** is a pending suit, action, petition for winding up a company,<sup>1</sup> or the like. The old doctrine of *lis pendens* was that if property was in question in a suit or action, it could not be alienated during the pendency of the suit or action, even to a purchaser or mortgagee without notice.<sup>2</sup> But by stat. 2 & 3 Vict. c. 11, no *lis pendens* binds a purchaser or mortgagee without express notice thereof, unless a memorandum giving a description of the person whose estate is intended to be affected thereby, and particulars of the suit, is registered in the Common Pleas Registry Office,<sup>3</sup> now the Central Office (*q. v.*). The registration of a *lis pendens* does not create an incumbrance on the property, but merely gives intending purchasers or mortgagees notice of the litigation.<sup>4</sup>

Provision is made by stat. 30 & 31 Vict. c. 47 for vacating a *lis pendens* if the litigation is not prosecuted *bonâ fide*.

**LITIGIOUS.**—In ecclesiastical law, a church or benefice is said to be litigious when two patrons present to it by several titles, because then the bishop knows not under which presentation to admit, even if they both present the same clerk.<sup>5</sup> (See *Jus Patronatûs*; *Quare impedit*.)

**LITIS CONTESTATIO.** See *Contestation of Suit*.

**LITTLETON.**—Thomas Littleton seems to have been born about the beginning of the fifteenth century; was called to the bar at the Inner Temple, made serjeant-at-law 1453, judge of the Common Pleas 1466, knighted 1475, and died 23rd August, 1481. He wrote the celebrated "Treatise on Tenures," still quoted as an authority on the law of real property, and made valuable by the equally celebrated Commentary of Sir E. Coke.<sup>6</sup> There is also a commentary on it by an unknown writer, which is pronounced by Mr. Hargrave to be "a very methodical and instructive work."<sup>7</sup>

**LIVERY.**—Formerly when an infant heir of land had been in ward to the king by reason of a tenure in capite ut de coronâ, he was obliged on attaining twenty-one to sue livery, that is, to obtain delivery of the possession of the land, for which (in the case of a general livery) he paid half-a-year's profit of the land. Livery was either general, that is, in the ordinary form, which had several disadvantages, or special, that is, granted by the king as a matter of grace, by which those disadvantages were avoided and for which the heir had to pay more.<sup>8</sup> As to the mode by which a tenant in capite ut de honore obtained his lands, see *Ousterlemain*. (See *Guardian*; *Knight's Service*; *In Capite*.)

**LIVERY OF SEISIN** is a public solemnity, or "overt ceremony," which was formerly necessary to convey an immediate estate of freehold

was a contemplation of legal proceedings, with a view to which the pedigree was manufactured, and I shall then hold that it comes within the rule which rejects evidence fabricated for a purpose, by a man who has an interest of his own to serve." Per Lord Brougham in *Monkton v. Att.-Gen.*, 2 Russ. & M. at p. 161; see also *Slaney v. Wade*, 1 Myl. & C. 338.

<sup>1</sup> Companies Act, 1862, s. 114; see *In re Barned's Banking Co.*, *Ex parte Thornton*, 2 Ch. 171.

<sup>2</sup> Fisher on Mortgage, 582.

<sup>3</sup> *Ibid.* 129.

<sup>4</sup> See an article on the subject in the Jurist, 1865 (part ii.) 383; *Bull v. Hutchins*, 32 Beav. 615; 9 Jur., N. S. 954.

<sup>5</sup> Phillimore, Eccl. Law, 445; Co. Litt. 243 a.

<sup>6</sup> Foss's Biog. Dict.; Coke's Preface to the First Institute.

<sup>7</sup> Cary's Comm. on Littleton, vii.

<sup>8</sup> Co. Litt. 77 a.

in lands or tenements: that is, an estate of freehold in possession, or an estate of freehold only kept out of possession by a chattel interest (*i.e.*, a term of years) preceding it.<sup>1</sup> Thus, if before the Statute of Uses a tenant in fee wished to convey his estate to another, he could only do so by a feoffment, which operates by livery of seisin.<sup>2</sup> (See *Feoffment*.) At the present day simpler means of conveyance are usually available, and livery of seisin is practically obsolete.

§ 2. Livery of seisin is a transfer of the feudal possession of land, and it is therefore essential that it should be made either in the absence or with the assent of all persons having a right to the possession as against the feoffor, such as lessees for years.<sup>2</sup>

Livery in deed.

Livery in law, or within the view.

§ 3. There are two kinds of livery of seisin, viz., a livery in deed and a livery in law. A livery in deed is where the feoffor is on the land to be conveyed, and verbally requests or invites the feoffee to enter, or formally hands to him any object, such as the ring or hasp of the door of the house, or a branch or twig of a tree, or a turf of the land, and declares that he delivers it to him by way of seisin of all the lands and tenements contained in the deed of feoffment.<sup>3</sup> § 4. "A livery in law [or livery within the view] is when the feoffor saith to the feoffee, being in view of the house or land, 'I give you yonder land to you and your heires, and go enter into the same, and take possession thereof accordingly,' and the feoffee doth accordingly in the life of the feoffor enter, this is a good feoffment."<sup>4</sup> (See *Heredilament*, § 2.)

**LIVING.** See *Benefice*. As to living memory, see *Memory*.

**LLOYD'S BONDS** are instruments of modern origin, being the invention of the eminent counsel whose name they bear. They are intended to assist railway companies in carrying out their schemes, by indirectly enlarging their borrowing powers, which are limited by the acts creating them, and by the stats. 7 & 8 Vict. c. 85, s. 19, and 8 & 9 Vict. c. 16. A Lloyd's bond is merely an admission under seal of a debt due from some railway company to the party in whose favour it is executed, with a covenant to pay the debt with interest.<sup>5</sup> The obligee is thus enabled to go into the market and obtain cash upon the faith of these instruments.<sup>6</sup> They are generally used (and can only legally be used) for paying contractors and others who have done work or supplied materials, &c. for the company, and cannot be given for a mere loan of money to the company.<sup>7</sup>

**LOCAL BOARDS OF HEALTH** are (i) authorities formed under the Local Government Acts (*q.v.*) for carrying out in their respective districts the provisions of those acts; (ii) authorities formed by order of

<sup>1</sup> Co. Litt. 48 a; Shepp. Touch. 209 *et seq.*; Burton's Comp. 7.

<sup>2</sup> Co. Litt. 48 b; Jarman & Bythewood, iv. 40; Williams on Seisin, 100.

<sup>3</sup> Co. Litt. 48 a.

<sup>4</sup> *Ibid.* 48 b.

<sup>5</sup> "An account stated under seal, with a covenant to pay:" per Blackburn, J., *Chambers v. Manchester and Milford Railway Co.*, 33 L. J., N. S., Q. B. 268; 5 Best & Smith, 588.

<sup>6</sup> Tarrant on Lloyd's Bonds, 7, 8.

<sup>7</sup> See Hodges on Railways, 129 *et seq.*

the Local Government Board under the Public Health Act, 1875, which repealed the Local Government Acts. Both kinds of local boards are urban sanitary authorities for the execution of the provisions of the Public Health Act, 1875. (See *Sanitary Authorities*.)

**LOCAL GOVERNMENT ACTS** are various statutes from 21 & 22 Vict. c. 98, to 26 & 27 Vict. c. 17, the first of which gave certain districts the power of adopting and carrying into effect the Public Health Act, 1848 (as amended by the L. G. A. 1858) without the necessity of a provisional order of the (then) General Board of Health confirmed by act of parliament. The acts deal with various subjects, including sanitary matters; but they have now been repealed and their provisions incorporated in the Public Health Act, 1875. This act, however, distinguishes its "sanitary provisions" from its "local government provisions;" the latter being those which deal with the powers of local authorities in respect to the construction, maintenance, repair and regulation of the highways, streets and buildings within their respective districts. (See *Provisional Order*; *Sanitary Authorities*.)

**LOCAL GOVERNMENT BOARD** is a board established by the stat. 34 & 35 Vict. c. 70, for the purpose of concentrating in one department of the government the supervision of the laws relating to the public health, the relief of the poor, and local government. The Board may be said to have the control of the various local authorities entrusted with the execution of these laws in their respective districts (see *Sanitary Authorities*; *Poor*; *Local Government*), and its sanction is necessary for many purposes, *e.g.*, the borrowing of money by sanitary authorities under the Public Health Acts.<sup>1</sup>

**LOCKE KING'S ACT**, so called from the member of parliament by whom the bill was introduced, is the statute 17 & 18 Vict. c. 113. It provides that when any person dies entitled to any estate or interest in land which is charged at the time of his death with the payment of money by way of mortgage, and he does not signify a contrary intention, his heir or devisee shall not be entitled to have the mortgage debt discharged out of his personal estate (as was the old rule), but shall take the land subject to the debt.<sup>2</sup> The rule has been extended to equitable charges and liens for unpaid purchase-money, and has been made applicable to leaseholds.<sup>3</sup> (See *Marshalling*; *Exoneration*.)

**LOCUS REGIT ACTUM**, in private international law, is the rule that when a legal transaction complies with the formalities required by the law of the country where it is done, it is also valid in the country where it is to be given effect to, although by the law of that country other formalities are required.<sup>4</sup> There are many exceptions to the rule, the principal

<sup>1</sup> The Board has the same powers and duties as those formerly vested in the Poor Law Board, the General Board of Health and some other authorities. Steph. Comm. iii. 49, 176.

<sup>2</sup> Williams R. P. 438; Fisher on Mortgage, 681, 696.

<sup>3</sup> Stats. 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34.

<sup>4</sup> Savigny, Syst. viii. § 381; Westlake, Priv. Int. Law, 159.

being with reference to land and other immoveables. The will of a British subject is valid in England, so far as regards personal estate, if made according to the forms required either by the law of the place where it was made, or by the law of his domicile.<sup>1</sup> (See *Lex Loci; Domicile.*)

**LOCUS STANDI** is the right of a person to be heard on a judicial or quasi-judicial proceeding. The phrase is chiefly used in parliamentary practice with reference to the question whether a person who objects to a private bill has the right to appear by counsel and summon witnesses to support his objection before the select committee.<sup>2</sup> (See *Referee.*)

**LODGER—LODGINGS.**—§ 1. A lodger is a person who occupies rooms in a house of which the general possession remains in the landlord, as shown by the fact that he retains control over the street or outer door. If, therefore, a house is divided into sets of rooms, each of which has an outer door opening on to a common staircase, while the entrance to that staircase either has no street-door, or has a door under the control of a porter acting as the servant of the collective tenants, then each set of rooms is not a lodging, but a separate hereditament, and each tenant has a rateable occupation.<sup>3</sup> (See *Rateable.*)

Exemption  
from distress.

§ 2. Goods belonging to a lodger are exempt from distress for rent owing by the lodger's landlord to the superior landlord. To entitle himself to this exemption, the lodger must serve on the superior landlord a declaration, with an inventory of the goods distrained on, stating if any rent is due to his immediate landlord, and that the goods are his, and must tender the amount to the superior landlord.<sup>4</sup>

Franchise.

§ 3. In every parliamentary borough, a person who has occupied lodgings, being of the yearly value of 10*l.*, for twelve months preceding the last day of July in any year, is entitled to be registered as a voter at parliamentary elections.<sup>5</sup>

Common  
lodging  
houses.

§ 4. The acts relating to the public health contain provisions for the registration, inspection and regulation of common lodging houses.<sup>6</sup>

**LOPWOOD** is a right in the inhabitants of a parish within a manor to lop for fuel at certain periods of the year the branches of trees growing upon the waste lands of the manor. The true nature of the right is not quite clear, and it seems that it can only be created by crown grant or act of parliament.<sup>7</sup> (See *Profit à prendre; Prescription.*)

**LORD—LORDSHIP.**—§ 1. In the law of real property, a lord is a person of whom land is held by another as his tenant. The relation between the lord and the tenant is called tenure (*q. v.*), and the right or

<sup>1</sup> Stat. 24 & 25 Vict. c. 114.

<sup>2</sup> May, Parl. Pr. 761.

<sup>3</sup> Castle on Rating, 83; L. R., 7 Q. B. 96.

<sup>4</sup> Stat. 34 & 35 Vict. c. 79.

<sup>5</sup> Stats. 30 & 31 Vict. c. 102; 41 & 42 Vict. c. 26, ss. 5 *et seq.*

<sup>6</sup> Public Health Act, 1875, ss. 76 *et seq.* The acts relating to the Metropolis are the Common Lodging Houses Acts, 1851, 1853, and the Sanitary Acts, 1866—1874.

<sup>7</sup> *Willingale v. Maitland*, L. R., 3 Eq. 103; *Chilton v. Corporation of London*, 7 Ch. D. 735.

interest which the lord has in the services of his tenant is called a lordship or seignory (*q. v.*).<sup>1</sup>

§ 2. If before the Statute of Quia Emptores (*q. v.*), A. conveyed land to B. to hold of himself (A.), and B. conveyed it to C. to hold of himself (B.), A. would be called lord paramount, B. mesne lord, or "mesne," and C. tenant paravail (see *Mesne*). The Statute of Quia Emptores having abolished subinfeudation, no person can now create a lordship (see *Subinfeudation*). The only lords of any importance at the present day are lords of manors (see *Manor*). But the crown is sovereign lord, or lord paramount, of all the land in England,<sup>2</sup> and in that character sometimes becomes entitled to land by escheat (*q. v.*).

See *House of Lords*.

**LORD CHANCELLOR.** See *Chancellor*, § 2.

**LORD CHIEF JUSTICE.** See *Justice*.

**LORD HIGH STEWARD.**—§ 1. When a person is impeached, or when a peer is tried on indictment for treason or felony before the House of Lords, one of the lords is appointed Lord High Steward, and acts as speaker pro tempore (see *Impeachment*; *Certiorari*, § 3). § 2. If a peer is indicted for treason or felony while the House of Lords is not sitting, the indictment is removed into the Court of the Lord High Steward, which is a Court instituted by commission from the crown, summoning all the peers of parliament; in it the Lord High Steward is sole judge on points of law, and the peers summoned are triers and judges of fact only.<sup>3</sup>

**LORD KEEPER**, or Keeper of the Great Seal, was originally another name for the Lord Chancellor. (See *Chancellor*, § 2.) After Henry II.'s reign they were sometimes divided, but now there cannot be a lord chancellor and lord keeper at the same time, for by the stat. 5 Eliz. c. 18 they are declared to be the same office.<sup>4</sup>

**LORD LIEUTENANT.**—The office of "lieutenants of counties" was created about the reign of Henry VIII., or one of his children (some say in that of Edward VI.), for the purpose of having a representative of the crown in each county, to keep it in military order. For this purpose they have the power of raising militia. Formerly, they had the command of the militia and other auxiliary forces, and appointed their officers,<sup>5</sup> but by the stat. 34 & 35 Vict. c. 86, the jurisdiction of lieutenants of counties in these respects has been transferred to the crown. They have, how-

<sup>1</sup> Williams on Seisin, 9.

<sup>2</sup> Co. Litt. 1 a, 65 a.

<sup>3</sup> Hom. Cox, Inst. 473; Steph. Comm. 302. This Court is not to be confounded with that of the Lord Steward of the King's Household, practically abolished

by stat. 9 Geo. 4, c. 31; Steph. Comm. iv. 325.

<sup>4</sup> Comyns' Dig. *Chancery*, B. 1.

<sup>5</sup> Steph. Comm. ii. 585; Broom & Hadley, Comm. i. 496.

ever, the power of recommending persons for certain commissions, to which recommendations the crown is bound to give effect.

**LORD MAYOR'S COURT.** See *Mayor's Court of London*.

**LORDS OF APPEAL** are those members of the House of Lords of whom at least three must be present for the hearing and determination of appeals. They are the Lord Chancellor, the Lords of Appeal in Ordinary (*infra*, § 2), and such peers of parliament as hold or have held high judicial offices—such as ex-chancellors and judges of the superior Courts in Great Britain and Ireland.<sup>1</sup> § 2. Lords of Appeal in Ordinary are persons appointed by the Queen for the purpose of aiding the House of Lords in the hearing and determination of appeals; they must have held some high judicial office for two years, or have been practising barristers or advocates for at least fifteen years. They are barons for life, and are entitled to sit and vote in the House of Lords during their tenure of office.<sup>2</sup>

In ordinary.

**LORDS JUSTICES OF APPEAL** are at present of three classes, namely, (1) the Lords Justices of Appeal in Chancery, who were in office when the Judicature Acts came into operation, and who by those acts were made members of the new Court of Appeal (*q.v.*); (2) the Lords Justices appointed under the Judicature Act, 1875; and (3) those appointed under the Appellate Jurisdiction Act, 1876. § 2. The two Lords Justices of the Court of Appeal in Chancery were appointed under the stat. 14 & 15 Vict. c. 83, to assist the Lord Chancellor in disposing of appeals from the Master of the Rolls, the Vice-Chancellors, and the Bankruptcy Court, and in disposing of business in lunacy.<sup>3</sup> (See *Court of Appeal in Chancery*.) § 3. The Lords Justices of Appeal under the Judicature Act are the ordinary members of the Court of Appeal: three of them (including the successors to the L.JJ. of A. in Chancery) are appointed under the Judicature Act, 1875, s. 4, and three under the Appellate Jurisdiction Act, 1876, s. 15; the latter L.JJ. differ from the three former in being under the obligation to go circuit, and to act on commissions of assize. (See *Court of Appeal; House of Lords*.)

**LOSS.**—§ 1. In the law of marine insurance, “the losses which arise from the various perils insured against may be either *total* or *partial*; they are *total* when the subject-matter of the insurance is wholly destroyed, or injured to such an extent as to justify the owner in abandoning to the insurer, and *partial* when the thing insured is only partially damaged, or where, in the case of an insurance on goods, the owner of them is called upon to contribute to a general average. § 2. Total losses may again be divided into *actual* and *constructive* total losses. Actual total losses arise where the ship or cargo is totally destroyed or annihilated, or where they are placed by any of the perils insured against in such a position that it is

Total.

Partial.

Actual total  
loss.

<sup>1</sup> Appellate Jurisdiction Act, 1876, ss. 2, 25.

<sup>2</sup> *Ibid.* s. 6.

<sup>3</sup> Haynes's Equity, 32.

wholly out of the power of the assured to procure their arrival. Thus, where by means of a peril insured against, a ship founders at sea, or is actually destroyed, or even where she is so much injured that she ceases to retain the character of a ship, and becomes a wreck or a mere congeries of planks, the loss is total and actual, although the form of the ship may still remain; and in these cases the assured may recover for a total loss without abandonment."<sup>1</sup> § 3. "Losses are constructively total when the subject-matter of the insurance, although still in existence, is either actually lost to the owners or beneficially lost to them, and notice of abandonment has been given to the underwriters. Thus, where the ship, although existing as a ship, is captured or laid under an embargo, and has not been recaptured or restored before action brought, so that she is lost to the owners; or where she is so damaged by a peril insured against as to be innavigable, and is so situated that either she cannot be repaired at the place in which she is, or cannot be repaired without incurring an expense greater than her value when repaired, the assured may abandon and treat the loss as total."<sup>2</sup>

Constructive  
total losses.

See *Abandonment; Insurance; Policy*.

As to loss of instruments, see *Accident*.

**LOST GRANT.**—Before the Prescription Act (*q. v.*), a claim to an easement could in theory only be supported either where it had been enjoyed from time immemorial, or where the claimant could prove that it had been created by a deed of grant. But after the statute 21 Jac. 1, c. 16, had limited the time for bringing possessory actions for land to twenty years, the Courts adopted the same period as sufficient to give rise to an easement, on the presumption that it had been created by a deed of grant which had been lost, "and juries were directed so to find in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction."<sup>3</sup> This presumption of a lost grant has been deprived of its importance in the case of most easements by the Prescription Act, but it is not altogether obsolete. (See *Support*).

**LOST OR NOT LOST** are words inserted in a maritime policy of insurance to prevent the operation of the rule that if a ship is lost at the time of insurance, the policy is void, although the assured did not know of the loss. The words operate to make the underwriter liable, even where the subject-matter of insurance had not vested in the assured at the time of the occurrence of the loss; for instance, if a merchant, having bought goods at sea, were to insure them "lost or not lost," the policy would entitle him to recover from the underwriter in respect of a loss sustained during the voyage, but before the purchase.<sup>4</sup> (See *Insurance; Policy; Loss*.)

<sup>1</sup> Maude & Pollock, Merch. Shipp. 402.

<sup>2</sup> *Ibid.* 404; Smith's Merc. Law, 382  
et seq.; *Aitchison v. Lohre*, 4 App. Ca. 755.

<sup>3</sup> *Angus v. Dalton*, 3 Q. B. D. at p. 105.

<sup>4</sup> Smith's Merc. Law, 354.

**LOT—LOT MEAD.**—§ 1. A lot is the same thing as a dole (*q. v.*).

§ 2. A lot mead or lot meadow is an open field divided into lots or doles.<sup>1</sup> (*See Dole; Open Fields.*)

These lot meads seem to have originated in certain manors where a piece of meadow land was periodically allotted to the freehold tenants of the arable land in the manor.<sup>2</sup>

*See Inheritance, § 5; Severalty.*

**LUCID INTERVAL** is an interval of sanity separating two attacks of insanity. Perfect sanity is not required to constitute a lucid interval in the sense in which the phrase is now used; it is sufficient that the lunatic knows what he is doing, and that his act is not affected by a delusion (*q. v.*). An act done during a lucid interval is as valid, and involves the same liabilities and responsibilities, as the act of a sane man.<sup>3</sup> (*See Lunatic.*)

**LUNACY** means either

I. The condition or status of a lunatic (*q. v.*), or

Proceedings  
in lunacy by  
inquisition.

II. Judicial proceedings taken before the Lord Chancellor or other person "intrusted by virtue of the Queen's sign manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind,"<sup>4</sup> for the purpose of making inquiry into the state of mind of persons alleged to be lunatics, of taking charge of them and their property if they are found to be lunatics, and for removing the restraint on their restoration to sanity. The proceedings generally consist of (1) a petition presented to the Lord Chancellor alleging the insanity, and supported by affidavits of medical men and a relative of the alleged lunatic, and praying for an inquiry; (2) an order by the Lord Chancellor directing the inquiry to be taken; (3) the inquiry before a Master in Lunacy with or without a jury, at which witnesses are examined and the alleged lunatic inspected; the "finding" or result of the inquiry is stated in a document called the inquisition, which consists of the verdict of the jury or (if there was no jury) of the master's certificate; (4) if the person has thus been found a lunatic, a statement called a state of facts and proposal, setting forth the result of the inquiry, and showing who are the heir-at-law and next-of-kin of the lunatic, his position in life, age, property, &c., the persons proposed as committees of his person and estate, and what sum should be allowed for his maintenance, is laid before the master; (5) evidence having been produced on these points, the master makes his report, giving the result of the inquiries and his recommendations as to the appointment of committees, management of property, maintenance, &c. (called consequential directions, because they are to be carried out on the confirmation of the

<sup>1</sup> Elton, Comm. 27.

<sup>2</sup> Williams, R. P. 501.

<sup>3</sup> Pope on Lunacy, 17, 18.

<sup>4</sup> Lunacy Reg. Act, 1853, s. 2. While the office existed, the Lords Justices of Appeal of the Court of Chancery were also

entrusted by warrant with this "care and commitment." Under the Judicature Acts, any judge of the High Court or the Court of Appeal may be so entrusted. Pope on Lunacy, 27.



report); and (6) the report is submitted to the Lord Chancellor for confirmation, with or without a petition; in the former case the confirmation is by order, in the latter by fiat; (7) the custody of the lunatic's person and estate is then granted to the committees, and provision is made for his maintenance, &c. (see *Committee*, § 1); (8) if the lunatic recovers his sound mind, he may obtain his release from restraint by presenting a petition for a supersedeas, and on the order being made a writ of supersedeas issues, by which the fiat, inquisition and other proceedings are superseded, determined, annulled and discharged; or the inquisition may be suspended for a time to test the effect of the removal of restraint.

§ 2. Where the property of a lunatic does not exceed 1,000*l.* in value, or 50*l.* a year, the Lord Chancellor has by the Lunacy Regulation Act, 1862, s. 12, power to make such order as he may consider expedient for the purpose of rendering the lunatic's property available for his maintenance, or for carrying on his business, without directing an inquiry as in ordinary cases; thus the income of the property may be ordered to be paid to some person to be applied for the maintenance of the lunatic.<sup>1</sup>

Proceedings  
under Act of  
1862.

§ 3. The High Court also has jurisdiction to authorize the income of the property of a person of unsound mind to be applied for his maintenance; this is done in an action for the administration of the property, instituted in the Chancery Division.<sup>2</sup> (See *Maintenance*.)

Chancery pro-  
ceedings.

As to lunatic trustees, see *Trustee Act*.

**LUNATIC** is used in law in three senses: to denote (1) a person who has attacks of intermittent insanity separated by lucid intervals,<sup>3</sup> or suffers from delusions (*q. v.*); (2) a person who from unsoundness of mind is incapable of managing himself or his affairs, and has been found or adjudged to be so by inquisition; and (3) a person detained in an asylum on account of unsoundness of mind.

§ 2. The word is used in the first sense when it is a question whether a person was insane or not when he entered into a contract, made his will, or did some other civil act; the general rule being that a contract or conveyance, &c. by a lunatic is voidable unless it was entered into by the other party without notice of his state of mind, *bonâ fide*, and for valuable consideration, and has been executed so that there cannot be a *restitutio in integrum*; but the principle is not satisfactorily settled.<sup>4</sup> (See *Delusion*.) A petition for divorce may be presented by the committee of a lunatic.<sup>5</sup> The term "lunacy" is not now often used with reference to criminal responsibility, having been superseded by the term "insanity"<sup>6</sup> (*q. v.*).

<sup>1</sup> Pope on Lunacy, 212; Elmer on Lunacy.

<sup>2</sup> *In re Bligh*, 12 Ch. D. 364; *In re T—*, 15 Ch. D. 78.

<sup>3</sup> "*Lunaticus qui gaudet lucidis intervallis*, and sometimes is of good and sound memory [*i. e.* mind], and sometimes *non compos mentis*." 4 Co. 124 b; Co. Litt. 247 a.

<sup>4</sup> Pope on Lunacy, 234; as to the wills of lunatics, see *ibid.* 327 *et seq.* and *Banks*

*v. Goodfellow*, L. R., 5 Q. B. 549; *Smee v. Smee*, 5 P. D. 84. Lunacy revokes an authority given by the lunatic while sane, but he continues to be liable for his agent's acts so far as concerns persons having no notice of his insanity. *Drew v. Nunn*, 4 Q. B. D. 661.

<sup>5</sup> *Baker v. Baker*, 5 P. D. 142; 6 P. D. 12.

<sup>6</sup> See Pope on Lunacy, 6, 14 *et seq.*

§ 3. In its second sense "lunatic" includes not only insane persons and idiots, but also persons imbecile from age or infirmity, so that they are incapable of managing themselves or their affairs. (See *Lunacy*.)

§ 4. In its third sense the word means a "proper person to be taken charge of and detained under care and treatment."<sup>1</sup> Such lunatics are divided into (i) pauper lunatics and criminal lunatics, who are confined and maintained at the public expense; and (ii) other lunatics, who are maintained either in private houses or in charitable institutions. Provision has been made by numerous acts of parliament for the licensing and regulation of lunatic asylums and for the visitation of lunatics so confined.<sup>2</sup> (See *Visitor*.)

## M.

**MAGISTRATE.**—§ 1. The term "magistrate" is sometimes used in a wide sense to denote a person charged with duties of government, and being either supreme, namely, the sovereign, or subordinate, namely, those officers who are appointed by or are subject to the sovereign.<sup>3</sup> In practice, however, "magistrate" means a judicial officer having a summary jurisdiction in matters of a criminal or quasi-criminal nature.

§ 2. In this sense of the word magistrates are of two kinds, honorary and stipendiary. The former class consists of justices of the peace (*q.v.*), the latter class includes the magistrates appointed to act in certain populous places (such as the metropolis) in lieu of the ordinary justices. These magistrates, who are also called police magistrates, generally have wider powers than ordinary justices.<sup>4</sup> To this class also belong the recorders in boroughs, and the recorder and common serjeant in the city of London. (See those titles.)

§ 3. As to the jurisdiction of magistrates generally, see *Justice of the Peace*. As to their liability for acts committed by them, see *Coram non Judge*; *Judge*, § 2.

**MAGNA CHARTA** is the name usually given to the charter originally granted by King John, and afterwards re-enacted and confirmed by parliament (more than thirty times, according to Coke), in the reigns of Henry III. and Edward I.<sup>5</sup> The charter now in force is the

<sup>1</sup> Stat. 16 & 17 Vict. c. 96, schedules.

<sup>2</sup> For an enumeration of the statutes, &c. relating to this subject, see Pope on Lunacy, 496 *et seq.*; Steph. Comm. iii. 112 *et seq.*

<sup>3</sup> Steph. Comm. ii. 318, 619, following Blackstone.

<sup>4</sup> As to metropolitan police magistrates, see stats. 2 & 3 Vict. c. 71; 10 & 11 Vict. c. 82 (repealed by Summary Jurisdiction

Act, 1879); 11 & 12 Vict. cc. 42, 43; 17 & 18 Vict. c. 20; 18 & 19 Vict. c. 126; 21 & 22 Vict. c. 73; 26 & 27 Vict. c. 97; 32 & 33 Vict. c. 34; parts of these acts are repealed by the Summary Jurisdiction Act, 1879.

<sup>5</sup> "It is called *Magna Charta*, not for the length or largeness of it, (for it is but short in respect to the charters granted of private things to private persons now a

statute 9 Henry III., with which our statute book commences. In addition to provisions respecting the feudal tenures, now of no practical importance, the charter contained provisions to protect the subject from abuse of the royal prerogative in the matter of arbitrary arrest and imprisonment, and from amercements, purveyance and other extortions. It also provided for the proper administration of justice, for the uniformity of weights and measures, and the protection of foreign merchants.<sup>1</sup>

**MAINPERNOR—MAINPRISE.**—Mainprise literally means a taking into the hand, and is used in the old books to signify the process of delivering a person to sureties or pledges (mainpernors) who undertook to produce him again at a future time. The term, therefore, included bail (*q. v.*), but it also had a wider signification, for bail only applied to cases where a man was arrested or imprisoned, while a man could be mainperned who had not been arrested or imprisoned, *e. g.*, in an appeal of felony and other obsolete proceedings.<sup>2</sup> The term has quite fallen into disuse.

**MAINTENANCE.**—**I.** § 1. In civil law, maintenance is the supply Civil. of necessaries, such as food, lodging, clothing, &c.

§ 2. Where property is being administered in an action or other By Court. proceeding in the Chancery Division, and the persons absolutely or presumptively entitled to it are incompetent to support themselves (as where they are infants or lunatics), the Court will direct a proper portion of the income to be expended for their maintenance.<sup>3</sup> Such an order may also be obtained, in the case of infants, on a summons issued in a summary way, without the institution of an action.

§ 3. A maintenance clause in a marriage settlement or will, by which Under settle- property is given to infants on their attaining majority, or the like, is one ment. which authorizes the trustees to expend the income of the property in maintaining and educating the infants during their minority. Now, by stat. 23 & 24 Vict. c. 145, this power is given to the trustees of all settled property.<sup>4</sup> (See *Accumulation*; *Lunacy*, § 3.)

**II.** § 4. In criminal law, maintenance “signifieth in law a taking in Criminal. hand, bearing up or upholding of quarrels and sides, to the disturbance or hindrance of common right . . . and it is twofold, one in the country and another in the court.”<sup>5</sup> An instance of maintenance in the country occurs where one person assists another in his pretensions to certain lands, by taking or holding the possession of them for him by force or subtilty.<sup>6</sup> This kind of maintenance is said to be punishable only at the suit of the king.<sup>7</sup> § 5. Maintenance in the courts includes champarty and embracery (*q. v.*), and is also used generally to denote the offence committed by a person who, having no interest in a suit,

dayes being (*elephantina charta*)), but it is called the great charter in respect of the great weightiness and weightie greatnesse of the matter contained in it in few words, being the fountaine of all the fundamentall lawes of the realme.” Co. Litt. 81 a.

<sup>1</sup> Steph. Comm. iv. 499.

<sup>2</sup> Fourth Inst. 179.

<sup>3</sup> Watson's Comp. Eq. 594; Pope on Lunacy, 137, 218; *Vane v. Vane*, 2 Ch. D. 124.

<sup>4</sup> Elphinstone, Conv. 311; Watson, 585; *Wilkins v. Jodrell*, 13 Ch. D. 564.

<sup>5</sup> Co. Litt. 368 b.

<sup>6</sup> Litt. § 701; Hawkins, P. C. i. 249.

<sup>7</sup> Co. Litt. 368 b.

maintains or assists either party, with money or otherwise, to prosecute or defend it.<sup>1</sup> The punishment at common law is fine and imprisonment; it is also prohibited by several statutes.<sup>2</sup> (See *Barrettry*.)

ETYMOLOGY.]—Norman-French, *meyntenir*,<sup>3</sup> to support; from *manus*, a hand, and *tenere*, to hold.

**MALA FIDES** ("bad faith") is the opposite of "bona fides" (*q. v.*).

**MALA IN SE—MALA PROHIBITA.**—*Mala in se* are acts which are wrong in themselves, such as murder, as opposed to *mala prohibita* (*mala quia prohibita*), or those acts which are only wrong because they are prohibited by law, such as smuggling. The distinction was formerly of importance with reference to the exemption of ambassadors, which, according to the earlier writers, only extended to *mala prohibita*; but this is no longer the case.<sup>4</sup> (See *Ambassador*.)

**MALA PRAXIS** is where a medical practitioner injures his patient by neglect, want of skill, or for experiment. Ordinary cases of *mala praxis* give rise to a right of action for damages. (See *Tort*.) In some cases of gross misconduct the party may be indicted.<sup>5</sup> (See also *Miscarriage*.)

**MALFEASANCE** is the doing of an unlawful act, *e. g.* a trespass.<sup>6</sup> Norman-French, *mau* or *mal*, wrongly, and *ferre*, to do. (See *Misfeasance*; *Nonfeasance*; *Tort*.)

**MALICE—MALICIOUS.**—§ 1. "Malice, in the legal acceptance of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another."<sup>7</sup> "Malice, in common acceptance, means ill-will against a person; but in its legal sense, it means a wrongful act done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of *malice*, because I do it *intentionally*, and without just cause or excuse. . . . If I am arraigned of felony, and wilfully stand mute, I am said to do it of *malice*, because it is intentional, and without just cause or excuse."<sup>8</sup>

Malice in law. § 2. Personal spite or ill-will is sometimes called actual malice, express malice, or malice in fact, to distinguish it from malice in law.<sup>9</sup> As to the effect of actual malice in questions of libel and slander, see *Privilege*.

Malice aforethought. § 3. In the definition of murder, malice aforethought exists where the

<sup>1</sup> Hawkins, 249; Steph. Crim. Dig. 86; Russell on Crimes, i. 354.

<sup>2</sup> Hawkins, 255 *et seq.*; stat. 32 Hen. 8, c. 9.

<sup>3</sup> Britton, 37 b.

<sup>4</sup> Steph. Comm. ii. 486.

<sup>5</sup> *Ibid.* iii. 376.

<sup>6</sup> Britton, 72 a; Cro. Jac. 266; Steph. Comm. iii. 363.

<sup>7</sup> Per Lord Campbell in *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 321, cited

Shortt on Copyright and Libel, 389.

<sup>8</sup> Per Bayley, J., in *Bromage v. Prosser*, 4 B. & C. 255, cited *ibid.* See Steph. Crim. Dig. 144.

<sup>9</sup> See *Toogood v. Spyring*, 1 Cr. M. & R. 193; *Wright v. Woodgate*, 2 Cr. M. & R. 577, cited Shortt, 428; per Brett, L. J., in *Clark v. Molynieux*, 3 Q. B. D. at p. 247; *Capital and Counties Bank v. Henty*, 5 C. P. B. 514.

person doing the act which causes death has an intention to cause death or grievous bodily harm to any person (whether the person is actually killed or not), or to commit any felony whatever, or has the knowledge that the act will probably cause the death of or grievous bodily harm to some person, although he does not desire it, or even wishes that it may not be caused.<sup>1</sup>

See *Homicide*; *Manslaughter*; *Murder*.

ETYMOLOGY.]—Latin, *malitia*, fraud, dishonesty, evil intention; from *malus*, bad.<sup>2</sup>

**MALICIOUS ARREST** is where a person maliciously and without reasonable cause procures another to be arrested. He thereby makes himself liable to an action for damages. The term is practically confined to cases of arrest in civil cases (*i. e.*, for debt, &c.) which have now become rare.<sup>3</sup> (See *Debtors Act*; *Malice*; *Tort*.)

**MALICIOUS INJURIES TO THE PERSON.**—Everyone who unlawfully and maliciously wounds or causes any grievous bodily harm to any person, or shoots or attempts to shoot him with the intent in any such case to maim, disfigure, disable or do some grievous bodily harm to him, is guilty of felony, and liable to penal servitude for life.<sup>4</sup>

**MALICIOUS INJURIES TO PROPERTY**—by which is meant those injuries to property which proceed rather from malicious or wanton motives than from any proposed gain to the offender—are in many cases criminal acts. They include arson (*q. v.*), causing injuries to buildings, &c. by gunpowder, destroying trees, cattle, &c., exhibiting false signals, removing buoys, &c., causing injuries to machinery, goods in process of manufacture, canals, telegraphs, ships, &c. Actual malice against the owner of the property is not essential.<sup>5</sup>

**MALICIOUS PROSECUTION** is where a person maliciously institutes criminal proceedings against another without probable cause, that is, believing that he is innocent. For the damage thereby caused to the accused he can sustain an action against the wrongdoer.<sup>6</sup> (See *Malice*; *Tort*.)

**MANAGER.**—§ 1. In Chancery practice, when a receiver (*q. v.*) is required for the purpose not only of receiving rents and profits, or of getting in outstanding property, but of carrying on or superintending a trade or business, he is usually denominated a “manager,” or a “receiver and manager.” The most usual cases in which managers are appointed are those in which partnership trades are to be carried on, or which

Chancery practice.

<sup>1</sup> Steph. Crim. Dig. 144; Russell on Crimes, i. 641.

<sup>2</sup> Dirksen, Man. Lat.

<sup>3</sup> Underhill on Torts, 738; Broom, C. C. L. 738.

<sup>4</sup> Stat. 24 & 25 Vict. c. 100, ss. 18 *et seq.*; Steph. Crim. Dig. 156.

<sup>5</sup> Stat. 24 & 25 Vict. c. 97; Russell on Crimes, ii. 892.

<sup>6</sup> Broom. C. C. L. 741; Underhill on Torts, 99.

relate to mines or collieries.<sup>1</sup> (See *Administration*, § 1.) § 2. If the trade or property is abroad, or in one of the colonies, and the manager must necessarily be resident there, it is usual to add to the order directing the appointment of a manager an order for the appointment of one or more consignee or consignees resident in this country, to whom the produce of the property in question may be remitted, and by whom it may be disposed of.<sup>2</sup>

As to the appointment of a manager by way of execution of a judgment, see *Execution*, § 7.

Bankruptcy.

§ 3. In bankruptcy, a manager of the business of the debtor may be appointed by the Court at any time after the presentation of the petition for adjudication or arrangement by liquidation or composition. A manager may also be appointed by the creditors themselves in an arrangement by liquidation or composition.<sup>3</sup>

Parliamentary.

§ 4. In parliamentary practice, where the two houses of parliament have a conference (*e.g.*, to settle amendments to a bill as to which there is a difference between the two houses), each house appoints managers to represent it, and the conference is held between the managers.<sup>4</sup> As to managers on an impeachment see that title.

**MANAGING OWNER OF SHIP.**—§ 1. The managing owner of a ship is one of several co-owners, to whom the others, or those of them who join in the adventure, have delegated the management of the ship. He has authority to do all things usual and necessary in the management of the ship and the delivery of the cargo, to enable her to prosecute her voyage and earn freight, with the right to appoint an agent for the purpose. It seems that it is a question to be decided in each case, whether a managing owner has been appointed by all his co-owners or only by some of them, and consequently whether he has power to bind all of them or only some of them: "he binds those whose agent he is; he binds nobody besides."<sup>5</sup>

Registration.

§ 2. Under the Merchant Shipping Act, 1876, s. 36, the name and address of the managing owner for the time being of every registered British ship must be registered, or if there is no managing owner, the ship's husband or other person to whom the management of the ship is entrusted, must be registered.

**MANDAMUS** is a writ issued in certain cases to compel the performance of a duty. It is directed to the person who is subject to the duty, and not to a sheriff or similar officer. Writs of mandamus are of two kinds.

Prerogative writ of mandamus.

I. § 2. The prerogative writ of mandamus issues in the Queen's name from the High Court of Justice on application to the Queen's Bench Division "in some cases where the injured party [the prosecutor] has

<sup>1</sup> Daniell, Ch. Pr. 1617.

<sup>2</sup> *Ibid.*

<sup>3</sup> Bankr. Act, 1869, s. 13; Bankr. Rules (1870), 260; Robson's Bankr. 335, 653.

<sup>4</sup> May's Parl. Pr. 454.

<sup>5</sup> Per Bowen, J., in *Frazer v. Cuthbertson*, 6 Q. B. D. 93; see *Coulthurst v. Sweet*, L. R., 1 C. P. 649; Merchant Shipp. Act, 1854, s. 18; M. S. Act, 1873, s. 22.

also another more tedious method of redress, as in the case of admission or restitution to an office; but it issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance,"<sup>1</sup> especially where the obligation arises out of the official status of the respondent and is hence of a public or quasi-public character. Thus the writ is used to compel the election, of corporate officers, to compel public officers to perform duties imposed upon them by common law or by statute (*e.g.*, to make a rate), to compel inferior Courts to proceed in matters within their jurisdiction<sup>2</sup> (*cf. Proce-dendo; Prohibition*), to compel the lord of a manor to admit a person as tenant of copyholds (see *Admittance*); it is also applicable in certain cases where a duty is imposed by act of parliament for the benefit of an individual: thus it lies to compel a railway company to comply with the provisions of its act for the benefit of private persons (*e.g.*, to build a bridge, open a road, &c.);<sup>3</sup> but in many such cases it has been superseded by the statutory writ of mandamus (*infra*, § 4). The writ recites the facts giving rise to the obligation, and commands the defendant to do the act or show cause why he does not; he may excuse himself by showing that the prosecutor on his own showing is not entitled to the writ, or by traversing some material fact alleged in the writ, or by alleging fresh matter as an answer to the prosecutor's case; if the return is insufficient or false the prosecutor may move to quash it, or may traverse, plead or demur to it, or may bring an action to recover damages for a false return (see *Return*). In any case if the prosecutor is successful the Court awards a peremptory mandamus, to which no excuse or other return except performance of the act required is allowed.<sup>4</sup> By the Common Law Procedure Act, 1854, s. 77, the provisions of that act and of the Common Law Procedure Act, 1852, so far as they are applicable, are extended to the pleadings and proceedings upon the prerogative writ of mandamus.

Peremptory  
mandamus.

§ 3. When witnesses whose evidence is required in a cause pending in the High Court in this country are resident in India or other parts of the Queen's dominions abroad, a writ in the nature of a mandamus may be issued requiring the judges of the principal Court in the colony to examine the witnesses and send over the depositions to be used at the trial.<sup>5</sup> (See *Commission*, § 7.)

Mandamus for  
the examina-  
tion of wit-  
nesses.

§ 4. By the C. L. P. Act, 1854 (ss. 68—74), the plaintiff in any action in any of the superior Courts (except replevin and ejectment) might claim a writ of mandamus, commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff was personally interested. The construction put upon this section limited it to cases where the duty is of a public or quasi-public nature (*e.g.*, to compel a railway company to carry out a compulsory purchase),<sup>6</sup> and not merely personal, such as that arising

Action of  
mandamus.

<sup>1</sup> Bl. Comm. iii. 110; Steph. Comm. iii. 630.

<sup>2</sup> Second Rep. C. L. P. Comm. 40; Phillimore, Eccl. Law, 1453. See an instance of a mandamus to the Postmaster-General and the return thereto, 1 Q. B. D. 658.

<sup>3</sup> Second Rep., C. L. P. Comm. 40.

<sup>4</sup> *Ibid.* 41; 3 Bl. 111; Tapping, 7, 400 *et seq.* An appeal may be brought from the granting of a peremptory mandamus; *Reg. v. All Saints, Wigan*, 1 App. Ca. 611.

<sup>5</sup> Chitty's Pr. 345; Smith's Action, 95.

<sup>6</sup> *Fotherby v. Met. Rail. Co.*, L. R., 2 C. P. 188.

out of a contract.<sup>1</sup> If the plaintiff recovered judgment the Court might, besides issuing execution in the ordinary way for the costs and damages, issue a peremptory writ of mandamus directed to the defendant and commanding him forthwith to perform the duty to be enforced.<sup>2</sup> The Judicature Acts contemplate actions of mandamus,<sup>3</sup> but contain no provisions on the subject; the provisions of the C. L. P. Act, 1854, therefore appear to remain in force, subject to the interpretation above mentioned. § 5. By the Judicature Act, 1873, an interlocutory mandamus may be granted in any case in which it shall appear to the Court to be just or convenient.<sup>4</sup> (See *Injunction*.)

Interlocutory  
mandamus.

§ 6. There are also statutory writs of mandamus under stats. 9 Ann. c. 20,<sup>5</sup> 11 Geo. 1, c. 4, and 7 Will. 4 & 1 Vict. c. 78, in many cases relating to corporations.<sup>6</sup>

ETYMOLOGY AND HISTORY.]—The writ of mandamus is so called from the words *vobis mandamus*, “we command you,” with which, when the writ was in Latin, the mandatory part commenced.<sup>7</sup> Originally “mandamus” was the generic name for a class of writs varying in their form and object,<sup>8</sup> but totally different from the modern prerogative writ, which, for the sake of distinction, was called a special mandamus.<sup>9</sup> In the 14th and the beginning of the 15th century the writ was in form a mere letter-missive from the sovereign; during the latter half of the 15th century the writ was directed to issue on a petition to parliament for redress; it thus became in form a parliamentary writ, and, being then chiefly used to enforce restitution to public offices, was commonly known as the “writ of restitution;” finally it became an original writ, issuable by the Court of King’s Bench in all cases where there was a legal right, but no other specific remedy.<sup>10</sup>

**MANDATE** is a direction or request. Thus a cheque is a mandate by the drawer to his banker to pay the amount to the transferee or holder of the cheque.<sup>11</sup>

**MANDATORY.** See *Injunction*, § 2. The mandatory part of a writ is that part by which the person to whom it is directed is commanded to do the act required of him.

**MANDATUM.** See *Bailment*, § 7.

**MANOR.**—§ 1. Properly speaking a manor is a district of land of which the freehold is vested in a person called the lord of the manor, of whom two or more persons, called freeholders of the manor, hold other land in respect of which they owe him certain free services, rents or other duties.<sup>12</sup> Hence every manor must be at least as old as the Statute of

<sup>1</sup> *Benson v. Paul*, 6 E. & B. 273; 25 L. J., Q. B. 274.

<sup>2</sup> *Day, C. L. P. Acts*, 319 *et seq.*; *Republic of Costa Rica v. Strousberg*, 11 Ch. D. 323.

<sup>3</sup> Jud. Act, 1875, App. A., Part II., sect. iv.

<sup>4</sup> Sect. 25, § 8; Rules of Court, lii. 4; *In re Paris Skating Rink Co.*, 6 Ch. D. 731.

<sup>5</sup> C. 25 in the Revised Statutes.

<sup>6</sup> Bl. Comm. iii. 264; Steph. Comm. iii. 631.

<sup>7</sup> See the forms given in Tapping, 437,

438, and 11 Co., 93 a (*Bagg’s Case*).

<sup>8</sup> For examples see *Termes de la Ley*; Tapping, 1, n. (a).

<sup>9</sup> *R. v. Gower*, 3 Salk. 230.

<sup>10</sup> Tapping, 3.

<sup>11</sup> *Smith v. Union Bank*, 1 Q. B. D. p. 33.

<sup>12</sup> Strictly speaking, the land vested in the freeholders does not form parcel of the manor; Williams on Seisin, 30. On the contrary, it is often said to be held of the manor, which is here personified so as to represent the lord. See *Ancient Demesne*.



Quia Emptores (*q. v.*); indeed, immemorial existence is essential to a manor.<sup>1</sup> The land which is vested in the lord is called the demesnes (*q. v.*), and comprises (1) the land of which the lord is seised, and which may be wholly in his own occupation or in that of his lessees for years, but in most manors is to a great extent in the occupation of the copyhold and customary tenants of the manor (though copyholders are not essential to a manor);<sup>2</sup> and (2) the waste lands of the manor, usually subject to the tenants' customary rights of common. (See *Common*.) A Court Baron for the freeholders, and a Customary Court for the copyholders (if any), are necessary incidents to every manor, and the principal manor in a parish usually has an advowson appendant to the demesnes.<sup>3</sup> There are also in general either annexed or appurtenant to the manor a variety of franchises (*q. v.*) exercisable by the lord, such as the right to have a Court Leet, the right to waifs and strays, treasure trove, wreck, the liberties of holding fairs and markets, of taking tolls and the like. Accordingly, a manor proper is shortly defined as consisting of demesne lands, jurisdiction in a Court Baron, and services of free tenants in fee, who are liable to escheat (*q. v.*) and owe attendance at the Court; or more shortly still as consisting of demesnes and services. (See *Demesne*, § 4; *Service*.)

§ 2. If the number of free tenants is reduced below two, the Court Baron cannot be held, and the manor ceases to exist, but may survive as a manor by reputation for the purpose of making a title to franchises or for holding copyholders' Courts. § 3. If all the demesnes are alienated, the manor is

Manor by reputation.

extinguished, and becomes merely a "lordship in gross;" while a temporary severance of all the demesnes, as by a lease for years, causes a suspension of the manor.<sup>4</sup>

Extinguishment and suspension of manor.

§ 4. If a copyhold tenement has by immemorial custom been treated by the tenant as if it were itself a manor, *e. g.*, by holding Courts, granting part of it to be held of himself as copyhold, &c., this forms a customary or copyhold manor, and the tenant is called a customary lord, although, as far as regards the principal manor, he is himself merely a copyholder of that manor, and pays fines, &c. like the other tenants.<sup>5</sup>

Customary manor.

§ 5. "Manor" may mean the district actually or formerly comprised in a manor in the strict sense, although the land may have been separated from it by enfranchisement.<sup>6</sup>

ETYMOLOGY AND HISTORY.]—§ 6. Manor is derived from the Norman-French, *manoir*, *maners* (Latin, *manerium*, from *manere*, to remain or dwell), a dwelling or habitation, originally applied to the mansion of the lord.<sup>7</sup> It is now generally supposed that manors were not a creation of the Norman conquest, but an adaptation to the Norman rules of tenure of the institutions known as village communities which existed among the Saxons.<sup>8</sup>

<sup>1</sup> Co. Copyh. § 31.

<sup>2</sup> See an instance of a manor without copyholders in *Warrick v. Queen's College*, L. R., 6 Ch. 716.

<sup>3</sup> Elton, Copy. 14.

<sup>4</sup> *Ibid.* 11; Burton, Comp. § 1026; Cruise, Dig. Copyhold, 2; Davids. Conv. i. 89; Co. Litt. 5 a.

<sup>5</sup> Co. Litt. 58 b; *Neville's Case*, 11 Co. 17.

<sup>6</sup> Elton, 15, citing *Delacherois v. Delacherois*, 11 H. L. C. 62.

<sup>7</sup> Dupin et Lab. gloss. s. v.; 2 Bl. Comm. 90, n. (13); Perkins, § 670.

<sup>8</sup> Williams, R. P., App. C.; Williams on Seisin, 13; Maine's Early Inst. 6; Digby, Hist. R. P. 11, 34, and the works there referred to, especially Stubbs.

**MANSLAUGHTER** is the crime of unlawful homicide, without malice aforethought. The most frequent instances occur (a) where death is caused accidentally by an unlawful act, as where A. strikes at B. with a small stick, not intending either to kill him or to do him grievous bodily harm, and the blow kills him; (b) where death is caused by culpable negligence, as where A., whose duty it is to put a stage at the mouth of a colliery shaft, omits to do so from mere negligence, in consequence of which B. is killed; (c) where death is caused by an act done in the heat of passion, caused by provocation, as in the case of an aggravated assault, or a fight, or unlawful imprisonment.

Manslaughter is felony, punishable by penal servitude for life, or a fine.<sup>1</sup>

**MANUMISSION** was the act of freeing or enfranchising a villein.<sup>2</sup> The term is taken from the Roman law.<sup>3</sup>

**MARCHET** was a fine which some tenants had to pay to their lord for liberty to give away their daughters in marriage. According to the old writers, no free man could be liable to pay such a fine, but only villeins,<sup>4</sup> and therefore it could not be claimed by custom against all the tenants of a manor.<sup>5</sup> But in later times a free man could take lands to hold by the service of marchet, if he liked to do so.<sup>6</sup> The tenure by marchet seems to have been long obsolete.

**ETYMOLOGY.**—Norman-French, *marché*,<sup>7</sup> *marchette*,<sup>8</sup> from Latin, *mercatus*, a buying and selling.

**MARINE INSURANCE.** See *Insurance*, § 3.

**MARITAL RIGHTS** are the rights of a husband. The expression is chiefly used to denote the right of a husband to property which his wife was entitled to during the treaty of marriage. If, after the engagement to marry, she makes a voluntary conveyance of any part of that property without notice to the intended husband, it is considered a fraud on his marital rights, and therefore liable to be set aside, although he may not have known that she was entitled to the property.<sup>9</sup> (See *Jus Mariti*.)

**MARITIME LAW.** See *Admiralty*; *Affreightment*; *Bill of Lading*; *Charter-party*; *Insurance*, § 3; *Lien*, § 6; *Merchant Shipping*; *Underwriter*.

**MARK.** See *Marksman*; *Merchandise Marks Act*; *Trade-Mark*.

**MARKET.**—The right to hold a market, including the right to charge tolls for its use by persons selling goods therein, and the right to prevent others from setting up a new market so near as to diminish the custom of the old one, is a franchise<sup>10</sup> (*q. v.*).

<sup>1</sup> Stephen's Crim. Dig. 144 *et seq.*; Russell on Crimes, i. 810 *et seq.*; stat. 24 & 25 Vict. c. 100.

<sup>2</sup> Litt. § 204 *et seq.*

<sup>3</sup> Just. Inst. i. 5.

<sup>4</sup> Bracton, 208 b, 26 a.

<sup>5</sup> Litt. § 209.

<sup>6</sup> *Ibid.* § 194.

<sup>7</sup> Britton, 97 b. This author also calls

it "redemption of blood," or "redemption of flesh and blood," 78 a; see Spelman, s. v. Grimm, D. R. A. 383.

<sup>8</sup> Loysel, Inst. Cout. gloss.

<sup>9</sup> Snell's Eq. 319; Williams, Pers. P. 446.

<sup>10</sup> Steph. Comm. i. 662 *et seq.*; see *Mayor of Penryn v. Best*, 3 Exch. D. 292; *Markets and Fairs Clauses Act*, 1847.

**MARKET OVERT** means "open market." Market overt in ordinary market towns is only held on the special days provided for particular towns, by charter or prescription, but in the city of London every day, except Sunday, is market day. The market place, or spot of ground set apart by custom for the sale of particular goods, is also in ordinary towns the only market overt, but in the city of London every shop in which goods are exposed publicly for sale is market overt, though only for such things as the owner professes to trade in.<sup>1</sup>

§ 2. The doctrine of market overt is that all sales of goods made therein are not only binding on the parties, but also on all other persons: so that if stolen goods are sold in market overt, the purchaser, if acting in good faith, acquires a valid title to them against the true owner, unless the latter has prosecuted the thief to conviction, in which case the goods re-vest in the true owner, and the buyer is left to obtain compensation out of any money which may have been taken from the thief on his apprehension.<sup>2</sup>

Sale in market overt.

§ 3. The doctrine of market overt does not apply to goods belonging to the crown, and in the case of horses it is subject to statutory restrictions.<sup>3</sup> (See *Horses*.)

**MARKSMAN.**—Where a person who cannot write is desirous of subscribing his name to a document, another person writes it for him, and he identifies it as his signature by inscribing over it, or near it, a mark, usually a cross. He is hence called a marksman. It seems that if there is any peculiarity about the mark, evidence *ex visu scriptiois* is admissible to prove it as the handwriting of the marksman, but not otherwise.<sup>4</sup> (See *Handwriting*.)

**MARQUE.** See *Letters of Marque*.

**MARRIAGE.**—I. § 1. Marriage is the voluntary union for life of one man and one woman to the exclusion of all others, for the purpose of living together and procreating children, entered into in accordance with the rules as to the consanguinity (*q. v.*) or affinity (*q. v.*) of the parties, and their capacity to enter into and perform the duties of matrimony, prevailing in the place of domicile of the parties, and in accordance with the rites or formalities required either by the law of England or the place where the marriage takes place:<sup>5</sup> as to which see *Marriage Acts*. A marriage must not contravene the fundamental principles of Christianity, and hence a polygamous marriage, although valid according to the *lex loci*, is no marriage according to English law.<sup>6</sup>

<sup>1</sup> Steph. Comm. ii. 73. That part of London not within the city does not seem to have the privilege of market overt: Williams, P. P. 461.

<sup>2</sup> Stat. 30 & 31 Vict. c. 35, s. 9. As to negotiable instruments and other valuable securities, see stat. 24 & 25 Vict. c. 96, s. 100; Williams, P. P. 462.

<sup>3</sup> Steph. 73 *et seq.*

<sup>4</sup> Best on Evidence, 329.

<sup>5</sup> Britton, 246 b; Macqueen's Husband and Wife, 1; Browne on Divorce, 53; Stephen's Comm. ii. 238; Phill. Eccl. Law, 705; *Hyde v. Hyde*, L. R., 1 P. & D. 130.

<sup>6</sup> Browne, 53.

§ 2. It is sometimes said that marriage is a contract, but this is incorrect; the agreement of the parties is essential to a valid marriage (see *Agreement*, § 1); but when it has been solemnized marriage is a personal relation of a very special kind,<sup>1</sup> somewhat resembling a natural relationship.

Effect on property.

§ 3. Marriage affects the property as well as the person.<sup>2</sup> For many purposes the husband and wife are one person in law, and hence the husband cannot at common law give or grant property to his wife *inter vivos*,<sup>3</sup> though he can under the Statute of Uses;<sup>4</sup> and a grant of land to the husband and wife by a third person gives them an estate by *entireties* (*q.v.*). The general rule is that the husband becomes by the marriage entitled absolutely to all the choses in possession belonging to his wife in her own right (see *Reduction into Possession*), and to the whole of the rents and profits of her land during the continuance of the coverture,<sup>5</sup> and to her chattels real if he survives her (see *Survivorship*); but this rule has had many exceptions engrafted on it; first, by the doctrines of equity, which allow a wife to hold separate estate (*q.v.*), and, secondly, by the Married Women's Property Acts (*q.v.*). Moreover, these rights of the husband do not extend to property held by the wife in *auter droit*, *e.g.*, as executrix. § 4. Another rule is, that if the husband survives the wife he has an interest in her lands and tenements during his life (see *Curtesy*), and vice versa (in certain cases) if she survives him (see *Dower*); but these interests are not now of frequent occurrence, other provisions being generally made by a settlement executed on the marriage.<sup>6</sup> (See *Settlement*.)

Husband's liability for debts.

§ 5. On the other hand, a husband was formerly liable for all the debts and liabilities of his wife contracted before the marriage, but this rule has been altered by the Married Women's Property Acts, which provide in effect that in the case of marriages taking place after 30th July, 1874, the husband shall be liable for his wife's debts and liabilities to the extent of the property belonging to the wife which he shall have acquired by the marriage, or which he might have acquired.<sup>7</sup> (See *Assets*, § 1.)

§ 6. A wife is not criminally liable for an offence committed by her under the coercion of her husband, except in the case of treason or murder and other heinous crimes.<sup>8</sup>

Marriage of ward by tenure.

II. § 7. Marriage formerly signified not only the union of man and wife, but also the right of a guardian by tenure to bestow his ward in marriage, "which the law gave to the lord, not for his benefit onely, but that he should match him [the ward] vertuously and in a good family without disparagement."<sup>9</sup> If an infant tenant by knight's service refused such a marriage, the lord was entitled to the value of the marriage, that is, to the amount which he would have received for giving his ward in

<sup>1</sup> *Hyde v. Hyde*, L. R., 1 P. & D. p. 133; *Sottomayer v. De Barros*, 5 P. D. at p. 101.

<sup>2</sup> See Watson's Comp. Eq. 316 *et seq.*

<sup>3</sup> Litt. § 168.

<sup>4</sup> Williams, R. P. 218.

<sup>5</sup> Macqueen, 17; Williams, R. P. 214.

He may also grant leases for twenty-one

years of any land of which she is seised in fee under the Settled Estates Act, 1877, s. 46. (See *Settled Estates Act*.)

<sup>6</sup> Williams, R. P. 220.

<sup>7</sup> Williams, P. P. 443.

<sup>8</sup> Roscoe, Crim. Ev. 990.

<sup>9</sup> Co. Litt. 76 a.

marriage,<sup>1</sup> but a guardian in socage could make no profit by the marriage of his ward.<sup>2</sup>

See *Bigamy*; *Disparagement*; *Divorce*; *Husband and Wife*; *Marital Rights*; *Necessaries*; *Settlement*; *Survivorship*.

**MARRIAGE ACTS.**—§ 1. The principal Marriage Acts are the stats. 4 Geo. 4, c. 76 and 6 & 7 Will. 4, c. 85. The former act provides for the publication of banns on three successive Sundays before the celebration of a marriage, unless it takes place by ecclesiastical licence (see *Licence*, § 4), and requires that it shall be solemnized by a person in holy orders and before two credible witnesses at least. It also provides for the case of one of the parties being under age, and for the consent of his or her parent or guardian being given. In certain cases marriages not solemnized in accordance with the provisions of the act are made void, and where a marriage is solemnized between persons, one of whom is under age, by means of the false oath or fraudulent procurement of one of the parties, the person so offending is liable to forfeit all property which would otherwise accrue to him or her from the marriage.

Marriage by banns or licence.

§ 2. The stat. 6 & 7 Will. 4, c. 85 (amended by stats. 7 Will. 4 & 1 Vict. c. 22; 3 & 4 Vict. c. 72; 19 & 20 Vict. c. 119; and 23 Vict. c. 18), introduced two new modes of celebrating marriages, by a certificate of the superintendent registrar of marriages with or without licence. To obtain the certificate without licence, public notice of the intended marriage must be given for twenty-one days: the certificate with licence only requires one day's notice. Under a registrar's certificate, marriages may be solemnized in any religious building registered for the purpose (except that under a certificate with licence a marriage may not be solemnized in a church or chapel of the Church of England), or it may be solemnized at the registrar's office.<sup>3</sup>

Marriage by registrar's certificate.

§ 3. Stats. 4 Geo. 4, c. 91, and 12 & 13 Vict. c. 68, provide for the marriage of British subjects abroad; and 28 & 29 Vict. c. 64, make colonial marriages valid everywhere, subject to certain restrictions. (See also *Domicile*, § 2.)

Foreign and colonial marriages.

§ 4. Under stat. 12 Geo. 3, c. 11, no descendant of King George II. other than the issue of princesses married into foreign families, may, except in certain cases, contract matrimony without the previous consent of the sovereign.<sup>4</sup>

Royal marriages.

**MARRIAGE-BROCAGE.**—A marriage brocade contract is an undertaking for reward to procure a marriage between two persons. Such a contract is void.<sup>5</sup> (See *Policy*.)

**MARRIED WOMEN'S PROPERTY ACTS** are the statutes 33 & 34 Vict. c. 93, and 37 & 38 Vict. c. 50. They provide in effect that (i) the earnings of a married woman derived from her own exertions; (ii) personal property coming to her during marriage, either (a) under

<sup>1</sup> Litt. § 110.

<sup>2</sup> *Ibid.* § 123.

<sup>3</sup> Browne on Divorce, 55 *et seq.*; Steph.

Comm. ii. 246.

<sup>4</sup> Steph. Comm. ii. 454.

<sup>5</sup> Chitty on Contracts, 618.

an intestacy, or (b) under any deed or will (not exceeding in the latter case 200*l.*); and

(iii) the rents and profits of real estate descending upon her during marriage,

shall belong to her, to her separate use; but in the case of property coming under (ii) and (iii) the rule only applies to women married after 9th August, 1870. Provision is also made for the registration of shares, stock, &c. in the name of a married woman so as to make them her separate property, and for actions being brought in her own name in respect of her separate property;<sup>1</sup> and as to the liability of her husband for her debts, &c., as to which see *Marriage*, § 5. (See *Separate Use*.)

Judge's  
marshal.

**MARSHAL.**—§ 1. In the practice of the Queen's Bench Division of the High Court, a marshal is an officer who attends each judge on circuit. He is the personal officer of the judge, as an aide-de-camp is of a general, and he performs the duties of secretary. He is not a permanent officer, neither is he continuously employed. He has to swear the grand jury, and to make an abstract or note for the judge of the nature of the actions tried before him.<sup>2</sup>

Admiralty  
marshal.

§ 2. The marshal of the Probate, Divorce and Admiralty Division in Admiralty matters is entrusted with the following duties: Execution of all warrants issued by the Court; appraisal and sale of condemned ships and cargoes; removal of ships, sub judice, from port to port on removal being ordered; receipt and subsequent payment into Court of all money arising out of execution of process; ascertaining the sufficiency or otherwise of bail; and the custody of embargoed ships.<sup>3</sup> (See *Action*, §§ 12 *et seq.* and the titles there referred to.)

**MARSHALLING.**—§ 1. In the distribution of assets, marshalling takes place where there are two claimants, A. and B., and two funds, X. and Y., both of which are available to satisfy A.'s claim, but only Y. is available for that of B., and A. is compelled to have recourse to the X. fund in order that the Y. fund may be left for B. Or, what is the same thing, if A. has been paid out of the Y. fund, B. is allowed to have recourse to the X. fund, against which he had originally no claim.<sup>4</sup> Thus, if a legacy is given to A. charged on real estate, and another not so charged is given to B., the personal estate not being sufficient to pay both, A. will be compelled to satisfy his legacy wholly or partially out of the real estate, so that B.'s legacy may be paid in full out of the personalty.<sup>5</sup>

Charities.

§ 2. A testator is said to "marshal his own assets" in favour of a charity when he directs a legacy to a charity to be paid out of his pure personal estate, for the law does not marshal assets in favour of charities, and, therefore, without such a direction, the legacy would abate in the

<sup>1</sup> Griffiths, *Married Women's Property Act*; *In re Voss*, 13 Ch. D. 504.

<sup>2</sup> Second Report of Legal Dep. Comm. (1874), 21.

<sup>3</sup> *Ibid.* (1874), 89.

<sup>4</sup> Watson, *Comp. Eq.* 36; White & Tudor's L. C. ii. 66; Snell's *Eq.* 231.

<sup>5</sup> *Bligh v. Earl of Darnley*, 2 P. W. 619.

proportion of the impure to the pure personalty.<sup>1</sup> (See *Abatement*, § 4; *Mortmain*.)

§ 3. The doctrine of marshalling also applies to mortgages. Thus, if the owner of two estates mortgages them both to one person, A., and then one of them to another, B., without B. having notice of A.'s mortgage, B. may insist that A.'s debt shall be satisfied out of the other estate (the one not mortgaged to B.) so far as it will extend.<sup>2</sup>

**MARSHALSEA.**—The Court of the Marshalsea had jurisdiction in actions of debt or torts the cause of which arose within the verge of the royal court. It was abolished by stat. 12 & 13 Vict. c. 101.<sup>3</sup>

**MASTER AND SERVANT.**—§ 1. The relation of master and servant exists where one person, for pay or other valuable consideration, enters into the service of another and devotes to him his personal labour for an agreed period.<sup>4</sup> The test of such a service seems to be, first, that the servant is bound to obey the reasonable commands of his master to do all acts falling within the scope of his employment, and, secondly, that the master has the power of dismissing the servant on his neglecting his duty, or for incompetence or gross misconduct, or on giving notice of dismissal in accordance with the express or implied terms of the contract.

It would also seem that a material difference in social position is essential to the relation of master and servant, for tutors, clerks, governesses, opera singers, and the like, are not servants; and that the service must be exclusive, *i. e.*, that the servant cannot work for any one else, without his master's permission, unless his service is limited to certain times or otherwise.<sup>5</sup>

§ 2. Servants are generally divided into menial or domestic servants, labourers and workmen, and apprentices. The rules of law as to the respective rights and duties of the master and servant in the absence of express agreement vary to some extent according to the nature of the employment.

§ 3. As regards strangers, the relation of master and servant affects them chiefly in the following respects :—The master may bring an action against any person for beating or maiming his servant, if he thus loses the services of his servant, and thereby suffers actual damages (see *Seduction* ; *Service* ; *Tort*), and the master has an action against any person who knowingly entices away a servant, or harbours and detains him after having been apprised of the former contract.<sup>6</sup> On the other hand, the servant is frequently the agent of his master for certain purposes, and accordingly has power to bind him by his acts<sup>7</sup> (see *Agent*) ; and if the

Rights and duties of strangers.

<sup>1</sup> *Robinson v. Geldert*, 3 Mac. & G. 735; Watson, 55.

<sup>2</sup> Fisher on Mortgage, ii. 704.

<sup>3</sup> Steph. Comm. iv. 317, n. (d).

<sup>4</sup> *Ibid.* ii. 226.

<sup>5</sup> The relationship between a master and a servant creates superiority and power on the one hand, and duty, subjection, and, as it were, allegiance on the other; Bacon's Abr. tit. *Master and Servant*; see also

Smith on Master and Servant, 106; *Lumley v. Gye*, 2 E. & B. 216; *Bowen v. Hall*, 6 Q. B. D. 333.

<sup>6</sup> Smith, 124; Underhill on Torts, 152. This principle also applies to contracts of service where the relation of master and servant does not strictly exist; *Bowen v. Hall*, 6 Q. B. D. 333.

<sup>7</sup> Smith, 219.

servant in the course of his employment tortiously causes injury to any person, the master is liable. Therefore, if a servant in driving his master's carriage on his master's business injures a person by negligent driving, the master is liable in damages to that person, even although the servant may have gone out of his proper course for his own business or amusement; but if the servant takes the carriage out without his master's orders and for his own business or amusement, then the master is not liable for his negligence.<sup>1</sup>

Master and  
Servant Acts.

§ 4. Under the stats. 20 Geo. 2, c. 19; 6 Geo. 3, c. 25; 4 Geo. 4, c. 34; the Master and Servant Act, 1867; and the Employers and Workmen Act, 1875, justices of the peace have jurisdiction in many cases where questions arise as to the rights or liabilities of either party to a contract of service, and, under the last-mentioned act, County Courts also have jurisdiction in some of those matters.<sup>2</sup>

See *Council of Conciliation*; *Embezzlement*; *Factories*; *False Character*.

### MASTER OF THE FACULTIES. See *Faculty*.

**MASTER OF THE ROLLS.**—The office of Master of the Rolls is one of great antiquity and high rank. He was originally keeper of the records, and acted as assistant to the Lord Chancellor, like the other masters in Chancery (see *Masters*, § 3). Subsequently, in the reign of Edward I., he acquired judicial authority in matters within the jurisdiction of the Court of Chancery, and in the reign of Henry VI. bills for relief were addressed to him as well as to the Lord Chancellor. In more modern times, any suit, petition, &c. could be heard in the first instance by the Master of the Rolls, as well as by the Vice-Chancellors.<sup>3</sup> By the Judicature Act, 1873, the Master of the Rolls was made a member of the High Court of Justice,<sup>4</sup> and an ex officio member of the Court of Appeal<sup>5</sup> (see those titles), but he still retains his non-judicial duties as custodian of the records. He is the head of the Petty Bag Office, and admits solicitors of the Supreme Court.<sup>6</sup>

Of Supreme  
Court.

**MASTERS** are officers attached to the principal Courts of justice. § 1. The Masters of the Supreme Court perform the duties formerly performed by the masters and associates of the Queen's Bench, Common Pleas, and Exchequer Divisions, the Queen's Coroner and Attorney, the Master of the Crown Office, and the Record and Writ Clerks.<sup>7</sup> The duties of the Masters of the Q. B., C. P., and Ex. Divisions, and of the Crown Office, were to attend in rotation the sittings of the Divisions to which they were attached, hear summonses and applications in Chambers, tax bills of costs, examine witnesses before trial, and report upon matters referred to them by the Court.<sup>8</sup> As to the duties of the Associates,

<sup>1</sup> *Joel v. Morrison*, 6 C. & P. 501; Smith, 271.

<sup>2</sup> Smith, 446; see also stats. 7 & 8 Vict. c. 101; 14 & 15 Vict. c. 11, and 24 & 25 Vict. c. 100, s. 26, relating to apprentices.

<sup>3</sup> Spence's Equity, 357; Hunter's Suit, 7; Haynes's Eq. 47.

<sup>4</sup> Sect. 4.

<sup>5</sup> Sect. 6.

<sup>6</sup> Sect. 87.

<sup>7</sup> Judicature (Officers) Act, 1879.

<sup>8</sup> Smith's Action, 17; Second Rep. Legal Dep. Comm. 15.



Queen's Coroner, and Record and Writ Clerks; see those titles. As to the distribution of business, see *Central Office*.

§ 2. In the Chancery Division of the High Court the Masters tax bills of costs<sup>1</sup> (see *Taxation*); the duties which, in the Queen's Bench Division, are performed by the Masters, are, in the Chancery Division, performed by the Chief Clerks and Registrars (*q. v.*). § 3. Originally the Masters in Chancery acted as assessors and assistants of the Chancellor, who delegated to them many of his judicial duties: the most important being that of taking accounts and inquiries in suits, and reporting the result to the Chancellor.<sup>2</sup> The Master of the Rolls, who was one of them, afterwards acquired jurisdiction as a judge of first instance; the other Masters were abolished in 1852, and their duties transferred to a new class of officers—the Chief Clerks (*q. v.*).<sup>3</sup>

Masters of the  
Chancery  
Division.

**MASTERS IN LUNACY** are officers of the Lord Chancellor, as guardian of lunatics. Their duties are of two kinds: first, to hold commissions or inquiries to find whether persons alleged to be insane are incapable of managing themselves and their affairs; secondly, to inquire as to the property, relations, &c. of persons found lunatic, and to superintend the management and employment of the property for the benefit of the lunatic.<sup>4</sup> (See *Lunacy; Report*.)

**MATERIAL—MATERIALITY.**—The question whether an untrue representation or a concealment avoids a contract to the subject-matter of which it relates, or whether an erasure or alteration avoids a written instrument, depends in general upon whether the misrepresentation, concealment, erasure or alteration is material; and the question whether it is material depends partly on the facts of the case and partly on the nature of the transaction. Thus, altering the date of a cheque is a material alteration.<sup>5</sup> (See *Alteration*.) So if during the negotiation of a marine insurance, a statement is made which has no real bearing on the risk, but which, nevertheless, influences the mind of the underwriter, as, for instance, an assertion that previous insurances have been obtained on the same ship at a low premium, the misrepresentation will avoid the policy.<sup>6</sup> (See *Uberrimæ Fidei*.)

**MATERNAL.** See *Descent*.

**MATRIMONIAL CAUSES** include suits for divorce, nullity of marriage, judicial separation, damages for adultery, restitution of conjugal rights, and suits of jactitation of marriage. (See the various titles: also *Alimony; Probate, Divorce and Admiralty Division*.)

<sup>1</sup> Second Rep. Legal Dep. Comm. 54.

<sup>2</sup> Spence's Equity, 359 *et seq.*; Haynes's Eq. 47.

<sup>3</sup> Rep. L. D. Comm. 58.

<sup>4</sup> *Ibid.* 60; Pope on Lunacy, 30; 16 & 17 Vict. c. 70, ss. 6 *et seq.*

<sup>5</sup> *Vance v. Lowther*, 1 Ex. D. 176; Leake on Contracts, 426; *Suffell v. Bank of England*, 7 Q. B. D. 270.

<sup>6</sup> *Maude & Pollock*, Merch. Shipp. 397, 401.

**MATRONS.** See *Jury*, § 10.

**MAYHEM** consists in violently depriving another of the use of a member proper for his defence in fight, such as an arm, a leg, an eye, &c.<sup>1</sup> It was originally both a civil injury and a criminal offence, but by modern statutes the law relating to felonious maiming and wounding has been amended, so that there is no legal difference between depriving a person of a member proper for his defence in fight and causing him any other grievous bodily harm<sup>2</sup> (see *Malicious Injuries to the Person*), except that every one has a right to consent to the infliction upon himself of any bodily harm not amounting to a mayhem.<sup>3</sup>

§ 2. Mayhem, as a civil injury, seems still to exist, but the use of the word is rare. See *Appeal*, § 7.

**MAYOR.** See *Municipal Corporation*.

**MAYOR'S COURT OF LONDON** is an inferior Court having jurisdiction in civil cases where the whole cause of action arises within the city of London; if, however, the debt or damage claimed in an action does not exceed 50*l.*, the Court has jurisdiction, provided that the defendant dwelt or carried on business within the city at the time the action was brought, or within six months previously, or that part of the cause of action arose within the city.<sup>4</sup> Actions of ejectment, and actions under the Bills of Exchange Act, may be brought in the Court, and also certain proceedings peculiar to the city.<sup>5</sup>

§ 2. The Court has two "sides" or divisions—a legal and an equitable—but of late years the equitable jurisdiction has almost fallen into disuse.<sup>6</sup>

§ 3. An ordinary action is commenced by the plaintiff entering at the office of the registrar of the Court what is called an action, which is in the nature of a *præcipe* (*q. v.*), giving the names of the parties and the nature of the claim; a copy of this action, together with a notice to the defendant to appear to the action, and particulars of the claim, is then issued and served on the defendant: this document is sometimes called a "copy action and notice," but more commonly a *plaint*.<sup>7</sup> The subsequent proceedings are similar to those in actions at law before the Judicature Acts, 1873 and 1875, as to which, see *Pleadings*; *Concessit solvere*; *Record*; *Postea*. § 4. Suits on the equitable side of the Court follow the practice of the Court of Chancery;<sup>8</sup> as to which, see *Pleading*; *Decree*, § 5. As to the procedure in foreign attachment, see that title.

The judge of the Court is the recorder, or, in his absence, the common serjeant.<sup>9</sup>

See *City of London Court*.

<sup>1</sup> Bl. Comm. iii. 121; Co. Litt. 126 a, 288 a.

<sup>2</sup> Stat. 24 & 25 Vict. c. 100, ss. 18 *et seq.*

<sup>3</sup> Steph. Crim. Dig. 129.

<sup>4</sup> Stat. 20 & 21 Vict. c. clvii, s. 12; *Mayor of London v. Cox*, L. R., 2 H. L.

239; *Hawes v. Pavey*, 1 C. P. D. 418.

<sup>5</sup> Candy's Mayor's Court Pr. 69, 121;

Yeatman's Mayor's Court. Pr. xxxix. iii.

<sup>6</sup> Yeatman, ii.

<sup>7</sup> See Candy, 71; Yeatman, 66.

<sup>8</sup> Yeatman, xix.

<sup>9</sup> Sect. 43 of the act.

**MEASE** or **MESE** is Norman-French for a house.<sup>1</sup>

**MEASURE OF DAMAGES.** See *Damages*.

**MEDICAL JURISPRUDENCE.** See *Forensic Medicine*.

**MEDIETAS LINGUÆ.** See *Jury*, § 9.

**MEETING.**—§ 1. In the law of bankruptcy (including proceedings for liquidation and composition), the most important kind of meeting is the first meeting of creditors, which is described under the titles *Bankruptcy*, § 6; *Composition*, § 4; *Liquidation*. The trustee in a bankruptcy or liquidation is bound to follow the directions of the creditors in administering the estate, and he may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes; in certain cases he is required to do so.<sup>2</sup> A member of the committee of inspection or the registrar of the Court may also summon a general meeting, *e.g.*, for the purpose of removing the trustee or appointing a new trustee.<sup>3</sup>

Bankruptcy:  
first meeting,

subsequent  
meetings.

§ 2. In the law of companies meetings are of two kinds, ordinary and extraordinary, or, as they are also called, general and special. Ordinary or general meetings are usually held at stated times and for the transaction of business generally. Extraordinary or special meetings are held as occasion may require for the transaction of some particular business, which ought to be specified in the notice convening the meeting. One meeting may be both ordinary and extraordinary.<sup>4</sup> Every company formed under the Companies Act, 1862, is bound to hold a general meeting within four months after its registration,<sup>5</sup> and once at least in every year thereafter.<sup>6</sup> § 3. It has been decided that a single person cannot constitute a meeting.<sup>7</sup>

Companies.

Ordinary.

Extraor-  
dinary.

See *Resolution*.

**MELIORATING WASTE.** See *Waste*.

**MELIUS INQUIRENDUM.**—If an office or other inquisition is found against the crown, a *melius inquirendum*, that is, a further (literally "better") inquiry under the former commission may be awarded for the crown. But no *melius inquirendum* is usually awarded in such case unless some *prima facie* ground is shown for supposing the inquisition to be wrong. A *melius inquirendum* may also be awarded if the former inquisition is on the face of it incomplete or uncertain.<sup>8</sup> (See *Inquest of Office; Inquisition*.)

**MEMORANDUM.**—In a policy of marine insurance the memorandum is a clause inserted to prevent the underwriters from being liable

<sup>1</sup> Litt. §§ 74, 251.

<sup>2</sup> Robson's Bankruptcy, 519; Bankr. Act, 1869, s. 20.

<sup>3</sup> B. Act, 1869, s. 21; B. Rules, 1870, r. 120.

<sup>4</sup> Lindley on Companies, 572.

<sup>5</sup> Companies Act, 1867, s. 39.

<sup>6</sup> Companies Act, 1862, s. 49.

<sup>7</sup> *Sharp v. Dawes*, 2 Q. B. D. 26.

<sup>8</sup> Chitty, *Prer.* 258; Co. Litt. 77 b.

for injury to goods of a peculiarly perishable nature and for minor damages. It begins as follows: "N.B.—Corn, fish, salt, fruit, flour and seed are warranted free from average, unless general or the ship be stranded;" meaning that the underwriters are not to be liable for damage to these articles caused by sea-water or the like.<sup>1</sup> (See *Average*; *Policy of Assurance*.)

**MEMORANDUM OF ALTERATION.**—Formerly where a patent was granted for two inventions, one of which was not new or not useful, the whole patent was bad, and the same rule applied when a material part of a patent for a single invention had either of those defects. To remedy this the statute 5 & 6 Will. 4, c. 83, empowers a patentee (with the fiat of the Attorney-General) to enter a disclaimer (*q. v.*), or a memorandum of an alteration in the title or specification of the patent, not being of such a nature as to extend the exclusive right granted by the patent, and thereupon the memorandum is deemed to be part of the letters patent or the specification.<sup>2</sup>

**MEMORANDUM OF ASSOCIATION** is a document by the registration of which a company is formed under the Companies Act, 1862. It specifies the name of the proposed company, the part of the United Kingdom in which the registered office of the company is to be, and the objects for which the company is established.<sup>3</sup> If the company is to be limited by shares, the memorandum must also contain the amount of the capital and the number of shares.<sup>4</sup> The memorandum must be signed by seven persons at least,<sup>5</sup> who are called the subscribers. It cannot be altered, except that a company limited by shares may increase its capital or alter the division of its capital into shares, &c. (See *Articles of Association*; *Companies Acts*; *Reduction of Capital*.)

Land regis-  
tries.

**MEMORIAL.**—§ 1. In the Land Registries of Middlesex, York, &c., which are registries of deeds and not of titles, the registration of a deed or other document is effected by leaving it at the registry together with a memorial under the hand and seal of one of the parties to the deed. The memorial is an abstract of the material parts of the deed, with the parcels (*q. v.*) at full length, and concludes with a statement that the party desires the deed to be registered. The execution of the deed and memorial is proved by the oath of an attesting witness. (See *Land Registry*.)

Petition.

§ 2. "Memorial" also signifies a petition or statement submitted to a person or body.

**MEMORY.**—In the old books, when a person alleges in legal proceedings, that a custom or prescription has existed from time whereof the memory of man runneth not to the contrary, that is as much as to say

<sup>1</sup> Maude & Pollock, *Merch. Shipp.* 371.

<sup>2</sup> Johnson on Patents, 151; stat. 15 & 16 Vict. c. 83, s. 39.

<sup>3</sup> Companies Act, 1862, s. 10.

<sup>4</sup> Sect. 8. As to companies limited by guarantee, see s. 9.

<sup>5</sup> Sects. 6, 11.

that no man then alive hath heard any proof of the contrary. This is also called time of living memory, as opposed to time of legal memory, which runs from the reign of Richard I., because the Statute of Westminster I. (3 Edw. 1, c. 8) fixed that period as the time of limitation for bringing certain real actions.<sup>1</sup> (See *Limitation*, § 6.) As to the practical importance of the distinction, see *Ancient Messuages*; *Custom*, § 5; *Lost Grant*; *Prescription*.

**MERCANTILE LAW** includes the law relating to bills of exchange, contracts of affreightment, marine insurance, &c.

**MERCHANDISE MARKS ACT, 1862**, is the statute 25 & 26 Vict. c. 88. Its object is to prevent the fraudulent marking of merchandise and the fraudulent sale of merchandise falsely marked. Its principal provisions are to make forging or falsely applying any trade-mark a misdemeanor, and to impose penalties for wrongfully selling goods with forged or false trademarks, or for marking false indications of quantity on articles for sale, or selling articles so marked. There are also various provisions as to procedure, &c.<sup>2</sup> (See *Trademark*.)

**MERCHANT SHIPPING.**—The law relating to the ownership, registration and transfer of British merchant ships, to the qualifications and control of masters, mates, pilots, engineers, &c., and to the protection and relief of ordinary seamen, is contained in the Merchant Shipping Act, 1854, and the various acts amending it down to the Merchant Shipping Act, 1876, for the prevention of casualties by unseaworthy ships and overloading, the Merchant Shipping Acts, 1880, and the Merchant Shipping (Carriage of Grain) Act, 1880, for enforcing precautions to prevent grain cargoes from shifting. The law of merchant shipping also deals with affreightment, marine insurance, hypothecation, salvage and wreck (*q.v.*).<sup>3</sup>

**MERGER** is that operation of law which extinguishes a right by reason of its coinciding with another right, of greater legal worth, in the same person. By "operation of law" is meant that it may take place independently of the wishes or intention of the parties; and by "greater legal worth" is meant that one right in estimation of law, though not necessarily in fact, is of higher value than the other.

I. § 2. In the law relating to rights of action, when a person takes or acquires a remedy or security of a higher nature in legal estimation than the one which he already possesses for the same right, then his remedies in respect of the minor right or security merge in those attaching to the higher one.<sup>4</sup> Thus, if a bond is taken for a simple contract debt, the remedy upon the simple contract is extinguished, and therefore an action

Rights of action.

<sup>1</sup> Litt. § 170.

<sup>2</sup> See Ludlow & Jenkyns on Trade-marks, 19 *et seq.*

<sup>3</sup> Maude & Pollock's Merchant Ship-

ping; Smith's Merc. Law, 176; Steph. Comm. iii. 148.

<sup>4</sup> Leake on Contracts, 506; *Price v. Moulton*, 10 C. B. 561.

for the debt must be brought on the bond ; again, if judgment is recovered in such an action, the right of action on the bond is merged in the judgment, and therefore no second action can be brought on the bond.<sup>1</sup>

II. In the law of property, merger takes place either according to the rules of law or according to those of equity.

Estates at law.

§ 3. At law, when a greater and a less estate meet in the same person without any intermediate estate, the less estate is merged in the greater, so as to cease to exist. The greater estate is thus accelerated, but not enlarged.<sup>2</sup> (See *Enlargement*.) Thus, if A. is tenant for life of land, and the reversion in fee afterwards descends to or is otherwise acquired by him, his estate for life merges in the fee, and he thus becomes tenant in fee in possession. But if a person has two estates in different rights, as where he has one in his own right, and the other in right of his wife, or as executor, there will in general be no merger. An estate for life being, in the estimation of the law, greater than any term of years however long, it follows that when a person holding a term for 1000 years becomes entitled to the land for an estate for life, the term merges in the life estate.<sup>3</sup> Merger or its consequences are in some instances prevented by statute ; thus an estate tail does not merge in the freehold<sup>4</sup> (see *Enlargement*) ; and now by the Judicature Act, 1873, there can be no merger, by operation of law only, of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.<sup>5</sup> This enactment is apparently meant to recognize the rule which prevailed in equity before the act, namely, that where the estate of a trustee accidentally merges, the cestui que trust shall not thereby be injured.<sup>6</sup>

In equity.

§ 4. In equity, where a legal and an equitable estate, equal and co-extensive, unite in the same person, the latter merges in the former.<sup>7</sup> Where an estate of inheritance in land and the right to a charge upon it become vested in the same person absolutely (as where a person entitled to have a portion raised out of land becomes entitled to the land in fee simple), the charge will merge unless kept alive, or unless it is to the owner's interest that it should not merge.<sup>8</sup> There is a general leaning against merger in Courts of Equity, except in those cases where merger is convenient and beneficial to all parties.

Crown grants.

III. § 5. In the law relating to grants by the crown, it is the rule that when a right belonging to the crown by virtue of its prerogative (such as the right to wreck) is granted to a subject as an appendancy to land, then if the land comes into the hands of the crown the right merges in the *jus coronæ*, and does not pass by a grant of the land, but must be created

<sup>1</sup> *In re European Central Rail. Co.*, 4 Ch. D. 33.

<sup>2</sup> Preston's Conveyancing, iii. 7.

<sup>3</sup> Bl. Comm. ii. 177 and notes ; Burton's Comp. §§ 747, 896 ; Jarman & Byth. Conv. viii. 1, n. (a).

<sup>4</sup> Stat. 13 Edw. I. c. 1 (De Donis). See as to the preservation of the rights incident to a reversionary term which has merged,

8 & 9 Vict. c. 106, s. 9 ; Williams, R. P. 251.

<sup>5</sup> Sect. 25, § 4.

<sup>6</sup> Williams, R. P. 415.

<sup>7</sup> Watson's Comp. Eq. 619 ; Spence's Eq. 879 ; Burton, § 1388.

<sup>8</sup> Watson, 621 ; Burton, § 1513 ; Spence, 346, 424, citing Gilbert's Lex Prætoria, 264.

again. Rights vested in the crown otherwise than *jure coronæ* (such as warrens, fairs, &c.) do not merge.<sup>1</sup>

As to the merger of tithes, see that title; also *Extinguishment*.

ETYMOLOGY.]—Norman-French, to drown.<sup>2</sup>

**MERITORIOUS.** See *Cause of Action*, § 2.

**MERITS.**—A person is said to have a good cause of action or defence on the merits when his claim or defence is based on the real matters in question, and not on any technical ground. Thus before the Judicature Acts a defence based on the misjoinder or nonjoinder of parties by the plaintiff would not have been a defence on the merits. If a defendant inadvertently allows judgment to go by default, the Court will not, as a rule, set the judgment aside and allow him to defend unless he makes an affidavit of merits, that is, an affidavit showing that he has a substantial ground of defence to the action.

**MESNE** signifies middle, intervening or intermediate. Thus in Assignments. framing an assignment of a lease which has already passed through several hands since it was originally granted, it is usual to refer to all the assignments before the last as “mesne assignments.” So if property Incum- is mortgaged first to A. and then to B., and is subsequently mortgaged to brances. A. a second time, B. is said to be a mesne incumbrancer, or to have a mesne incumbrance, because his mortgage stands between the two mortgages to A. (See *Priority*; *Tacking*.)

§ 2. When a person is wrongfully in possession of land, and the Profits. rightful owner brings an action to recover possession, he usually sets up in addition, either in the same or a separate action, a claim for “mesne profits:” that is, for the benefit which the defendant has derived from his wrongful occupation of the land between the time when he acquired wrongful possession and the time when the possession was taken from him.<sup>3</sup> (See *Joinder*, § 1: also *Double Rent*; *Double Value*.)

As to the meaning of “mesne lord,” see *Lord*; *Mesnalty*; of “mesne process,” see *Process*; of “mesne tenure,” see *Tenure*. In the old books “mesne” often denotes “mesne lord.”<sup>4</sup>

§ 3. The writ of mesne was a writ which a tenant paravail had to Writ of mesne. compel his immediate lord (the mesne) to protect or acquit him against the lord paramount.<sup>5</sup> (See *Acquit*, § 2.) It was abolished by stat. 3 & 4 Will. 4, c. 27.

ETYMOLOGY.]—Norman-French, *meen*; modern French, *moyen*, from late Latin, *medianus*, from *medius*, middle.<sup>6</sup>

<sup>1</sup> *Case of the Abbot of Strata Marcella*, 9 Co. 24; *Heddy v. Wheelhouse*, Cro. Eliz. 591; *Duke of Northumberland v. Houghton*, L. R., 5 Ex. 127.

<sup>2</sup> Co. Litt. 338 b.

<sup>3</sup> Steph. Comm. i. 294. It was formerly called an action of trespass for mesne pro-

fits, being a species of the action of trespass vi et armis (see *Trespass*); Adams on Ejectment, 379.

<sup>4</sup> Co. Litt. 152 b.

<sup>5</sup> Litt. § 142.

<sup>6</sup> Britton, 58 a; Diez. Etym. Wörtl. i. 276.

**MESNALTY** is the tenure or seignory of a mesne lord. "If there be lord [paramount], mesne [lord], and tenant [paravail], and . . . if the lord paramount purchase the tenancie [of the tenant paravail] in fee, then . . . the seignorie of the mesnalty is extinct."<sup>1</sup>

**MESSAGE** is a house. As a word of conveyance, "message" includes not only the buildings but also the curtilage, orchard and garden belonging thereto.<sup>2</sup> A "capital message" is the chief mansion house of an estate.<sup>3</sup>

ETYMOLOGY.]—Norman-French, *message*, a house.<sup>4</sup>

**METES AND BOUNDS.**—In ordinary cases where a widow is entitled to dower of land, her share is ascertained and set apart to be held by her in severalty, and she is then said to hold it "by metes and bounds," that is, by measurement and boundaries.<sup>5</sup> (See *Admeasurement*.)

**METROPOLITAN BOARD OF WORKS** is an authority created by the Metropolis Local Management Act, 1855 (amended by the acts of 1856, 1862, 1871, 1875, 1876, 1877, 1878, 1879 and 1880). The general scheme of these acts is to provide for the formation of District Boards of Works by the union of the smaller parishes of the metropolis into groups, and for the formation of a corporation called the Metropolitan Board of Works, representing the whole metropolis. The Metropolitan Board has jurisdiction in matters affecting the metropolis at large (*e. g.*, the main sewers, the naming and numbering of streets, executing public improvements, &c.), while the vestries of the large parishes, and the District Boards formed as above mentioned, have jurisdiction in matters affecting their respective districts (*e. g.*, the local sewers and drains, new buildings, paving, lighting and cleansing streets, removing nuisances, &c.). The powers and authorities exercisable in other places by local boards and other sanitary authorities (*q. v.*) are thus in London divided between the Metropolitan Board on the one hand, and the parishes and District Boards on the other. (See *Police*; *Rate*.)

**MILITARY.**—The various tenures by knight-service, grand-serjeanty, cornage, &c., are frequently called military tenures, from the nature of the services which they involved.<sup>6</sup> (See *Service*; *Tenure*.)

**MINERALS—MINES.**—§ 1. In the most general sense of the term, minerals are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit. The term therefore includes coal, metal ores of all kind, clay, stone, slate, and coprolites.<sup>7</sup>

<sup>1</sup> Litt. § 231.

<sup>2</sup> Co. Litt. 5 b, 56 b.

<sup>3</sup> Davids. Conv. i. 89.

<sup>4</sup> Liber Albus, 201 a.

<sup>5</sup> Litt. §§ 36, 44; Co. Litt. 32 a, b.

<sup>6</sup> Steph. Comm. i. 204.

<sup>7</sup> "Surface" means that part of the land which is capable of being used for agricultural purposes; *Midland Rail. Co. v. Checkley*, L. R., 4 Eq. 19; *Heat v. Gill*, 7 Ch. 669; *Att.-Gen. v. Tomline*, 5 Ch. D. at p. 762.



A mine is a work for the excavation of minerals by means of pits, shafts, levels, tunnels, &c., as opposed to a quarry, where the whole excavation is open. While unsevered, minerals form part of the land, and as such are real estate. When severed, they become personal chattels.<sup>1</sup> § 2. Royal mines are mines of gold or silver, and belong to the crown, in whosoever land they may be found.<sup>2</sup> § 3. In other cases, mines and minerals belong *primâ facie* to the owner of the surface of the land, though they may be, and frequently are, held by different persons. It follows from the nature of copyhold tenure that the minerals under copyhold land belong to the lord, though he cannot work them without the tenant's consent, except by a local custom. (See *Copyhold*, § 3.) In many places, customs or prescriptions exist, by virtue of which persons are entitled to work mines in land, the freehold of which is vested in another person. (See *Gale; Stannaries; Tin-bounding*.)<sup>3</sup>

§ 4. In consequence of a judicial decision,<sup>4</sup> that the ordinary power of sale contained in settlements does not authorize the trustees to sell the settled lands without the minerals, or the minerals without the lands, the Confirmation of Sales Act, 1862,<sup>5</sup> was passed to confirm all such sales theretofore made, and to authorize such sales to be made in future with the sanction of the Chancery Division.<sup>6</sup>

§ 5. As to the rights of adjoining owners in respect of minerals, see *Barrier; Boundaries*, § 4; *Bounds; Easement*, § 1; *Support*.

§ 6. By modern statutes, numerous obligations have been imposed on mine owners for the protection of the public, and of persons employed in mines. The principal acts now in force are the Coal Mines Regulation Act, 1872, and the Metalliferous Mines Regulation Acts, 1872 and 1875. (See *Fence*, § 3.) The right to work minerals under railways, canals, water-works and highways is restricted by the acts relating to those matters.

**MINISTERIAL** is opposed to judicial or discretionary. Thus, a ministerial office or duty is one which merely involves the following of instructions; in other words, one which can be performed without the exercise of more than ordinary skill, prudence, or discretion, *e. g.*, the payment or receipt of money, the execution of a deed, or the like;<sup>7</sup> while a judicial or discretionary office or duty involves the exercise of judgment or discretion (*q. v.*). As to the ministerial office of a coroner, see *Coroner*, § 1. The phrase is often used in speaking of a delegation of authority; the general rule being that an executor, trustee, agent, &c. can delegate his authority so far as to empower another person to do a merely ministerial act for him, but not to empower another person to exercise a discretion vested in him (the executor, trustee, agent, &c.). Thus, an executor cannot (it is conceived) authorize another person to dispose of his testator's estate, or compromise claims by creditors; but if he has entered into an agreement for the sale of the property, or for the compromise of

Royal mines.

Confirmation of Sales Act, 1862.

<sup>1</sup> Bainbridge on Mines, 1.

<sup>2</sup> Bl. Comm. i. 295. As to mines of lead, &c. containing also gold or silver, see stats. 4 W. & M. st. 1, c. 30, and 5 W. & M. c. 6.

s.

<sup>3</sup> Bainbridge, 543 *et seq.*

<sup>4</sup> *Buckley v. Howell*, 29 Beav. 546.

<sup>5</sup> Stat. 25 & 26 Vict. c. 168.

<sup>6</sup> Williams, R. P. 311.

<sup>7</sup> See Lewin on Trusts, 18.

a claim, he may appoint another person to carry out the agreement by receiving or paying the money.<sup>1</sup> (See *Agent*.)

As to ministerial trusts, see *Trust*.

**MINOR.** See *Guardian*, §§ 2 *et seq.*; *Infant*, § 3.

**MINUTES** are notes or records of a transaction. Thus, the record of the proceedings at a meeting of directors or shareholders of a company is called the minutes.

Agreed  
minutes of  
order, &c.

§ 2. When the parties to an action, petition, or other proceeding in the Chancery Division, are agreed as to the order or judgment which should be made on an application to the Court, they usually (especially if the matter is complicated) draw up beforehand minutes of the order or judgment (formerly called "minutes of decree"), containing in outline all the provisions which are thought necessary. The minutes are afterwards put into the form of an order by the registrar. (See *Pass*; *Settle*.)

Registrar's  
minutes.

§ 3. Formerly, in Chancery suits, when an order or decree had been made, the registrar did not draw it up in full in the first instance, but framed an outline giving the substance of the order, copies of which were delivered to the parties, to be settled by them in his presence, if necessary. For some time past the practice has been to draw up the order or decree complete in the first instance, and copies of the draft are delivered to the parties. In practice these copies are still called "minutes;" and when any dispute arises on the form of the order which has to be referred to the Court, the cause is put into the paper "to be spoken to on the minutes."<sup>2</sup>

See *Enter*; *Pass*; *Settle*.

**MISAPPROPRIATION** is not a technical term of law, but it is sometimes applied to the misdemeanor which is committed by a banker, factor, agent, trustee, &c., who fraudulently deals with money, goods, securities, &c. entrusted to him, or by a director or public officer of a corporation or company who fraudulently misapplies any of its property.<sup>3</sup> (See *Fraud*, § 18; *Public Officer*.)

**MISCARRIAGE.**—A woman who, being with child, unlawfully administers to herself any drug, or uses any other means to procure her own miscarriage, is guilty of felony punishable with penal servitude for life, as is also any person who administers any drug or uses any other means to procure the miscarriage of a woman, whether she be with child or not.<sup>4</sup>

**MISDEMEANOR** is any crime or indictable offence not amounting to felony: such as perjury, battery, libel, conspiracy, and public nuisances. § 2. At common law, misdemeanors are generally punishable by fine and

<sup>1</sup> See Lewin on Trusts, 18.

<sup>2</sup> Hunter's Suit, 86.

<sup>3</sup> Stephen's Crim. Dig. 257 *et seq.*; stat.

24 & 25 Vict. c. 96, ss. 75 *et seq.*

<sup>4</sup> Stat. 24 & 25 Vict. c. 100, s. 58; Steph. Comm. iv. 83.

imprisonment without hard labour.<sup>1</sup> In many cases special punishments have been attached to misdemeanors by statute.

§ 3. Under the stat. 5 & 6 Vict. c. 51, whoever shoots or strikes at the Queen, or does certain other acts with intent to alarm her Majesty, is guilty of a high misdemeanor, and is liable to be sentenced to seven years penal servitude, or three years' imprisonment, with or without whipping. High misdemeanor.

**MISDESCRIPTION.**—§ 1. In certain cases, when a contract contains a material misdescription, that is, when the description of the subject-matter of the contract is incorrect or misleading in a material and substantial point, the contract is voidable at the option of the party misled, independently of fraud, concealment, or misrepresentation (*q. v.*). Thus, in a contract of fire insurance, if the building is so described by the assured as to make the risk appear less than it really is, the insurer is entitled to avoid the contract.<sup>2</sup> So, in a sale of land, a misdescription materially affecting the value, title, or character of the property sold, will make the contract voidable at the purchaser's option.<sup>3</sup> The test of materiality seems to be whether, if the subject-matter had been correctly described, the party misled would have entered into the contract.<sup>4</sup>

§ 2. A wrong description does not affect the validity of the transaction if there is no mistake as to the identity of the person or thing intended to be described, as where a person is called by a wrong name, according to the maxim *falsa demonstratio non nocet*.

**MISE**, in the obsolete writ of right (*q. v.*), was the same thing as the issue in an ordinary action, and was so called because the tenant *put* himself upon the grand assise, that is, chose it as the mode of trial.<sup>5</sup>

**MISFEASANCE—MISFEASOR.**—§ 1. Misfeasance is either the doing of a wrongful act or the improper performance of a lawful act: as where a person is guilty of negligence in performing a contract. Misfeasor is a person who does a misfeasance. § 2. In the old books misfeasance was used especially to signify trespasses and other offences in parks, forests, &c.<sup>6</sup> At the present day it is chiefly used to signify negligence.<sup>7</sup>

See *Malfeasance*; *Nonfeasance*; *Tort*.

ETYMOLOGY.]—Norman-French, *mis*, wrongly, and *ferre*, to do.

**MISJOINDER** is where persons are wrongly joined as plaintiffs or defendants in an action: in other words, where persons are made parties who ought not to be. The rule before the Judicature Acts was that in

<sup>1</sup> Russell on Crimes, 187, 197; Stephen's Crim. Dig. 14.

<sup>2</sup> *In re Universal, &c. Co.*, L. R., 19 Eq. 485; *Lachlan v. Reynolds*, Kay, 52.

<sup>3</sup> *Flight v. Booth*, 1 Bing. N. C. 370; Pollock on Contract, 454.

<sup>4</sup> *Ibid.*

<sup>5</sup> Co. Litt. 294 b; Britton, 266 b.

<sup>6</sup> See stat. West. 1, c. xix.; 2 Inst. 198.

<sup>7</sup> Underhill on Torts, 27; Stephen's Comm. iii. 363. As to misfeasance by an officer of a company under sect. 165 of the Companies Act, 1862, see *McKay's Case*, 2 Ch. D. 1; *Coventry and Dixon's Case*, 14 Ch. D. 660.

an action of contract a misjoinder of plaintiffs led only to increased costs, while a misjoinder of defendants was fatal; and that in an action of tort a misjoinder of plaintiffs or defendants led only to increased costs.<sup>1</sup> No action can now be defeated by a misjoinder.<sup>2</sup> (See *Joinder*, § 2.)

**MISPRISION**, "in its larger sense, is used to signify every considerable misdemeanor which has not a certain name given to it by the law; and it is said that a misprision is contained in every treason or felony whatsoever, and that one who is guilty of felony or treason may be proceeded against for a misprision only."<sup>3</sup> The term is, however, rarely if ever used in this sense, it being now practically confined to the two phrases, misprision of treason and misprision of felony.

Of treason.

§ 2. Misprision of treason is where a person who knows that some other person has committed high treason does not within a reasonable time give information thereof to a judge of assize or justice of the peace. The punishment is imprisonment for life and forfeiture of the offender's goods, &c.<sup>4</sup>

Of felony.

§ 3. Misprision of felony is where a person who knows that some other person has committed felony conceals or procures the concealment thereof. In ordinary cases the offence is a misdemeanor; if the offender is a sheriff or coroner, or the bailiff of either officer, a special punishment is inflicted.<sup>5</sup>

ETYMOLOGY.]—Old French, *mes-*, wrongly, and *prendre*, to take: to commit an error.<sup>6</sup>

**MISREPRESENTATION** is where one of the parties to an intended contract conveys to the other a false impression as to some matter relating to the contract, whether by an express statement (active) or by silence (passive).

False or fraudulent.

§ 2. False or fraudulent misrepresentation is a representation contrary to the fact, made by a person with knowledge of its falsehood, and being the cause of the other party's entering into the contract.<sup>7</sup> (See *Dolus dans Locum Contractui*; *Fraud*.)

Negligent.

§ 3. Negligent misrepresentation is a false representation made by a person who has no reasonable grounds for believing it to be true, though he does not know that it is untrue, or even believes it to be true.<sup>8</sup>

Innocent.

§ 4. Innocent misrepresentation is where the person making the representation had reasonable grounds for believing it to be true.<sup>9</sup>

Consequences of.

§ 5. When a person has been induced to enter into a contract by fraudulent or negligent misrepresentation, he may in general either (i) affirm the contract and insist on the misrepresentation being made

<sup>1</sup> Dicey on Parties, 502 *et seq.*

<sup>2</sup> Rules of Court, xvi. 13.

<sup>3</sup> Russell on Crimes, i. 187; see Staunf. Pl. 37.

<sup>4</sup> Stephen's Crim. Dig. 93.

<sup>5</sup> Steph. 93; stat. 3 Edw. I, c. 9.

<sup>6</sup> Littré, s. v. *Méprendre*; Shaks. *Henry IV.* (1st part), i. 3.

<sup>7</sup> *Attwood v. Small*, 6 Cl. & F. 232.

<sup>8</sup> *Reese River Silver Mining Co. v. Smith*, L. R., 4 H. L. 79.

<sup>9</sup> *Kennedy v. Panama &c. Co., L. R.*, 2 Q. B. 580.

good, if that is possible, so as to be put in the same position as if it had been originally true, or (ii) rescind the contract (see *Rescission*), or (iii) bring an action for damages,<sup>1</sup> or (iv) rely upon the misrepresentation as a defence to an action on the contract.<sup>2</sup> § 6. An innocent misrepresentation has no effect on the contract unless it produces mistake excluding true consent<sup>3</sup> (error in substantiâ, as to which see *Mistake*, § 10); or unless it amounts to a warranty or condition, or unless the contract is one in which good faith is especially required, such as contracts of insurance and family settlements.<sup>4</sup>

**MISTAKE.**—§ 1. Although mistake and ignorance are strictly speaking not identical, the one being positive and the other negative, they are commonly used as convertible terms in law, their effects being identical.<sup>5</sup> Mistake then may be defined as a misapprehension as to the existence of a thing, arising either from ignorance in the strict sense, that is, absence of knowledge on the subject, or from mistake in the strict sense, that is, a false belief on the point. § 2. Where, however, mistake produces a legal effect, not of itself, but because it coincides with some other fact, the effect is not attributed to the mistake, but to the whole transaction. Thus, mistake is essential to the idea of fraud, because no one can be defrauded unless he is misled, and to many cases where negligence or bona fides is of importance; but no one would treat these subjects as instances of mistake. In practice, therefore, the term mistake is limited to cases where the effect produced is attributed to it alone.<sup>6</sup>

Mistake per se.

Mistake is either of law or of fact.

I. § 3. Mistake of law (error or ignorantia juris) is a mistake as to a general rule of law: as where a testator thinks that to disinherit his heir it is necessary to give him a nominal bequest, or where a person does not know that a contract not to be performed within a year must be in writing. The general rule is that such a mistake does not affect the transaction, whether in civil or in criminal law.<sup>7</sup> Thus, in the first of the above cases the executor could not refuse to pay the bequest, and, in the second, the contract would be void for want of the formality of writing.

Mistake of law.

II. § 4. Mistake of fact (error or ignorantia facti) is either as to the existence of a fact or as to the existence of a right depending on questions of mixed law and fact.<sup>8</sup> Thus, where A., believing that under a deed of grant he had merely a right of rabbit warren over certain land, entered into an agreement for an exchange of properties with a neighbouring

Mistake of fact.

<sup>1</sup> Pollock on Contract, 482.

<sup>2</sup> *Hirschfeld v. L. B. & S. C. Rail. Co.*, 2 Q. B. D. 1.

<sup>3</sup> *Kennedy v. Panama, &c. Co.*; *Manson v. Thacker*, 7 Ch. D. 620.

<sup>4</sup> *Fane v. Fane*, L. R., 20 Eq. 698; Pollock on Contract (2nd edit.), 462.

<sup>5</sup> Savigny, Syst. iii. 326; Ahrens, Jurist. Encyc. 618. See, however, Lord Chelms-

ford's remarks in *Beauchamp v. Winn*, L. R., 6 H. L. p. 230.

<sup>6</sup> Savigny, 340.

<sup>7</sup> Snell's Eq. 345; Bl. Comm. iv. 26; Pollock on Contract, 368; for exceptions, see *ibid.* 301.

<sup>8</sup> Savigny, iii. 327, 338; *Cooper v. Phibbs*, L. R., 2 H. L. 149.

proprietor, who was also under the belief that A. was only entitled to the right of warren, but it was afterwards discovered that under the deed of grant A. was entitled to the land itself: it was held that the mistake was one of fact, and that, therefore (under the rule stated *infra*, § 10), A. was entitled to have the agreement rescinded, although it had been partially carried out.<sup>1</sup> Questions of foreign law being questions of fact, a mistake as to foreign law is a mistake of fact. (See *Fact*.)

Mistake of fact is of two kinds, fundamental and collateral.

Fundamental mistake.

Unilateral.

§ 5. A mistake is fundamental when it prevents an act from producing its legal effect, because it excludes the necessary intention. Such a mistake may be either unilateral or bilateral. § 6. Instances of unilateral mistake excluding intention occur both in civil and criminal law. Thus, if A. signs a document by mistake, thinking it to be another document, his signature is ineffectual, because he did not intend to sign it.<sup>2</sup> So if A. takes away a thing belonging to B., believing it to be his own, he does not commit a theft, because the necessary criminal intention is absent.<sup>3</sup> § 7. Bilateral mistake excluding intention, occurs only in civil law. Thus, if A. and B. enter into a contract of sale for an estate called Dale, there being in fact two estates called Dale, A. meaning one and B. the other, the consent or common intention necessary to constitute a contract is absent, and there, therefore, is no contract (error in corpore).<sup>4</sup>

Bilateral.

Collateral mistake.

Unilateral.

§ 8. Collateral mistake is where the necessary intention is present, but it is induced or accompanied by a mistake. The mistake may be either unilateral or mutual. § 9. As a general rule unilateral mistake has no legal effect at all.<sup>5</sup> Thus if A. purchases property from B. under a mistaken belief as to its qualities, he cannot set aside the sale or recover damages from B. on the ground of his mistake, unless there was misrepresentation or a guarantee on the part of B.<sup>6</sup> The principal exception to the rule is that if money is paid under a mistake of fact it may be recovered back.<sup>7</sup> § 10. Mutual mistake is where the parties have a common intention, but it is induced by a common or mutual mistake. The most important instance of this kind is where there is a common mistake as to the substance of the thing (error in substantiâ). Thus if A. and B. enter into a contract of sale for a vessel, each believing it to be of gold, while it is in fact of brass, either may rescind the contract.<sup>8</sup> § 11. Again, if a mistake occurs in expressing the terms of an agreement, it will, as a general rule, be corrected, either when proceedings are taken to enforce it or by substantive proceedings taken for the purpose. (See *Rectification*.) The

Mutual mistake.

Error in substantiâ.

Mistake in expression.

<sup>1</sup> *Beauchamp v. Winn*, L. R., 6 H. L. 223. See also *Daniell v. Sinclair* (6 App. Ca. 181), where the Court remarked that "in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn" as at common law.

<sup>2</sup> *Foster v. Mackinnon*, L. R., 4 C.P. 704.

<sup>3</sup> Bl. Comm. iv. 232.

<sup>4</sup> *Raffles v. Wichelhouse*, 2 H. & C. 906; Savigny, iii. 272.

<sup>5</sup> Savigny, 341; Pollock, 358. For exceptions to the rule, see Pollock, 359.

<sup>6</sup> Pollock (2nd edit.), 420.

<sup>7</sup> *Ibid.* 397. As to collateral mistake in criminal law, see *Reg. v. Prince*, L. R., 2 C. C. R. 154.

<sup>8</sup> *Gompertz v. Bartlett*, 2 E. & B. 849; *Cox v. Prentice*, 3 M. & S. 344; *Kennedy v. Panama, &c. Mail Co.*, L. R., 2 Q. B. 580; Savigny, iii. 276 *et seq.* For another example see above, § 4.

most obvious example is that of clerical errors made in reducing a contract to writing.<sup>1</sup>

**MITIGATION.**—Where a defendant or prisoner whose responsibility or guilt is not in dispute proves facts tending to reduce the damages or punishment to be awarded against him, he is said to show facts in mitigation of damages, or of sentence, as the case may be. Thus the defendant in an action of seduction may prove the bad character of the woman in mitigation of damages.<sup>2</sup>

**MITTER LE DROIT—MITTER L'ESTATE.** See *Release*.

**MITTIMUS** (= “we send”) is a writ used in sending a record or its tenor from one Court to another. Thus where *nul tiel record* is pleaded in one Court to the record of another Court of equal or superior jurisdiction, the tenor of the record is brought into Chancery by a certiorari (*q. v.*), and thence sent by mittimus into the Court where the action is.<sup>3</sup> It is apprehended that since the Judicature Acts this writ will not be much used.

**MIXED.**—“Mixed personalty” is the same as “impure personalty.”<sup>4</sup> (See *Personalty*; *Charity*; *Abatement*, § 4.) As to what is meant by a “mixed fund,” see *Blended Fund*; as to mixed questions of law and fact, see *Fact*, § 3; and as to mixed actions, see *Action*, § 22.

**MODUS**, or **MODUS DECIMANDI**, is where there exists by custom a particular manner of tithing, that is, of paying tithes, different from the general rule. This is sometimes a pecuniary compensation, such as twopence an acre for the tithe of land; sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him, or the like.<sup>5</sup> Moduses are within the Tithe Commutation Acts, and have probably been commuted in most if not in all cases. (See *Tithes*; *De non Decimando*; *Composition*, § 5.)

**MOIETY** is used in the old books in the sense of “half.” “If a joyn't estate be made of land to a husband and wife, and to a third person, in this case the husband and wife have in law in their right but the moiety, and the third person shall have as much as the husband and wife, viz. the other moiety. And the cause is, for that the husband and wife are but one person in law.”<sup>6</sup> The word is, however, frequently used to signify any equal part—such as a third, fourth, &c.

<sup>1</sup> Pollock, 406.

<sup>2</sup> Underhill on Torts, 157.

<sup>3</sup> Tidd's Pr. 745.

<sup>4</sup> *In re Hill's Trusts*, 16 Ch. D. 173.

<sup>5</sup> Bl. Comm. ii. 29; Phill. Eccl. Law, 1502; stat. 2 & 3 Will. 4, c. 100, fixing the time for claiming a modus by prescription.

<sup>6</sup> Litt. § 291.

**MOLESTATION.**—Molesting a person by following him in a persistent or disorderly manner, or by hiding his property, or by besetting his place of work or residence, with the view of compelling him to do, or abstain from doing, an act, is forbidden by stat. 38 & 39 Vict. c. 86, repealing stat. 34 & 35 Vict. c. 32. The term “molestation” was used in the latter act, but is omitted from the former. (See *Intimidation*; *Trades Unions*.)

**MOLLITER MANUS IMPOSUIT** is the compendious name for the defence set up to an action for battery, where the defendant alleges that the battery complained of was lawful, and that “he laid hands on the defendant gently;” that is, used no more force than was necessary: as where a churchwarden turns a man out of church to prevent him from disturbing the congregation.<sup>1</sup> (See *Justification*.)

**MONEY.** See *Earmark*; *Goods*.

**MONEY HAD AND RECEIVED—MONEY PAID.** See *Contract*, §§ 6, 8; *Quasi Contract*.

Admiralty.

**MONITION.**—§ 1. In admiralty practice, a monition is a formal order of the Court commanding something to be done by the person to whom it is directed,<sup>2</sup> and who is called the person monished. Thus, when money is decreed to be paid, a monition may be obtained commanding its payment.<sup>3</sup> A monition is granted either on motion or on application in chambers, and, if not obeyed, may be enforced by attachment<sup>4</sup> (*q. v.*).

Monition for process.

§ 2. In ecclesiastical appeals to the Privy Council (and formerly also in admiralty appeals), as soon as the petition of appeal is lodged, a “monition for process” issues, calling upon the judge and officers of the Court below to transmit the proceedings in the cause to the registry of the Court of Appeal.<sup>5</sup> (See *Process*.)

§ 3. Monitions in divorce practice are now disused, orders having taken their place.<sup>6</sup>

Ecclesiastical law.

§ 4. In ecclesiastical procedure, a monition is an order monishing or warning the party complained against to do or not to do a certain act “under pain of the law and contempt thereof.” Thus, there may be a monition for personal answers (see *Answer*, § 4), for payment of costs, requiring a clergyman to reside, &c.<sup>7</sup> A monition may also be appended to a sentence inflicting a punishment for a past offence: in that case the monition forbids the repetition of the offence.<sup>8</sup>

See *Admonition*.

**MONOPOLY** is a licence or privilege allowed by the sovereign for the sole buying and selling, making, working, or using of anything

<sup>1</sup> Steph. Comm. iii. 375.

<sup>2</sup> Williams & Bruce's Admiralty, 297.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* 298.

<sup>5</sup> *Ibid.* 314; Macph. Privy C. Pr. 175.

<sup>6</sup> Browne on Divorce, 254.

<sup>7</sup> Phill. Eccl. Law, 1257.

<sup>8</sup> See *Martin v. Mackonochie*, 3 Q. B. D. 730; 4 Q. B. D. 697.



whatsoever. Monoplies were made illegal by stat. 21 Jac. 1, c. 3, except in the case of patents for new inventions and a few other instances.<sup>1</sup> (See *Patent*.)

**MONSTER**, in the technical sense, is a child "which hath not the shape of mankind."<sup>2</sup> It cannot inherit or purchase land;<sup>3</sup> and, therefore, the birth of a monster does not entitle a husband to curtesy.<sup>4</sup>

**MONSTRANS DE DROIT** is the remedy which a subject has when the crown is in possession of property belonging to him, and title of the crown appears from facts set forth upon record. In such a case the claimant may present a monstrans de droit ("manifestation of right"), either showing that upon the facts as recorded he is entitled to the property, or setting forth new facts showing that he is entitled. Thus if A. disseises B. of land and then dies without heirs, whereupon the land is adjudged to the crown by inquest of office (*q. v.*), here the crown's title appears upon record, and B.'s remedy is therefore by monstrans de droit, setting forth his disseisin by A.<sup>5</sup> (See *Ousterlemain; Petition of Right; Traverse*.)

**MONTESQUIEU**.—Charles de Sécondat, Baron de la Brède et de Montesquieu, was born 1st January, 1689, and died 10th February, 1755. He wrote *L'Esprit des Loix*, and various historical and other works.<sup>6</sup>

**MONTHS** are either lunar, consisting of twenty-eight days, and of which thirteen make a year: or calendar, which are of unequal lengths according to the almanac or common calendar, and of which twelve make a year. By the common law, a "month" means in matters temporal a lunar month: in matters ecclesiastical, a calendar month;<sup>7</sup> but in acts of parliament, "month" means calendar month.<sup>8</sup>

**MOOTS** are exercises in pleading, and in arguing doubtful cases and questions, by the students of a inn of Court (*q. v.*) before the benchers of the inn.<sup>9</sup>

**MORT D'ANCESTOR**. See *Assise of Mort d'Ancestor*.

**MORTGAGE**.<sup>10</sup>—§ 1. A mortgage is where one person (the mortgagor) secures to another (the mortgagee) the payment of money (whether already owing, or advanced at the time, or to be advanced subsequently), by vesting in him some property or interest in property, subject to the mortgagor's right to redeem or buy it back by paying the money within a

<sup>1</sup> Steph. Comm. 266.

<sup>2</sup> Co. Litt. 7 b; "non humanæ figuræ, sed alterius, magis animalis quam hominis." Dig. L. 16, fr. 135.

<sup>3</sup> Co. Litt. 7 b, 3 b.

<sup>4</sup> *Ibid.* 29 b. As to the rules of the Roman law, see Dig. I. 5, fr. 14; L. 16, fr. 135; Savigny, Syst. ii. 9.

<sup>5</sup> Steph. Comm. iii. 656; Manning's

Pr. Exch. 86; stat. 36 Edw. 3, c. 13.

<sup>6</sup> Holtz. Encycl.

<sup>7</sup> Stephen, Comm. i. 283.

<sup>8</sup> Stat. 13 & 14 Vict. c. 21, s. 4; see *Migotti v. Colville*, 4 C. P. D. 233.

<sup>9</sup> See Manning's *Serviens ad Legem*, 262; Reeves, 247.

<sup>10</sup> As to mortgages generally, see Fisher on Mortgage; Watson's Comp. Eq. 625.

Mortgage  
debt.

certain time, while the mortgagee has the right, after the lapse of a certain time, of enforcing his security, or making it available in obtaining payment of the money advanced. The sum secured by the mortgage is called the mortgage debt, although there is not necessarily any personal liability on the part of the mortgagor (as, for instance, in the case of a mortgage by trustees for raising portions.) The term mortgage debt is also used to signify the security of the mortgagee,<sup>1</sup> that is, his interest in the property mortgaged, and his other rights and remedies for obtaining satisfaction of the debt.

Mortgage of  
stock.

Stock-mort-  
gage.

§ 2. The term mortgage is most commonly used as applied to land or other realty and leaseholds,<sup>2</sup> but personalty may also be mortgaged, although the transaction is not generally called a mortgage, except in the case of ships<sup>3</sup> and choses in action (*e. g.*, policies of assurance, copyrights, &c.). A mortgage of chattels in possession, such as furniture, is called a bill of sale (*q. v.*, § 5). § 3. A mortgage of stock in the funds, or of a public company, &c., may be made.<sup>4</sup> Such a mortgage must be distinguished from what is technically called a stock mortgage, which is where A. has sold a sum of stock (*e. g.*, consols), and advanced the proceeds to B., who covenants to replace the stock (that is, to purchase and transfer to A. a like amount of stock) at a future time, and executes a mortgage of land or other property to A. as security for the covenant. The object of such a mortgage generally is that the mortgagee may obtain a higher rate of interest than that paid on the stock, and that he may be protected from the risk of the stock rising in price before the mortgage debt is repaid.<sup>5</sup>

Legal.

By convey-  
ance,

by demise,  
by assign-  
ment and by  
underlease.

Mortgages are of three kinds, legal, equitable, and statutory.

I. § 4. A legal mortgage (so called because it was formerly the only one recognized at common law) is where A. conveys property to B. by deed, as a security for the repayment of money. If the property mortgaged consists of the fee simple of land, the deed contains a conveyance in the ordinary form. If the mortgagor is the owner of the fee simple, and grants a term of years as the mortgage security (formerly a common mode of mortgaging land), it is called a mortgage by demise. If the owner of a term or lease wishes to mortgage it, he may do so either by an assignment or by underlease. If the terms of the lease are onerous, the mortgagee generally prefers the latter mode, as he thus escapes liability to the original lessor.<sup>6</sup> A legal mortgage may take one of five forms:—

(1) Upon  
condition.

(1) § 5. The old form was a conveyance, with a condition that it should be void on payment of the debt on a fixed day. In such a case the mortgagee had at common law an estate upon condition, and was called "tenant in mortgage."<sup>8</sup> The condition was sometimes called a defeasance (*q. v.*). When the time for payment expired, the estate of the mortgagee

<sup>1</sup> Williams, R. P. 422.

<sup>2</sup> Davids. Conv. ii. 549 *et seq.*

<sup>3</sup> As to which see Williams & Bruce's Admiralty, 27, and *infra*, § 17.

<sup>4</sup> *Langton v. Waite*, L. R., 2 Eq. 165; 4 Ch. 402.

<sup>5</sup> See *Blyth v. Carpenter*, L. R., 2 Eq. 501; *Whitney v. Smith*, 4 Ch. 513.

<sup>6</sup> Davidson, *ubi supra*.

<sup>7</sup> See Hayes' Conv. ii. 119.

<sup>8</sup> Litt. §§ 332, 333.

became absolute at law, but remained redeemable in equity, whence the mortgage was said to have an equity of redemption (*q. v.*). This form of mortgage has long been obsolete in all cases except mortgages of copyholds (see *Surrender*); and as the rules of equity now prevail, it seems that a conditional conveyance by way of mortgage cannot become absolute until foreclosure.

(2) § 6. At the present day, a mortgage is, in ordinary cases, effected by an absolute conveyance, followed by a proviso or agreement (express or implied), called the proviso for redemption, by which the mortgagee agrees to reconvey the property to the mortgagor on payment of the debt and interest by a certain date. Formerly, if the money was not repaid on the day, the mortgage became irredeemable at common law, but the mortgagor had an equity of redemption until foreclosure or sale.<sup>1</sup> The common law rule no longer exists.<sup>2</sup> § 7. Incident to both these kinds of mortgage is the right of foreclosure, a right which entitles the mortgagee to compel the mortgagor either to pay off the debt within a reasonable time, or to lose his equity of redemption. (See *Foreclosure*.) § 8. In addition to the rights thus created by operation of law, a legal mortgage generally contains elaborate stipulations and provisions, especially in the interest of the mortgagee. The principal of these are the power of sale, which enables the mortgagee to take possession of and sell the property, if default is made in payment of the principal or interest beyond a certain period;<sup>3</sup> and the various powers of leasing and managing the property, and appointing a receiver, which are necessary for the proper management of a landed estate.<sup>4</sup> (See *Mortgage in Possession*.)

(3) § 9. A mortgage may also take the form of a conveyance by the borrower to the lender (or his nominee), upon trust to sell it, and, after satisfying the debt and expenses, &c., to pay the surplus proceeds (if any) to the mortgagor. Such a mortgage does not give the right of foreclosure,<sup>5</sup> but in all other respects it seems to be similar to an ordinary mortgage; and hence, if the mortgagee remains in possession for more than twelve years, without giving a written acknowledgment of the mortgagor's title, the mortgagor's right to redeem is gone.<sup>6</sup>

(4) § 10. A Welsh mortgage is said to be a mortgage under which the mortgagee is let into possession of the mortgaged land until the rents and profits repay the principal and interest, the property being redeemable at any time on payment of the amount remaining due.<sup>7</sup> But this is sometimes described as "a mortgage in the nature of a Welsh mortgage,"—a genuine Welsh mortgage being defined as (5) the conveyance of an estate redeemable at any time on payment of the debt, without payment of interest by the borrower, or account of the rents and profits by the lender,

<sup>1</sup> Williams, R. P. 424; White & Tudor's L. C. ii. 919.

<sup>2</sup> Judicature Act, 1873, s. 25, § 11.

<sup>3</sup> As to the frame of mortgage deeds, see Davids. ii. 560 *et seq.*; Elphinst. 141; and see stat. 23 & 24 Vict. c. 145, which confers a statutory power of sale on every mortgagee of land, &c., where the mortgage

contains no such power.

<sup>4</sup> See also Judicature Act, 1873, s. 25, § 5.

<sup>5</sup> Hayes' Conv. ii. 119, n.

<sup>6</sup> Stats. 3 & 4 Will. 4, c. 27; 37 & 38 Vict. c. 57, s. 7; *Re Alison*, 11 Ch. D. 284.

<sup>7</sup> Watson's Comp. Equity.

who is let into possession from the beginning, and takes the rents in lieu of interest.<sup>1</sup> A Welsh mortgage does not admit of foreclosure, as the mortgagee does not stipulate for redemption.<sup>2</sup>

Sub-mort-  
gage.

§ 11. A sub-mortgage is a mortgage by a mortgagee of his mortgage debt (§ 1) with a transfer of the mortgage security; the original mortgagee is then called sub-mortgagor in respect of the sub-mortgage.

Further  
charge.  
Further  
security.

§ 12. A further charge is an agreement that a subsisting mortgage shall be a security for a further advance by the mortgagee. § 13. A further security is a mortgage of some additional property, or a grant of additional remedies to secure a subsisting mortgage debt.

Equitable

II. § 14. An equitable mortgage is one which passes only an equitable estate or interest, either (1) because the form of transfer or conveyance used is an equitable one, that is, operates only as between the parties to it, and those who have notice of it, or (2) because the mortgagor's estate or interest is equitable, that is, consists merely of the right to obtain a conveyance of the legal estate. § 15. Of the former class, the principal kinds are<sup>3</sup> (a) an agreement to execute a legal mortgage: (b) a deposit of title deeds, share certificates, land certificates, or other documents of title, either with or without a memorandum of deposit, that is, a statement in writing that the documents are deposited by way of security.<sup>4</sup>

—by agree-  
ment,  
—by deposit.  
Memorandum  
of deposit.

§ 16. An equitable mortgage of the second class occurs in the case of a mortgage of an equity of redemption; thus, if A. mortgages his estate to B., and then mortgages it again to C., though in terms professing to convey the legal estate, C. has an equitable mortgage, because it is in effect only a charge on A.'s equity of redemption.

Statutory

III. § 17. A statutory mortgage is one which, by virtue of the provisions of a statute, produces almost the same effect as an ordinary mortgage, without operating as a transfer or conveyance of the property. Thus, a mortgage of land registered under the Land Transfer Act, 1875, is effected by an "instrument of charge" executed by the mortgagor and entered on the register.<sup>5</sup> So a "mortgage" of a ship under the Merchant Shipping Act, 1854, does not operate as a conveyance, but merely gives the mortgagee a charge with a power of sale.<sup>6</sup>

—of land,

—of ship.

See *Charge; Consolidation of Securities; Pawn; Pledge; Receiver; Re-conveyance; Tacking*.

ETYMOLOGY.]—Norman-French, *mort*, dead, *gage*, a pledge, from low Latin, *vadium*, which in its turn comes from either Latin, *vas*, *vadis*, a surety, or Germanic, *wetti*, *ved*, a bond, or from a combination of the two.<sup>7</sup> Notwithstanding the authority of Littleton, who says that a mortgage is so called because if the feoffor does not pay on the appointed day the land is dead to him, and if he does pay then it is dead to the feoffee,<sup>8</sup> it seems quite clear that "mortgage" originally denoted a pledge of land under which the creditor took the rents and profits for himself, so that it was dead or profitless to the

<sup>1</sup> 5 Bythewood's Conv. 96.

<sup>2</sup> Fisher on Mortgage, 5, 11.

<sup>3</sup> *Ibid.* 33.

<sup>4</sup> *Russel v. Russel*, 1 Bro. C. C. 269; *White & Tudor's L. C.* i. 603. As to the difference between a mortgage by deposit and a lien, see *Dauids. Conv.* ii. 86, 11.

<sup>5</sup> Sect. 22 *et seq.*; General Rules, 20 *et seq.*, Form 20.

<sup>6</sup> Sect. 66 *et seq.*; Maude & Pollock, *Merch. Shipping*, 33 *et seq.*

<sup>7</sup> Littré, *Dict. v. Gage*.

<sup>8</sup> Sect. 332.

debtor, as opposed to a pledge under which the rents and profits went in reduction of the debt (*vif gage, vivum vadum*).<sup>1</sup> For another instance of *mort* in the sense of profitless see *Mortmain*. For the history of *pignus* in Roman law, which strikingly resembles that of our own law of mortgage, see Kuntze, *Cursus*, §§ 549 *et seq.*, and for the theory of mortgage in general see Vangerow, *Pandecten*, i. 797.

### MORTGAGOR AND MORTGAGEE IN POSSESSION.—Mortgagor.

§ 1. A mortgagor in possession is in the same position as an ordinary landowner, except that he must not prejudice the security by committing waste. He is entitled to collect rents under leases granted before the mortgage, until the mortgagee gives the tenants notice of the mortgage; and, under sect. 25 of the Judicature Act, 1873, he may bring actions in his own name in respect of the possession or rents of the land. A limited power of leasing is sometimes given to the mortgagor by the mortgage.

§ 2. A mortgagee in possession is bound to account to the mortgagor Mortgagee. for the rents and profits which he has received, or ought with proper management to have received (see *Account*, §§ 7 *et seq.*), and is liable for waste.<sup>2</sup> Powers of leasing and management, and of appointing a receiver, are frequently given by the mortgage deed. (See *Mortgage*, § 8.)

**MORTMAIN.**—The term mortmain is applied to two classes of statutes.

I. § 1. The statutes prohibiting alienation in mortmain, in the strict Statutes of Mortmain. sense of the word, that is, alienation of land to corporations, are *Magna Charta*, the stat. *De Viris Religiosis* (7 Edw. 1), stat. *Westminster II.* (13 Edw. 1, c. 32), and 15 Rich. 2. These statutes prohibited not only direct grants of land to corporations, whether sole or aggregate, but also several contrivances by which the religious houses, against which the statutes were especially directed, attempted to elude their provisions. (See *Use*.) Their effect was, that if land was granted to a corporation without a licence Licence in mortmain. from the crown, and from the feudal lords of whom it was mediately or immediately holden, then within a certain time the immediate lord might enter on or take possession of the land, which thus became forfeited to him; or, if he failed to do so, each lord paramount had the Forfeiture. right to enter in his turn, and in default of all of them the crown. In modern times, however, the rights of intermediate lords became unimportant, and by the stat. 7 & 8 Will. 3, c. 37, it was enacted that the crown for the future may grant licences to aliene or take land in mortmain, of whomsoever it may be holden. Many corporations are exempt from the operation of the Statutes of Mortmain: such are the universities and colleges of Oxford and Cambridge, associations formed under the Companies Acts, the Building Societies, Friendly Societies, and Industrial and Provident Societies Acts, &c.<sup>3</sup>

<sup>1</sup> See Glanvil, x. 6, 8; Loysel, *Inst. Cout.* 483; Fisher, 2, n. (e).

<sup>2</sup> Watson, *Comp. Equity*, 670. As to the effect of the ordinary attornment clause in a mortgage in making the mortgagee a mortgagee in possession without any act on his part, see *Re Stockton Iron Co.*, 10 Ch. D. 335, 356; *Ex parte Punnett*, 16 Ch. D. 226.

<sup>3</sup> Britton, 90a; Co. Litt. 2b, 98b; Bl. Comm. ii. 267; Steph. Comm. i. 454; Tudor, *Char. Trusts*, 36; Digby's *Hist. R.* P. 98, 150, 256, 325. See also the acts of 18 & 19 Vict. c. 124, and 33 & 34 Vict. c. 34, enabling charities, &c. to invest money in real securities.

Charitable  
Uses or  
Mortmain  
Act.

II. § 2. In the popular use of the word, the Mortmain Act is the act of 9 Geo. 2, c. 36 (more accurately called the Charitable Uses Act), which prohibits gifts of land or of money to be laid out in the purchase of land for any charitable purposes, except by absolute and immediate conveyance by deed, executed and enrolled with certain formalities, the object being to prevent improvident alienations or dispositions of land by languishing or dying persons to the disherison of their lawful heirs. Therefore, all gifts by will of land and of money arising out of or connected with land, for charitable purposes, are void.<sup>1</sup> The act was passed to supplement the provisions of the Statutes of Mortmain (*supra*, § 1), and of the act against superstitious uses (*q. v.*); because, although charities are not generally corporations, yet gifts to them are practically in perpetuity, and are therefore contrary to the policy of the law, which favours free dealing in land. The Charitable Uses Act is, however, quite distinct from the Statutes of Mortmain; and, therefore, a corporation which has power to hold land in mortmain cannot take land by a gift contravening the provisions of the Charitable Uses Act.<sup>2</sup>

ETYMOLOGY.—Norman-French, *morte meyn*;<sup>3</sup> low Latin, *mortua manus*, a dead hand, because “the lands were said to come to dead hands as to the lords, for that by alienation in mortmaine they lost wholly their escheats, and in effect their knights-services for the defence of the realme; wards, marriages, relieves, and the like; and therefore was called a dead hand, for that a dead hand yeeldeth no service.”<sup>4</sup>

Public health.

**MORTUARIES.**—§ 1. In the modern sense of the word, a mortuary is a place for the reception of dead bodies before interment. Under the Public Health Act, 1875, ss. 141, 142, every local sanitary authority is empowered to provide a mortuary, and to cause dead bodies to be removed to it in cases where their retention in dwelling-houses might be prejudicial to the health of the inmates.

Church law.

§ 2. In church law, mortuaries are a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister in very many parishes on the death of one of his parishioners. The nature of the gift formerly varied according to the custom of the place, being frequently the next best chattel of the deceased, after the lord's heriot. But by stat. 21 Hen. 8, c. 6, mortuaries were fixed at certain sums, in no case exceeding 10s.<sup>5</sup>

**MOTION.**—§ 1. A motion is an application to a Court or a judge. Some motions are made summarily, without reference to any pending action, as where application is made for a writ of habeas corpus (*q. v.*). Other motions are employed to obtain a judgment on the main question

<sup>1</sup> See Tudor's Char. Trusts, 39 *et seq.*; Williams, R. P. 69 *et seq.*, where the acts relaxing some of the stringent provisions of the stat. 9 Geo. 2 are referred to. As to what kinds of property (debentures, &c.) are within the act, and the effect of a bequest to a charity out of a fund partly arising from land, see Watson's Comp. Eq. Abatement, § 4, and Debenture, § 11;

*Attree v. Hawe*, 9 Ch. D. 337; *Ashworth v. Munn*, 15 Ch. D. 363.

<sup>2</sup> *Luckraft v. Pridham*, 6 Ch. D. 205.

<sup>3</sup> Britton, 32 b; Loysel, Inst. Cout. gloss.

<sup>4</sup> Co. Litt. 2 b.

<sup>5</sup> Bl. Comm. ii. 425; Phill. Eccl. Law, 873; and see stats. 13 Ann. c. 6, and 28 Geo. 2, c. 6.

in an action (see *Motion for Judgment*); but these are not motions in the sense in which the word is commonly used, namely, to denote an interlocutory application in an action. In admiralty practice, motions may be made either in Court or in chambers; but, as a general rule, a motion is an oral application made by counsel in open Court, as opposed to a petition, which is a written application, and to a summons, which is made in chambers.<sup>1</sup>

§ 2. Ordinarily a motion is only made after notice has been given to the other side: sometimes, however, a motion is made *ex parte*. In common law practice, too, a motion is sometimes for a rule to show cause: in such a case the applicant moves *ex parte* for a rule calling upon the other side to show cause to the Court on a day named why the order asked for should not be made upon him. (See *Rule; Order*.)

§ 3. A motion of course is a motion which is granted by the Court as a matter of course: for an instance, see *Foreclosure*.

§ 4. In chancery practice, if counsel is unable to make a motion on the day for which notice has been given, he is entitled; as a matter of right, "to save the motion," that is, to adjourn it to the next motion day by mentioning it to the Court, without the consent of the other side.<sup>2</sup>

§ 5. If counsel does not either bring on or save his motion on the day for which notice has been given (provided of course he has had an opportunity of being heard), the motion is said to be abandoned, and the other side is entitled to his costs of it.

§ 6. As to motions by way of appeal, see *Appeal*.

**MOTION FOR DECREE.**—Under the practice of the Court of Chancery the most usual mode of bringing on a suit for hearing when the defendant had answered was by motion for decree. To do this the plaintiff served on the defendant a month's notice of his intention to move for a decree.<sup>3</sup> (See *Decree*, § 5; *Further Consideration*.)

**MOTION FOR DIRECTIONS.**—Formerly, in divorce and probate practice, after the pleadings had been concluded, it was necessary to make a motion to obtain the directions of the Court as to the manner in which the questions of fact raised by the pleadings were to be tried.<sup>4</sup> This practice has recently been abolished, and a cause at issue is now set down for trial in accordance with a general order of the Court.<sup>5</sup>

**MOTION FOR JUDGMENT** is the mode of obtaining the judgment of the High Court in an action in all cases where no other mode of obtaining it is prescribed.<sup>6</sup> Thus, if at the trial of an action the judge does not direct any judgment to be entered, the proper course is for the party who thinks the result of the trial in his favour to move for judgment on the verdict or findings at the trial.<sup>7</sup> So, if the defendant makes default in delivering his defence, the plaintiff must set down the action on motion

<sup>1</sup> Daniell, Ch. Pr. 1437; Steph. Comm. iii. 627; Williams & Bruce's Adm. 302.

<sup>2</sup> Daniell, 1444.

<sup>3</sup> Hunter's Suit, 59; Daniell's Ch. Pr. 722.

<sup>4</sup> Browne on Divorce, 229; Browne's Probate Pr. 290. See Rules of Court,

xxxvi. 5.

<sup>5</sup> Probate, Divorce and Admiralty Rules, s. 205 (10th August, 1880).

<sup>6</sup> Rules of Court, xl. 1; Smith's Action, 146.

<sup>7</sup> See Rules of Court, xl. 3.

for judgment, unless it is of such a nature that he may enter judgment for his claim at once (*e.g.* where it is for a debt, damages, recovery of land, or the like).<sup>1</sup>

§ 2. A motion for judgment requires to be set down in the cause list, and notice of it is given to the other side.

**MOTION FOR NEW TRIAL.** See *Trial*.

**MOTION IN ARREST OF JUDGMENT.** See *Arrest of Judgment*.

**MOTION TO SET ASIDE JUDGMENT** is a step taken by a party in an action in the High Court who is dissatisfied with the judgment directed to be entered at the trial of the action, on the ground either that the finding of the jury has been wrongly entered, or that the judgment itself is wrong. The motion is made to the Court of Appeal.<sup>2</sup>

**MULIER** in the old books is applied to a son, daughter, brother, sister, &c. to signify one born in lawful wedlock, or legitimate, as opposed to a bastard. (Norman-French, *mulieré*; from Latin, *mulier*, a wife.<sup>3</sup>) The expression was formerly of importance in what was called the case of "bastard eignè and mulier puisnè" ("eldest son a bastard and younger son legitimate"), which occurred where a man had a bastard son, and afterwards married the mother and by her had a legitimate son. If the father died and the bastard entered on his land and died seised of it, so that it descended to his issue, the mulier puisnè was barred of his right to the land.<sup>4</sup> The doctrine seems to have been abolished by 3 & 4 Will. 4, c. 27, s. 39.<sup>5</sup> (See *Bastard*.)

**MULTIFARIOUSNESS.**—Under the practice of the Court of Chancery, a bill of complaint was open to a demurrer for multifariousness when it attempted to embrace too many objects or causes of suit.<sup>6</sup> Under the new practice, a plaintiff may include as many causes of action as he pleases in one writ, except in the case of actions for the recovery of land, actions by executors and trustees in bankruptcy, &c., and in the case of one action being brought for several claims which cannot be conveniently disposed of together.<sup>7</sup> (See *Joinder*, § 1.)

**MULTIPLY.**—When a thing is divided into several parts, and something which was dependent on or annexed to it thenceforward becomes dependent on or annexed to each part of it, the accessory is said to be multiplied. Thus, if a copyhold tenement for which a heriot is due to the lord on the death of each successive tenant, is divided into parcels and conveyed to different persons, the heriot will be multiplied, *i.e.*, a heriot will be due for each parcel.<sup>8</sup> (See *Apportionment*; *Entire*.)

**MUNICIPAL CORPORATION** is a corporation consisting of all or part of the inhabitants of a town, and having the power and duty

<sup>1</sup> Rules of Court, xxix. 10.

<sup>2</sup> *Ibid.* xl. 4.

<sup>3</sup> Britton, 203 b; Co. Litt. 243 b.

<sup>4</sup> Litt. §§ 399 *et seq.*

<sup>5</sup> Bl. Comm. ii. 248, n. (14).

<sup>6</sup> Daniell's Ch. Pr. 283.

<sup>7</sup> Rules of Court, xvii.

<sup>8</sup> Elton, Copyh. 183, citing *Attree v. Scutt*, 6 East, 481.



of enforcing the good rule and government of the place, including the lighting, cleansing, paving and improving of the streets, the prevention of nuisances, &c.<sup>1</sup> Most municipal corporations (London being the principal exception) are regulated by the Municipal Corporations Act, 1835,<sup>2</sup> which fixes the qualification for the burgesses or members of the corporation, and provides for the election in each borough of a mayor, aldermen and council: for the appointment of a watch committee to regulate the police of the borough, and for the payment of the expenses of the borough out of the borough fund and rate. Most municipal corporations are also the authorities for carrying out the provisions of the Public Health Act, 1875, the Artizans' Dwellings Act, 1875, and similar acts, in their respective districts.

§ 2. Corporations regulated by the M. C. Act, 1835, are trustees of the corporate property for the benefit of their respective boroughs.<sup>3</sup>

See *Borough; Justice of the Peace; Metropolitan Board of Works; Recorder*.

**MUNICIPAL LAW.** See *Law*, § 3.

**MUNIMENTS.**—Title deeds and other documents relating to the title to land are sometimes called muniments, from the Latin word *munio*, which signifies to defend or fortify, because they enable the owner to defend his estate.<sup>4</sup>

**MURDER** is the crime of unlawful homicide with malice aforethought (see *Homicide; Malice*); as where death is caused by an act done with the intention to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm. Thus, if A. finds B. asleep on some straw and lights the straw, whether he means to kill B., or whether he means to do B. serious injury without killing him, in either case if B. is burnt to death, A. is guilty of murder. So if A. shoots at B., intending to kill him, and kills C. instead, A. is guilty of murder.

§ 2. Murder is punishable by death (*q.v.*); attempts to murder are punishable by penal servitude for life.<sup>5</sup>

§ 3. A person who kills himself in a manner which, in the case of another person, would amount to murder, is guilty of self-murder or suicide (*q.v.* and see *Felo de se*).

**MUSIC.** See *Copyright; Right of Representation and Performance*.

**MUTE.**—A prisoner is said to stand mute when, being arraigned for treason or felony, he either makes no answer at all, or answers foreign to the purpose, or with such matter as is not allowable, and will not answer

<sup>1</sup> Grant on Corporations, 16; Steph. Comm. iii. 31 *et seq.*

<sup>2</sup> See the Municipal Corporations (New Charters) Act, 1877.

<sup>3</sup> Grant, 108; *Att.-Gen. v. Mayor of*

*Brecon*, 10 Ch. D. 204.

<sup>4</sup> *Termes de la Ley*.

<sup>5</sup> Stephen's Crim. Dig. 144 *et seq.*; Russell on Crimes, i. 641 *et seq.*; stat. 24 & 25 Vict. c. 100.

otherwise. In the first case, a jury must be sworn to try whether the prisoner stands mute of malice (*i. e.*, obstinately) or by visitation of God (*e. g.*, being deaf or dumb). If he is found mute by visitation of God, the trial proceeds as if he had pleaded not guilty; if he is found mute of malice, or if he will not answer directly to the indictment, the Court may order a plea of not guilty to be entered, and the trial proceeds accordingly.<sup>1</sup>

**MUTINY ACT.**—The Bill of Rights (stat. 1 W. & M. (2), c. 2) declares that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law. Therefore, to enable the army to be kept up, an act of parliament is annually passed authorizing this to be done. Formerly this annual act contained elaborate provisions for the enlistment, payment and billeting of soldiers, for the punishment of mutiny and desertion, and generally for the government of the army,<sup>2</sup> and was hence called the Mutiny Act; but these provisions have recently been consolidated in one act, called the Army Discipline and Regulation Act, 1879; and, therefore, in the annual act it is sufficient to provide that the Army Discipline and Regulation Act, 1879, shall remain in force for one year.

**MUTUAL CREDITS—MUTUAL DEALINGS.**—§ 1. The phrase “mutual credits” used in the Bankruptcy Acts denotes such dealings between two persons as must in their nature terminate, or have a tendency to terminate, in debts.<sup>3</sup> The “mutual credit clauses” in the acts provide that where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and one of his creditors, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively.<sup>4</sup> The effect produced by the mutual credit clause is, therefore, a species of set-off (*q. v.*), but differs from the ordinary set-off between solvent persons in having for its object, not to prevent cross actions, but to avoid the injustice, which would otherwise arise, of compelling a creditor to pay the trustee in bankruptcy the full amount of the debt due from him to the bankrupt, while the creditor would perhaps only receive a small dividend under the bankruptcy on the debt due from the bankrupt to him.<sup>5</sup>

**MUTUAL PROMISES.** See *Consideration*, § 5; *Promise*.

<sup>1</sup> Steph. Comm. iv. 391; stat. 7 & 8 Geo. 4, c. 28. In *Reg. v. Berry* (1 Q. B. D. 447) a plea of “not guilty” was ordered to be entered for a prisoner who stood mute by visitation of God.

<sup>2</sup> Steph. Comm. ii. 589.

<sup>3</sup> Robson's Bankr. 312; Chitty on Con-

tracts, 785; *Rose v. Hart*, 8 Taunt. 449; Smith's L. C. ii. 296.

<sup>4</sup> Bankruptcy Act, 1869, s. 39. See B. A. 1849, s. 171.

<sup>5</sup> Robson's Bankr. 308, 314. See *Astley v. Gurney*, L. R., 4 C. P. 714; *In re Winter*, 8 Ch. D. 225.

**MUTUALITY.**—§ 1. In every agreement the parties must, as regards the principal or essential part of the transaction, intend the same thing; that is, each must know what the other is to do: this is called mutuality of assent.<sup>1</sup> Mutuality of assent.

§ 2. In a simple contract arising from agreement, it is sometimes the essence of the transaction that each party should be bound to do something under it: this requirement is called mutuality; thus, an agreement by A. to refer a question between him and B. to arbitration is not enforceable, unless B. also agrees to be bound by the award; and an agreement by C. with D. to learn a trade is not binding unless there is also an undertaking by D. to teach him.<sup>2</sup> This may be called mutuality of obligation. Mutuality of obligation.

§ 3. Mutuality of remedy is where each party can enforce the contract against the other; thus, a vendor of land can enforce specific performance of the contract by the purchaser, because the purchaser could have done the same to him; on the other hand, mutuality of remedy does not exist where one of the parties to a contract is under disability, or where it is required by the Statute of Frauds to be in writing, and he has not signed it, because, though he can enforce it, the other party cannot.<sup>3</sup> Mutuality of remedy.

## N.

**NAME AND ARMS CLAUSE** is the popular name for the clause, sometimes inserted in a will or settlement by which property is given to a person, for the purpose of imposing on him the condition that he shall assume the surname and arms of the testator or settlor, with a direction that if he neglects to assume or discontinues the use of them, the estate shall devolve on the next person in remainder, and a provision for preserving contingent remainders.<sup>4</sup>

**NATIONAL DEBT.** See *Fund*, § 3.

**NATIONALITY** is that quality or character which arises from the fact of a person's belonging to a nation or state. Nationality determines the political status of the individual, especially with reference to allegiance (*q. v.*), while domicile determines his civil status. Nationality arises either by birth or by naturalization (*q. v.*).<sup>5</sup>

<sup>1</sup> Chitty on Contracts, 13.

<sup>2</sup> *Ibid.* 14.

<sup>3</sup> *Ibid.* 13.

<sup>4</sup> Davidson, Conv. iii. 277.

<sup>5</sup> See Savigny, Syst. viii. § 346 (where "nationality" is also used as opposed to

"territoriality" (*q. v.*) for the purpose of distinguishing the case of a nation having no national territory, *e. g.* the Jews); Westlake, Priv. Int. Law, 5; *Udny v. Udny*, L. R., 1 H. L. (Sc.) 441.

**NATURAL-BORN SUBJECT.** See *Allegiance*; *Nationality*; *Naturalization*, § 3.

**NATURAL RIGHTS** are those rights which supplement the direct rights of ownership (*q. v.*), by imposing duties on other persons. Thus every owner of land has *prima facie* the right to prevent his neighbours from polluting the air passing over his land, and from disturbing, diminishing or polluting the water flowing through his land; he is also entitled to so much support from his neighbour's land as is necessary to keep his own land at its natural level. These are called natural rights, as opposed to acquired rights, such as easements, profits à prendre, franchises, &c.<sup>1</sup> (See the various titles: also *Access*; *Air*; *Navigation*; *Support*; *Water*.)

**NATURALIZATION** takes place when a person becomes the subject of a state to which he was before an alien. The effect of naturalization is that the naturalized subject thereby acquires all political and other rights, powers and privileges, and becomes subject to all obligations to which natural-born members of the state are entitled and subject, except that he cannot divest himself of his obligations towards the state of which he was formerly a subject, without the consent of that state. (See *Expatriation*.)

§ 2. An alien becomes a naturalized British subject by obtaining a certificate of naturalization from a Secretary of State in accordance with the provisions of the Naturalization Act, 1870, which enlarges the powers given by 7 & 8 Vict. c. 66; a special certificate of naturalization may be obtained for the purpose of quieting doubts as to the right of a person to be a British subject (*s. 7*).<sup>2</sup> Since the passing of the above-mentioned acts, naturalization by private act of parliament, which was formerly the only method of becoming naturalized,<sup>3</sup> has become unusual save in exceptional cases.<sup>4</sup>

§ 3. The term "naturalization" is also sometimes applied to that operation of law by which the children and grandchildren born abroad of English natural-born subjects are themselves natural-born subjects "to all intents, constructions and purposes."<sup>5</sup> (See *Allegiance*, § 5; *Denizen*; *Expatriation*; *Nationality*.)

**NAVAL COURTS** are held abroad in certain cases to inquire into complaints by the master or seamen of a British ship, or as to the wreck or abandonment of a British ship. A Naval Court consists of three, four or five members, being officers in her Majesty's navy, consular officers, masters of British merchant-ships or British merchants.

<sup>1</sup> Some writers use the term "natural rights" to include all rights arising from ownership (Phear on Water, 7); but this is inconvenient and unnecessary. See *Proprietary Rights*.

<sup>2</sup> Cutler on Naturalization; Block, Dict.;

Holtz. Encycl.

<sup>3</sup> 1 Bl. 374.

<sup>4</sup> Rep. on Natur. App. 8.

<sup>5</sup> Stats. 7 Ann, c. 5; 13 Geo. 3, c. 21; as to the proper construction of the acts, see Westlake, Priv. Int. Law, 11.

It has power to supersede the master of the ship with reference to which the inquiry is held, to discharge any of the seamen, to decide questions as to wages, send home offenders for trial,<sup>1</sup> or try certain offences in a summary manner.<sup>2</sup>

**NAVIGABLE—NAVIGATION.**—§ 1. The right of navigation is the right of the public to use an arm of the sea, a river, or other piece of water, as a highway for shipping, boating, &c., including the right to anchor in it.<sup>3</sup> It is a right of way and not a right of property, and therefore the owner of the bed of a river over which the public have by user acquired a right of navigation may make any erection on it which does not interfere with the navigation warranted by that user<sup>4</sup> (see *High-way*). In the case of estuaries and navigable tidal rivers, however, the beds of which are *primâ facie* vested in the crown, the ownership of the soil is wholly subject to the public right of navigation, and no part of it can be used so as to derogate from or interfere with that right.<sup>5</sup> A river which is subject to a right of navigation is said to be "navigable."

As to navigation on the sea, see *High Seas*.

§ 2. The question whether a river is navigable or not seems to depend partly on its size and the formation of its bed, and partly on the use to which it has been put; if a river will admit ships and it has been used for shipping purposes by the public it is a navigable river, whether it be tidal or non-tidal, and whether it flow through or over private land or land belonging to the crown.<sup>6</sup> As a rule, however, an arm of the sea or a tidal river with a broad and deep channel is navigable.<sup>7</sup>

§ 3. Where the public have acquired the right of navigation on a private or non-tidal river, the original exclusive right of the riparian owners to fish in it is not thereby affected.<sup>8</sup> (See *Fishery*.)

§ 4. Obstructing the navigation of a navigable water is a public nuisance.<sup>9</sup> (See *Nuisance*.)

**NAVIGATION ACTS** were various statutes (especially 12 Car. 2, c. 18) passed for the encouragement and protection of British shipping by excluding foreign ships from trading with British colonies and even with Great Britain. They have now been almost wholly repealed, the principal exceptions being certain provisions designed to enforce reciprocity in commerce between British and foreign countries, that is, to prevent British shipping from being placed at a disadvantage in foreign countries; for this purpose the Privy Council has power to impose retaliatory restrictions and duties on foreign shipping.<sup>10</sup>

<sup>1</sup> Merch. Shipp. Act, 1854, ss. 260 *et seq.*; Maude & Pollock, 163.

<sup>2</sup> M. S. Act, 1855, s. 28.

<sup>3</sup> *Gann v. Free Fishers of Whitstable*, 11 H. L. C. 192; Coulson & Forbes on Waters, 396.

<sup>4</sup> *Orr Ewing v. Colquhoun*, 2 App. Ca. 839; Phear on Water, 53.

<sup>5</sup> Coulson & Forbes, 413.

<sup>6</sup> See Hale, De Jur. Mar. part i. c. 3; *Lyon v. Fishmongers' Co.*, 1 App. Ca. 662; *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 713.

<sup>7</sup> Coulson & Forbes, 413.

<sup>8</sup> *Ibid.* 59.

<sup>9</sup> *Ibid.* 421.

<sup>10</sup> Steph. Comm. iii. 143; stat. 16 & 17 Vict. ss. 324 *et seq.*; Customs Consolidation Act, 1876.

**NE EXEAT REGNO** is a writ which issues from the High Court of Justice (in the Chancery Division) to restrain a person from going out of the kingdom without the Queen's licence or the leave of the Court. It is a high prerogative writ, which was originally applicable to purposes of state only, but was afterwards extended to private transactions.<sup>1</sup> It is employed when a person, against whom another has an equitable claim for a sum of money actually due, is about to leave the country for the purpose of evading payment, and the absence of the defendant would materially prejudice the plaintiff in the prosecution of his action.<sup>2</sup>

**NE UNQUES EXECUTOR** (= "never executor") is the plea by which, under the old common law practice, a person sued as executor of a deceased person denied that he filled that office: similarly with the plea *ne unques administrator*.<sup>3</sup>

Infant.

**NECESSARIES.**—§ 1. Notwithstanding the general rule that an infant is incapable of binding himself by a contract, he may make a contract for necessities: and the word necessities is not confined in its strict sense to such articles as are necessary to the support of life, but extends to articles fit to maintain the particular person in the state, degree, and station of life in which he is.<sup>4</sup> (See *Infant*.)

Lunatic.

§ 2. The same doctrine applies to lunatics.<sup>5</sup>

Married woman.

§ 3. As a general rule every wife has an implied authority to contract with tradesmen for necessities suitable to the degree and estate of her husband, so as to make him liable to the tradesmen, unless he has sufficiently supplied her with articles of the kind in question, or unless she has a separate income. If the husband and wife are living together, this authority is implied, in the case of ordinary household necessities, from the usual practice of persons in the particular class of life, according to which a wife has the management of such matters: if, therefore, the husband wishes to put an end to this authority, he must give notice to the tradesmen that it is withdrawn. But this principle does not apply to such things as dresses, jewellery, &c.; and, therefore, the husband need not give notice to the tradesmen that his wife has no authority to pledge his credit for such things, unless, by his previous conduct (as by habitually allowing his wife to purchase such things on credit and by paying for them), he has given her an implied authority to do so. Where, however, the husband turns the wife out of doors, or so conducts himself that she is obliged to leave him, he is under a legal duty to maintain her; and if he does not do so, she has power to provide for herself at his expense by pledging his credit for necessities, such as

<sup>1</sup> Daniell, Ch. Pr. 1548; Hunter's Suit, 145; *Sobey v. Sobey*, L. R., 15 Eq. 200; Beames on *Ne Exeat*; Rules of Court (August, 1875), r. 10.

<sup>2</sup> *Drover v. Beyer*, 13 Ch. D. 242. See Debtors Act, 1869, s. 2.

<sup>3</sup> Williams, Ex. 1794.

<sup>4</sup> Co. Litt. 172 a; Chitty on Contracts, 138; Pollock on Contract, 46; *Peters v. Fleming*, 6 M. & W. at p. 46; *Ryder v. Wombwell*, L. R., 4 Exch. 32.

<sup>5</sup> Pope on Lunacy, 239; Pollock, 74; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170; 7 D. & R. 614.

food, apparel, lodging, &c. And as this authority is conferred on her by the law, and not by the husband, he cannot revoke or destroy it.<sup>1</sup>

§ 4. In the case of ships, the term "necessaries" means such things as are fit and proper for the service in which the ship is engaged, and such as the owner, being a prudent man, would have ordered if present; *e.g.*, anchors, rigging, repairs, victuals.<sup>2</sup> The master may hypothecate the ship for necessities supplied abroad so as to bind the owner.<sup>3</sup> (See *Action*, §§ 11 *et seq.*) Merchant shipping.

§ 5. In criminal law, the wilful neglect to provide necessities for children or apprentices is a misdemeanor.<sup>4</sup> Criminal law.

**NEGATIVE PREGNANT**, in pleading, is where a person gives an evasive answer to an allegation of his opponent by answering it literally, without answering the substance of it. Thus, if it is alleged that A. received a certain sum of money, and he denies that particular amount, this is a negative pregnant, because the substance of the allegation is the receipt of some money, and not the particular amount received. A. should, therefore, answer either that he did not receive any money at all, or state how much he received. Similarly, when something is alleged to have happened under certain circumstances, it is not sufficient to deny that it happened under those particular circumstances; but the party must state whether it happened at all.<sup>5</sup>

**NEGLIGENCE** is want of proper care, and may consist in doing something which ought not to be done, or in not doing something which ought to be done.<sup>6</sup> The legal effect of negligence is either civil or criminal.

I. In civil law, negligence may operate either to create or to defeat a right of action. Civil law.

(1) § 2. Negligence which creates a right of action is a species of tort or injury giving rise to a right to damages, and may exist either (a) where the parties are strangers, or (b) where they stand in a special relation to one another. (a) To the first class belong those cases where one person by want of care in the use of his own property, or in the pursuit of his own private advantage or pleasure, causes injury to some one else;<sup>7</sup> thus, a person who keeps his buildings in a bad state of repair, is liable for any injury caused thereby to a person having a right to be in or near them.<sup>8</sup> So where a man's land is subject to an easement for the Towards strangers.

<sup>1</sup> *Debenham v. Mellon*, 5 Q. B. D. at p. 398; *S. C.*, 6 App. Ca. 24. The older authorities (*Manby v. Scott*, *Montague v. Benedict*, *Jolly v. Rees*, &c.), will be found fully discussed in *Smith's L. C.* ii. 429.

<sup>2</sup> *Maude & Pollock*, *Merch. Shipp.* 71, 113.

<sup>3</sup> *Ibid.* 68.

<sup>4</sup> *Stats.* 24 & 25 Vict. c. 100, s. 26; 31 & 32 Vict. c. 122, s. 37. See also the statutes passed to prevent parents from allowing their children to become chargeable to the parish: *Steph. Comm.* ii. 290 *et seq.*

<sup>5</sup> *Rules of Court*, xix. 22.

<sup>6</sup> See *Smith v. L. & S. W. Rail. Co.*, L. R., 5 C. P. at p. 102; *Underhill on Torts*, 135. Mr. Campbell (*Law of Negligence, passim*) follows Austin in defining negligence as the state of mind of the doer or ommitter; but in ordinary parlance negligence means both the state of mind and the act or omission, and there is no reason why it should not. One without the other would give no right of action.

<sup>7</sup> *Campbell*, 25.

<sup>8</sup> *Terry v. Ashton*, 1 Q. B. D. 314. See also *Mersey Docks Trustees v. Gibbs*, L. R.,

Negligence in law and in act.

Arising from contract.

Slight, ordinary and gross.

Gross negligence in concreto :

in abstracto.

Negligence by estoppel and contributory negligence.

support of the buildings on his neighbour's land, and he excavates his land, so that the buildings are injured, he is liable to an action, no matter how carefully he may have done it ; hence this kind of negligence (meaning the invasion of a *jus in rem*) is sometimes called negligence in law, to distinguish it from negligence in fact.<sup>1</sup> (b) § 3. To the latter class belong those cases in which a person by entering into a contract with another puts himself under an obligation to exhibit a certain degree of care, and fails to do so, whether the obligation is created by the contract itself, or is imposed by law. It is with reference to these cases that the division of negligence into slight, ordinary, and gross, becomes important : thus, the general rule in the law of bailments (*q. v.*) is that when a bailment is made for the sole benefit of the bailee, he is liable for slight negligence ; when it is made for the benefit of both, he is liable for ordinary negligence ; and when it is made for the sole benefit of the bailor, the bailee is only liable for gross negligence.<sup>2</sup> Ordinary negligence is the want of that care which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would presumably have exercised under the circumstances of the particular case ;<sup>3</sup> and slight negligence is the want of a greater degree of care. § 4. The term gross negligence is chiefly used to mean, not that the person accused of it has used less care than a reasonable man would have used, but that he has used less care than he himself would presumably have used if he had been acting in his own affairs, so that what would be gross negligence in a prudent man may not be so in a reckless one. Thus, if a man for his own convenience places goods for safe keeping without reward with a man who "is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen and his own, yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow."<sup>4</sup> § 5. It is, however, also used to signify the want of that skill and care which persons exercising certain employments are bound to exhibit, even when they act gratuitously, as in the case of physicians, solicitors, &c. ; it is, therefore, ordinary negligence committed by a gratuitous agent or bailee ; the term "gross" seems to have been applied to these cases in order not to disturb the symmetry of the rule that a gratuitous agent is only liable for gross negligence.<sup>5</sup>

(2) § 6. Negligence operating to defeat a right of action is either (a) negligence amounting to estoppel (as to which see *Estoppel*, § 6), or (b) contributory negligence, which occurs where the injury complained

1 H. L. 93 ; *Rylands v. Fletcher*, L. R., 3 H. L. 330 (negligent use of property) ; *Worth v. Gelling*, L. R., 2 C. P. 1 (negligent keeping of a ferocious dog) ; *Gautret v. Egerton*, L. R., 2 C. P. 371 (distinction between invitation to use dangerous property and mere licence or permission).

<sup>2</sup> Gale on Easements, 394.

<sup>3</sup> *Coggs v. Bernard*, Smith's L. C. i. 147.

<sup>4</sup> *Smith v. L. & S. W. Rail. Co.*, L. R.,

5 C. P. at p. 102.

<sup>5</sup> *Coggs v. Bernard*, Smith's L. C. i. 155. The modern civilians distinguish negligence with reference to the individual and negligence with reference to the *diligens paterfamilias* as *culpa in concreto* and *in abstracto* (Kuntze, *Cursus des R. R.* 481).

<sup>6</sup> See Campbell on Negligence, 15 ; Smith, L. C. i. 615.



of has been caused partly by the negligence of the plaintiff and partly by that of the defendant : thus, if A. and B. are both driving negligently, and their carriages come into collision, so that A. is injured, he cannot sue B. if his own negligence contributed to the accident, that is, if he could by ordinary care have avoided the consequence of the other's negligence.<sup>1</sup>

II. § 7. As to the effect of negligence in criminal law, see *Homicide*.

Criminal law.

See *Scienter*; *Act of God*.

**NEGOTIABLE.**—I. § 1. An instrument is said to be negotiable when any person who has acquired it in good faith and for value can enforce the contract or right of property of which it is evidence against the person originally liable on it, although the person from whom he acquired it may have had a defective title or none at all. In the first of these respects, negotiable instruments were always an exception to the rule that choses in actions are not assignable (a rule which can now be hardly said to exist); and, in the latter respect, they are an exception to the rule which denies to the transferee of property a title superior to that of the person from whom he receives it.<sup>2</sup> Moreover, the benefit of the contract or other right is attached to the possession of the document, which, according to ordinary rules, would be only evidence of the right.<sup>3</sup> Negotiable instruments are, therefore, altogether anomalous institutions. They exist primarily for the convenience of commerce.<sup>4</sup>

Negotiability is either absolute or qualified. § 2. When an instrument is transferable so as to give the transferee all the rights originally created by it without affecting him with any equities between prior holders, its negotiability is said to be absolute; an ordinary bill of exchange, promissory note or cheque is an instance. Thus, if A. being indebted to B., gives him a promissory note on the condition that it is to be regarded as a security only, and not to be negotiated before a certain time, B. may nevertheless transfer it to C. for value; and if C. has no notice of the arrangement between A. and B., he may enforce payment of it against A.<sup>5</sup> So if B. steals a bill and transfers it to C. for value, and without notice of the theft, C. may enforce it against the parties liable on it, although B. had in fact no title to transfer.

Absolute.

§ 3. When an instrument is transferable only to certain persons, or in a certain manner, or so as to make the transferee take it subject to equities affecting it in the hands of prior holders, while preserving the other incidents of negotiability, its negotiability is said to be qualified or restrained. Thus, in the first instance given above, if the promissory note were transferred after its due date, the transferee would take subject to the arrangement between A. and B.<sup>6</sup> (See *Equity*, §§ 9 *et seq.*; *Cheque*, §§ 3 *et seq.*)

Qualified.

<sup>1</sup> Dicey, 412; *Oppenheim v. White Lion Hotel Co.*, L. R., 6 C. P. 515; *Smith*, L. C. i. 298; *Campbell*, 179.

<sup>2</sup> *Solicitors' Journal*, 10th July, 1875, p. 687; *Smith's Merc. Law*, 199; *Miller v. Race*, 1 Burr. 452; *Smith*, L. C. i. 538; *Crouch v. Crédit Foncier of England*, L. R., 8 Q. B. 374; *Re Agra and Masterman's Bank*, L. R., 2 Ch. at p. 397; *Fuentes*

*v. Montes*, L. R., 3 C. P. at p. 276.

<sup>3</sup> *Pollock on Contract*, 206.

<sup>4</sup> *Goodwin v. Roberts*, L. R., 10 Exch. 76, 337; 1 App. Cas. 476; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194.

<sup>5</sup> *Ex parte Swan*, L. R., 6 Eq. 344.

<sup>6</sup> *Ibid.*; *Solicitors' Journal*, Dec. 18th, 1875, p. 134.

Quasi-negotiable.

II. § 4. "Negotiable" is also used in a wide sense to denote an instrument transferable from one person to another by indorsement or delivery, but wanting in the essential of giving the transferee a good title notwithstanding any defect of title in his transferor. This quality is also called quasi-negotiability, to distinguish it from negotiability in the true sense. (See *Debenture*, § 10; *Exchequer Bills*; *Scrip*.)

**NEGOTIATE.**—To negotiate a bill of exchange, promissory note, cheque or other negotiable instrument for the payment of money is to transfer it for value by delivery or indorsement.<sup>1</sup>

**NEIFE** is the technical name for a female villein.<sup>2</sup> Originally, however, the word signified a villein of either sex, and "nayfté" meant the status of a villein. It is derived from the Latin *nativus*, there having been apparently at one time a distinction between villeins by birth and freemen who had become villeins, *e. g.*, by confession in a Court of Record.<sup>3</sup> (See *Confession*, note (9)).

**NEMO EST HÆRES VIVENTIS.** See *Heir*, § 7.

**NEUTRALITY.** See *Foreign Enlistment Act*.

**NEW ASSIGNMENT.**—Under the former common law practice, where the declaration in an action was ambiguous and the defendant pleaded facts which were literally an answer to it, but not to the real claim set up by the plaintiff, the plaintiff's course was to reply by way of new assignment, that is, allege that he brought his action not for the cause supposed by the defendant, but for some other cause to which the plea had no application.<sup>4</sup> Under the new practice, a plaintiff in such a case would amend his statement of claim.<sup>5</sup>

**NEW TRIAL.** See *Trial*.

**NEXT FRIEND.**—§ 1. An infant who desires to bring an action must, as a rule, do so through the intervention of a person called a next friend, generally a relation. The same rule applies where a married woman sues without her husband, or an action requires to be brought by a person of unsound mind who has no committee or has a committee whose interest is adverse to his own.<sup>6</sup> § 2. Every next friend is responsible for the propriety of the proceedings taken in his name.<sup>7</sup> (See *Guardian*, § 14.)

Next in degree of kindred.

**NEXT OF KIN.**—I. § 1. In the strict sense of the term, the next of kin of a deceased person are those who are next in degree of kindred

<sup>1</sup> See *Sharples v. Rickard*, 2 H. & N. 57; *Griffin v. Weathersby*, L. R., 3 Q. B. 753.

<sup>2</sup> Litt. § 186.

<sup>3</sup> Britton, 77 b, and note in Nichols's edition (p. 195); Loysel, Inst. Cout. gloss. v. *Naif*.

<sup>4</sup> Steph. Comm. iii, 507.

<sup>5</sup> Rules of Court, xix. 14.

<sup>6</sup> Rules of Court, xvi. 8, xviii.; Pope on Lunacy, 298.

<sup>7</sup> Daniell, Ch. Pr. 67. According to Coke, the phrase "next friend," as applied to an infant heir in socage, meant next of blood, and this is borne out by the way in which the phrase is used by Littleton (§ 123; Co. Litt. 88 a).

to him, that is, are most closely related to him in the same degree. The degrees of kindred are reckoned according to the Roman law, both upwards to the ancestor and downwards to the issue, each generation counting for a degree. Thus, from father to son is one degree, from grandfather to grandson or vice versa is two degrees, and from brother to brother is two degrees, namely, one upwards to the father and one downwards to the other son: so from uncle to nephew, or vice versa, is three degrees. In tracing the degrees of kindred in the distribution of an intestate's personal estate (*infra*, § 2), no preference is given to males over females, nor to the paternal over the maternal line, nor to the whole over the half blood, nor do the issue of a deceased person stand in his place, as in the case of descent of real estate.<sup>1</sup> (See *Descent*.)

II. § 2. More commonly, the "next of kin" of a person who has died intestate signifies those persons who are entitled to his personal property, after payment of his debts, under the Statutes of Distribution (22 & 23 Car. 2, c. 10; 1 Jac. 2, c. 17, s. 7; see *Distribution*). If the intestate leaves a widow and any child or children or descendant of any child, the widow takes a third and the issue take two-thirds per stirpes (*q. v.*), subject to the rule as to advancement (*q. v.*, § 3). If he leaves no widow, his issue take the whole in the same manner. If he leaves a widow but no issue, the widow takes a half, and the other half, or if there is no widow, the whole, goes as follows: first to the father, if living; then to the mother, brothers and sisters, or such of them as shall be living, in equal shares, the children of any deceased brother or sister standing in their parent's place, provided the mother or any brother or sister of the deceased is living; and if there is neither mother, brother nor sister living, then to those who are next of kindred to the deceased in the same degree (*supra*, § 1). The husband of a woman dying intestate takes the whole of her personal property.<sup>2</sup>

Under  
Statutes of  
Distribution.

§ 3. When a testator gives his property to the "next of kin" of himself or another, the expression is construed to mean "next of kin" in the strict sense of the word (*supra*, § 1); and, therefore, does not include persons claiming by representation (*e. g.*, children of a deceased brother), unless there is an express or implied reference to the Statutes of Distribution.<sup>3</sup> Even then "next of kin" does not include the husband or wife of the deceased.<sup>4</sup>

In wills.

**NEXT PRESENTATION.**—§ 1. In the law of advowsons, the right of next presentation is the right to present to the first vacancy of a benefice. When an advowson is sold during an existing incumbency, the right of next presentation passes to the grantee, unless the owner reserves it or has already sold it to some one else, as he may do. But when a vacancy has actually occurred, the right of presenting to it is considered to be of such a personal nature that it cannot be sold; if, therefore, the owner sells the advowson at such a time, the next presentation will

<sup>1</sup> Williams, P. P. 421.

<sup>2</sup> *Ibid.* 419.

<sup>3</sup> Jarman on Wills (4th edit.), ii. 108.

<sup>4</sup> *Ibid.* 125.

not pass to the grantee; and if the owner of the advowson dies intestate during a vacancy, the next presentation goes to his executor, while the advowson goes to his heir.

§ 2. A next presentation, when granted separately from the advowson, is personal estate.<sup>1</sup>

See *Simony*.

**NIGHT.** See *Day*.

**NISI.**—A decree, order, rule, declaration, or other adjudication of a Court is said to be made *nisi* when it is not to take effect *unless* the person affected by it fails to show cause against it within a certain time, that is, unless he appears before the Court, and gives some reason why it should not take effect. (See *Absolute*; *Decree*, § 2; *Rule*.)

**NISI PRIUS.**—§ 1. In the practice of the High Court, a trial at nisi prius is where an action is tried by a jury before a single judge, either at the sittings held for that purpose in London and Middlesex, or at the assizes (*q. v.*, § 3). Formerly all common law actions were tried at bar, that is, before the full Court, consisting of several judges; and, therefore, the writ for summoning the jury commanded the sheriff to bring the jurors from the county where the cause of action arose to the Court at Westminster. But when the statute 13 Edw. 1 directed the justices of assize to try issues in the county where they arose, the sheriff was thenceforth commanded to bring the jurors to Westminster on a certain day, “unless before that day” (*nisi prius*) the justices of assize came into the county.<sup>2</sup> (See *Banc*; *Trial*.)

§ 2. A Chancery action which is to be tried by a jury must be tried at nisi prius, and not before a judge sitting in the Chancery Division.<sup>3</sup>

Q. B. Division.

**NOLLE PROSEQUI**, in the practice of the Queen’s Bench Division of the High Court, is an acknowledgment or undertaking entered on record by the plaintiff in an action, to forbear to proceed in the action, either wholly or partially. It has been superseded in most cases by the modern practice of discontinuance and withdrawal (*q. v.*), but it seems to be still applicable in some cases.<sup>4</sup> § 2. In criminal prosecutions by indictment or information, a nolle prosequi to stay proceedings may be entered by leave of the Attorney-General at any time before judgment.<sup>5</sup>

Criminal practice.

**NOMINAL.** See *Damages*, § 3.

**NOMINATING AND REDUCING** is a mode of obtaining a panel of special jurors, from which to select the jury to try a particular action.

<sup>1</sup> Williams, R. P. 346; Steph. Comm. ii. 717.

<sup>2</sup> Smith’s Action (11th edit.), 134.

<sup>3</sup> Warner v. Murdoch, 4 Ch. D. 750.

See West v. White, *ibid.* 631; Wood and Ivery v. Hamblet, 6 Ch. D. 113.

<sup>4</sup> Archbold’s Pr. 1201.

<sup>5</sup> Arch. Crim. Pl. 109.

The proceeding takes place before the under-sheriff or secondary, and in the presence of the parties' solicitors. Numbers denoting the persons on the sheriff's list are put into a box and drawn until forty-eight unchallenged persons have been nominated. Each party strikes off twelve, and the remaining twenty-four are returned as the panel (*q. v.*). This practice is now only employed by order of the Court or judge.<sup>1</sup>

**NOMINATION.**—§ 1. A member of a friendly society, or an industrial or provident society, may by writing under his hand, delivered at or sent to the registered office of the society, nominate any person to whom his share or interest in the society is to belong at his death. Such a nomination may be revoked or varied by the nominator, and must not dispose of a share or interest exceeding 50*l.*<sup>2</sup> It is in the nature of a testamentary disposition, and seems to be allowed in this form because members of the working classes do not generally leave wills.<sup>3</sup> Friendly societies.

§ 2. In ecclesiastical law, the owner of an advowson may grant the right of nomination to another, and then the grantor is bound to present for institution any clerk whom the grantee shall name.<sup>4</sup> (See *Presentation.*) Benefice.

**NON ASSUMPSIT**, in the old action of assumpsit (*q. v.*), was the name for the plea by which the defendant averred that "he did not promise" as alleged, and thus raised the general issue. (See *Issue*, § 7.)

**NON COMPOS MENTIS** (not sound in mind) is properly a generic term, in which are included four species:—"1. *Ideota* [an idiot], which from his nativitie, by a perpetuall infirmitie, is *non compos mentis*. 2. Hee that by sicknesse, griefe, or other accident, wholly loseth his memory and understanding. 3. A lunatique that hath sometime his understanding and sometime not, *aliquando gaudet lucidis intervallis*, and therefore he is called *non compos mentis* so long as he hath not understanding. [4.] Lastly, hee that by his owne vitious act for a time depriveth himselfe of his memorie and understanding, as he that is drunken. But that kind of *non compos mentis* shall give no privilege or benefit to him or to his heires."<sup>5</sup> (See *Drunkennes; Insanity; Lunacy.*)

**NON CONSTAT**, "it is not clear," "it does not follow."

**NON DECIMANDO.** See *De non decimando.*

**NON EST INVENTUS** is the name of the return made by a sheriff or other officer to a writ directing him to arrest a person, when he is unable to find him. (See *Attachment; Capias ad satisfaciendum; Return.*)

**NON OMITTAS** is a clause usually inserted in writs of execution, directing the sheriff "not to omit" to execute the writ by reason of any

<sup>1</sup> Smith's Action, 130; Juries Act, 1870, s. 17.

<sup>2</sup> Friendly Soc. Act, 1875, s. 15, § 3; F. S. Act, 1876, s. 10; Industrial and F. Soc. Act, 1876, s. 11, § 5.

<sup>3</sup> Compare the subsections following those above cited.

<sup>4</sup> Phill. Eccl. Law, 348.

<sup>5</sup> Co. Litt. 247 a; 4 Co. 124 b; Pope on Lunacy, 18.

liberty, because there are many liberties or districts in which the sheriff has no power to execute process unless he has special authority.<sup>1</sup>

**NON-ACCESS**, in the law of husband and wife, is the absence of access (*q. v.* § 2). If non-access for above nine months is proved, by showing that the husband and wife were separated from one another, any children conceived and born of the wife during that period are bastards.<sup>2</sup>

**NONAGE** is the period of infancy, that is, the age of a person under twenty-one years.<sup>3</sup> (See *Age*.)

**NON-CLAIM**.—§ 1. At common law, the levying of a fine (*q. v.* § 9) barred the right of all persons, whether parties, privies or strangers, unless they put in their claim within a year and a day.<sup>4</sup> This was called being barred by non-claim. Alterations were afterward made in the time allowed for claiming,<sup>5</sup> but the subject is now of no practical importance, fines having been abolished.<sup>6</sup>

§ 2. There was also a non-claim in a writ of right.<sup>7</sup>

**NON-EXISTING GRANT**. See *Lost Grant*.

**NONFEASANCE** is the neglect or failure of a person to do some act which he ought to do. The term is not generally used to denote a breach of contract, but rather the failure to perform a duty towards the public whereby some individual sustains special damage, as where a sheriff fails to execute a writ.<sup>8</sup> (See *Malfeasance*; *Tort*.)

**NON-JOINDER** is where a person who ought to be made party to an action is omitted. The general rule is that in an action on a contract all the parties to it who are entitled or liable jointly should be joined as plaintiffs and defendants, and that in an action of tort persons who have a joint interest ought to sue jointly for an injury to it: persons who have a separate interest, but sustain a joint injury, may sue either jointly or separately. Joint wrongdoers may be sued either jointly or separately.<sup>9</sup> (See *Joint*; *Misjoinder*.)

Non-joinder is cured by making an application to the Court to add the necessary parties.<sup>10</sup>

**NON-RESIDENCE**, in ecclesiastical law, is where a spiritual person holding a benefice does not keep residence on it. It is in ordinary cases an offence, and is punishable by monition and sequestration of the benefice, by forfeiture of part of the income of the benefice, and by the compulsory appointment of a curate. Licences for non-residence may be granted by the bishop in certain cases.<sup>11</sup>

<sup>1</sup> Steph. Com. ii. 630.

<sup>2</sup> *Ibid.* ii. 285.

<sup>3</sup> Litt. § 258.

<sup>4</sup> *Ibid.* § 441; Bl. Comm. ii. 354.

<sup>5</sup> Stats. 34 Edw. 3, c. 16; 4 Hen. 7, c. 24.

<sup>6</sup> Stat. 3 & 4 Will. 4, c. 74, s. 2.

<sup>7</sup> Co. Litt. 262a.

<sup>8</sup> Bl. Comm. iii. 165; Broom's C. C. L. 655; *Borough of Bathurst v. MacPherson*, 4 App. Ca. 256.

<sup>9</sup> Dicey on Parties, 11 and *passim*.

<sup>10</sup> Rules of Court, xvi. 13 *et seq.*

<sup>11</sup> Phil. Eccl. Law, 1149; stat. 1 & 2 Vict. c. 106.

**NON-RESIDENT**, as applied to a trading corporation, signifies that it has no place of business in England. The question is of importance with reference to the liability of such a corporation to be sued in this country, and to the manner in which it should be served with process.<sup>1</sup> (See *Jurisdiction*; *Domicile*, § 3.)

**NONSUIT** is where the plaintiff in an action abandons his case at the trial before the jury have given their verdict, whereupon judgment of nonsuit is given against him. (See *Judgment*, § 8.) Formerly the advantage of this practice (which was peculiar to the common law Courts) was that the plaintiff could bring another action against the defendant for the same cause of action; but under the new practice any judgment of nonsuit, unless the Court otherwise directs, has the same effect as a judgment on the merits, that is, it bars the plaintiff from bringing another action for the same cause: but in case of mistake, surprise or accident, a judgment of nonsuit may be set aside by the Court.<sup>2</sup>

ETYMOLOGY.—Norman-French, *nonsue*, = “he does not prosecute his action.”<sup>3</sup>

**NON-USER** is where a person ceases to exercise a right. The term is principally used with reference to easements, profits à prendre, and similar rights, which may be extinguished by non-user for a certain number of years, which apparently must be not less than twenty; but the non-user must be of such a nature as to show an intention to abandon the right, as where it amounts to acquiescence in an unlawful interruption.<sup>4</sup> (See *Interruption*.) A public office is liable to forfeiture for non-user or neglect to perform the duties.<sup>5</sup>

**NOT GUILTY** is the appropriate plea to an indictment where the prisoner wishes to raise the general issue. (See *Issue*, § 10; *Plea*.) § 2. It was also a plea used in common law actions of tort under the old practice, when the defendant simply denied that he had committed the wrong complained of. (See *Issue*, § 7.) Under the present system of pleading a defendant must deal specifically with all allegations made by the plaintiff which he does not admit, and therefore a plea of “not guilty” is no longer, as a general rule, permissible. There are, however, certain acts of parliament which provide (principally for the protection of constables, inspectors, and other public officers) that in all actions for anything done in pursuance of the act or in execution of the powers and authorities thereof, the defendant may plead “not guilty,” which entitles him to give the special matter in evidence at the trial; that is, he may prove the facts of the case and show that he acted in pursuance of the statute, so that such a plea has the same effect as if he had pleaded the facts and his defence specifically.<sup>6</sup> This is called pleading “not guilty by statute,”

Criminal law.  
Civil actions.

Not guilty  
by statute.

<sup>1</sup> *Westman v. Aktiebolaget, &c.*, 1 Ex. D. 237.

<sup>2</sup> Rules of Court, xli. 6; *Singer, &c. Co. v. Wilson*, 2 Ch. D. 438.

<sup>3</sup> See Co. Litt. 138b.

<sup>4</sup> Gale on Easements, 619 *et seq.*

<sup>5</sup> Co. Litt. 233a.

<sup>6</sup> See for instance, stats. 5 & 6 Will. 4, c. 76, s. 76; 5 & 6 Will. 4, c. 63, s. 39. See also stat. 5 & 6 Vict. c. 97, s. 3.

and may still be done under the new practice, but the defendant cannot plead any other defence without leave;<sup>1</sup> and he must insert in the margin of the plea the words "By Statute," together with the year, chapter, and section of the act or acts on which he relies, and specify whether they are public or private.<sup>2</sup>

**NOTARY PUBLIC** is a person who attests the execution of any deeds or writings, or makes certified copies of them in order to render the same authentic, especially for use abroad (see *Legalization*). He is appointed to his office by the Archbishop of Canterbury.<sup>3</sup> An important branch of his duties is the protesting of bills of exchange (see *Protest*). He also makes a record of the proceedings in an ecclesiastical cause.<sup>4</sup>

**NOTATION**, in probate practice, is the act of making a memorandum of some special circumstance on a probate or letters of administration: thus where a grant is made for the whole personal estate of the deceased within the United Kingdom, which can only be done in the case of a person dying domiciled in England, the fact of his having been so domiciled is noted on the grant.<sup>5</sup>

#### Judicial.

**NOTICE.**—§ 1. Primarily "notice" means knowledge or cognizance: and, therefore, when we speak of a Court taking judicial notice of a fact we mean that the Court recognizes the fact without evidence to prove it. Thus the Courts notice the political constitution of our own government, the existence and title of every state and sovereign recognized by the sovereign of England, the dates of the calendar, &c.<sup>6</sup>

§ 2. To give notice of a fact to a person is to bring it to his knowledge: when the circumstances are such that he is either actually aware of the fact, or might or ought to be aware of it, he is said to have notice of it.

#### Express.

Notice is either actual (express) or constructive. § 3. Actual or express notice is that given in plain words from one person to another, either verbally or in writing. When a written notice purports on the face of it to be a notice it is called a "formal notice."

#### Constructive.

§ 4. Constructive notice is where knowledge of the fact is presumed from the circumstances of the case: thus where a person has actual notice of a charge or incumbrance on certain property, he is held to have constructive notice of facts to a knowledge of which he would have been led by an inquiry into the charge or incumbrance, whether his abstention from inquiry was fraudulent or merely negligent.<sup>7</sup> So notice to an agent, solicitor, &c. is constructive notice to the principal or client,<sup>8</sup> on the presumption that the agent did his duty by communicating the notice to his principal; therefore that presumption may be rebutted if it appears that

<sup>1</sup> Rules of Court, xix. 16.

<sup>2</sup> Reg. Gen. T. T. 1853; 1 El. & B. lxxxii.

<sup>3</sup> Phil. Ecc. Law, 1232; stats. 41 Geo. 3, c. 79; 6 & 7 Vict. c. 90.

<sup>4</sup> *Ibid.* 1243.

<sup>5</sup> Coote's Probate Pr. 36.

<sup>6</sup> Best on Evidence, 354.

<sup>7</sup> *Jones v. Smith*, 1 Hare, 55; *White & Tudor's L. C.* ii. 55; *Dart, V. & P.* 861.

<sup>8</sup> *Le Neve v. Le Neve*, Amb. 436; *White & Tudor*, ii. 43; *Dart, V. & P.* 858.



the agent was a party to a fraud, or otherwise acted in such a way as to raise a presumption that he would not communicate the notice to his principal.<sup>1</sup>

§ 5. The doctrine of notice (formerly 'an equitable doctrine) is that a person who purchases an estate, although for valuable consideration, after notice of a prior equitable right, makes himself a *malâ fide* purchaser, and will not be enabled, by getting in the legal estate, to defeat that right, but will be held a trustee for the benefit of the person whose right he sought to defeat.<sup>2</sup> Thus if a vendor contract with two different persons, for the sale to each of them of the same estate, and if the person with whom the second contract is made acquires notice of the first contract, and then procures a conveyance of the legal estate in pursuance of his own contract, the Court will order him to convey the property to the first purchaser.<sup>3</sup>

§ 6. As to notice of the assignment of a chose in action, see *Chose in Action*, § 4.

See *Lis pendens*; *Priority*; *Registration*; *Tacking*.

**NOTICE OF ACTION.**—When a statute imposes public or quasi-public duties on a person, such as a magistrate, constable, surveyor of highways, or the like, it frequently provides that before any action is brought against him for acts done in execution of his office, one month's notice of the intended action shall be served on him.<sup>4</sup> (See also *Amends*; *Not Guilty*.)

**NOTICE OF ADMISSION.** See *Admission*, § 2.

**NOTICE OF BREACHES.** See *Particulars of Breaches and Objections*.

**NOTICE OF CLAIM.** See *Citation*, § 2.

**NOTICE OF DECREE OR ORDER.**—In the Chancery Division, when an action is instituted for the administration of the estate of a deceased person, or for the execution of the trusts of an instrument, by or against one member of a class of persons (*e. g.*, one of the executors, administrators, residuary legatees, next of kin, trustees or cestuis que trust), it is not necessary to join the other members of the class as plaintiffs or defendants in the action, provided they are served with notice of the decree or order directing the administration of the estate or execution of the trusts. After being so served they will be bound by the proceedings in the action in the same manner as if they had been originally made parties.<sup>5</sup> Thus if an administration action is commenced

<sup>1</sup> *Cave v. Cave*, 15 Ch. D. 639; *Patman v. Harland*, 17 Ch. D. 353; *Williams v. Williams*, *ibid.* 437.

<sup>2</sup> *Basset v. Nosworthy*, Rep. t. Finch, 102; *White & Tudor's L. C. ii.* i.

<sup>3</sup> *Potter v. Saunders*, 6 Hare, 1. As to the doctrine of notice generally, Markby's *Elements of Law*, § 487.

<sup>4</sup> Chitty's Pr. 1303 *et seq.*

<sup>5</sup> Stat. 15 & 16 Vict. c. 86; Daniell's Ch. Pr. 358.

by an executor against one of the residuary legatees, the other residuary legatees must be served with notice of the decree or order. If a person so served wishes to see that the action is properly conducted, he should obtain an order for leave to attend the proceedings,<sup>1</sup> on which he is entitled to be heard as if he were a party.

**NOTICE OF DISHONOUR.** See *Bill of Exchange*, § 6.

**NOTICE OF OBJECTIONS.** See *Particulars of Breaches and Objections*.

**NOTICE OF TRIAL.**—In the practice of the High Court, as soon as the pleadings in an action are closed, the plaintiff may give the defendant notice of trial of the action, and thereby specify the mode in which he desires the action to be tried; if the plaintiff fails to give such a notice within a certain time, the defendant may give notice of trial, or move to dismiss the action for want of prosecution. Ordinary notice of trial is a ten days' notice: short notice of trial, which is sufficient when the party to whom it is given has consented to take it, is a four days' notice. The action will be tried in the manner mentioned in the notice, unless it is a case in which the party to whom it is given is entitled to have the action tried before a jury and gives a counternotice to that effect, or unless the Court orders it to be tried in a particular way.<sup>2</sup> (See *Action; Trial*.)

Service on  
foreigner.

**NOTICE OF WRIT OF SUMMONS.**—§ 1. In an action in the High Court, when the defendant is a foreigner, and is out of the jurisdiction, and the plaintiff has obtained leave to serve him out of the jurisdiction, the defendant is served with a notice giving the substance of the writ of summons, and stating what will be the result of his not entering an appearance within the time allowed.<sup>3</sup> This is done in lieu of serving the defendant with the writ of summons itself, because it is considered inappropriate to serve the subject of a foreign state with a mandate in the Queen's name.

Substituted  
service.

§ 2. When a defendant is suspected of keeping out of the way to avoid service, the Court sometimes allows substituted service to be effected by notice of the writ being given to the defendant,<sup>4</sup> e.g., by advertisement. (See *Service*.)

**NOTICE TO ADMIT.**—In the practice of the High Court, either party to an action may call on the other party by notice to admit the existence and execution of any document, in order to save the expense of proving it at the trial; and the party refusing to admit must bear the costs of proving it, unless the judge certifies that the refusal to admit was

<sup>1</sup> Daniell's Ch. Pr. 363.

<sup>2</sup> Rules of Court, xxxvi. 3 *et seq.*; *Metro-politan I. C. Rail. Co. v. M. Rail. Co.*, 5 Ex. D. 196.

<sup>3</sup> Rules of Court, xi.; Forms (A) I. 3; *Westman v. A. E. M. Snickarefabrik*, 1 Ex. D. 237; *In re Howard*, 10 Ch. D. 550.

<sup>4</sup> Rules of Court, ix. 2; x.

reasonable. No costs of proving a document will in general be allowed, unless such a notice is given.<sup>1</sup>

**NOTICE TO PRODUCE.**—§ 1. If one of the parties to an action is in possession of any document which would be evidence for the other party if produced, the latter may give him notice to produce it at the trial, and, in default of production, may give secondary evidence of it.<sup>2</sup>

§ 2. At any time before the trial of an action, any party to an action or other proceeding may give any other party notice to produce for his inspection any document referred to in the pleadings or affidavits of the party to whom the notice is given. If he refuses to produce them without good cause, an order for inspection may be obtained from the Court.<sup>3</sup>

See *Inspection ; Production*.

**NOTICE TO QUIT.**—Where there is a tenancy of land from year to year, or from two years to two years, or other like indefinite period, a notice to quit is required, to enable either the landlord or the tenant to determine the tenancy without the consent of the other. As a general rule, no particular form is required, but the notice is usually in writing and formal.

§ 2. In some cases the length of notice required is fixed by special agreement between the lessor and lessee, in other cases it is fixed by a local custom, and in other cases by the general law of the land. Where a tenancy from year to year exists without a special agreement or local custom as to its determination, half a year's notice, expiring at the end of the first or some other year of the tenancy, must be given ; thus, if the tenancy commenced on the 25th March, notice to quit must be given on or before the 28th September, expiring on the 25th March following. § 3. In the case of land subject to the Agricultural Holdings Act, 1875, a year's notice to quit is required instead of half a year.<sup>4</sup>

**NOTICE TO THIRD PARTY.** See *Citation*, § 2.

**NOTICE TO TREAT** is the notice which a railway company or other public body having compulsory powers for the purchase of land is bound to give to the persons interested in any land which it is empowered and desires to purchase. The notice demands particulars of the estate and interest of the persons to whom it is given, and states that the company is willing to treat for the purchase of the land. When a person receives such a notice, he may send a notice of claim to the company, stating his interest in the land, and the compensation he claims, and requiring the amount to be settled by arbitration in case of dispute. In other cases the compensation is fixed by a jury.<sup>5</sup>

<sup>1</sup> Rules of Court, xxxii. 2.

<sup>2</sup> Best on Evidence, 611 ; Common Law Proc. Act, 1852, s. 119.

<sup>3</sup> Rules of Court, xxxi. 14 *et seq.*

<sup>4</sup> Woodfall's Landlord & Tenant, 300 *et seq.* ; Chitty on Contracts, 314.

<sup>5</sup> Lands Clauses Act, 1845, ss. 18 *et seq.* ; Hodges on Railways, 170 *et seq.*

**NOTING**, in the law of bills of exchange, is a minute or memorandum made by a notary on a bill which he has presented, and which has been dishonoured. It consists of his initials and charges, and the date, and, in the case of foreign bills, is considered as preparatory to a formal protest (*q. v.*).<sup>1</sup>

**NOTORIOUS**.—In the law of evidence, matters deemed notorious do not require to be proved. There does not seem to be any recognized rule as to what matters are deemed notorious; cases have occurred in which the state of society or public feeling has been treated as notorious, *e. g.*, during times of sedition.<sup>2</sup>

**NOVATION** is where the promisee in a contract agrees to accept another person as the person to be bound in lieu of the original promisor. The term is practically confined to cases where a company or partnership transfers its liabilities to another company or partnership, in which case the question frequently arises whether there has been a novation, that is, whether the creditors or promisees have agreed to accept the liability of the new company or partnership in discharge of the old company or partnership.<sup>3</sup>

The term is borrowed from the Roman law.<sup>4</sup>

**NOVEL DISSEISIN.** See *Assise of Novel Disseisin*.

**NOVELLÆ.** See *Corpus Juris Civilis*.

**NOVELTY**.—An objection to a patent on the ground that the invention is not new or original, is called an objection for want of novelty. It is a fatal objection, even if it only applies to part of the invention, unless the patentee has filed a disclaimer. (See *Disclaimer*, § 2; *Patent Right*.)

**NOVITER PERVENTA**, or **NOVITER AD NOTITIAM PERVENTA**, in ecclesiastical procedure, are facts “newly come” to the knowledge of a party to a cause. Leave to plead facts *noviter perventa* is generally given, in a proper case, even after the pleadings are closed,<sup>5</sup> or on appeal.<sup>6</sup>

**NUISANCE** is either public (common) or private.

Public or  
common.

§ 1. A public or common nuisance is an act which interferes with the enjoyment of a right which all members of the community are entitled to, such as the right to fresh air, to travel on the highways, not to be exposed to danger to health from infectious diseases, unwholesome food, &c. Hence, if a person carries on a manufacture from which noxious fumes are emitted, or exposes for sale unwholesome food, or stops up or ob-

<sup>1</sup> Byles on Bills, 257.

<sup>2</sup> Best on Evidence, 354.

<sup>3</sup> Lindley on Part. i. 450; *Wilson v. Lloyd*, L. R., 16 Eq. 60; *Bilborough v. Holmes*, 5 Ch. D. 255.

<sup>4</sup> Hunter's Roman Law, 445 *et seq.*

<sup>5</sup> Phill. Eccl. Law, 1257; Rogers' Eccl. Law, 723.

<sup>6</sup> Macpherson, Privy C. Pr. 213.

structs a highway, or allows buildings belonging to him near a highway to become ruinous, he commits a public nuisance. The remedy for a public nuisance (which is a misdemeanor) is by indictment or information,<sup>1</sup> and in certain cases by abatement (*q. v.*); and if special damage is caused to an individual, he has an action for damages or injunction against the wrongdoer.<sup>2</sup> Modern legislation has also provided a summary mode of dealing with nuisances. Thus, under the Public Health Acts, local sanitary authorities are required to ascertain by inspection what nuisances exist within their districts, and the local magistrates are empowered to deal summarily with such as are found to exist.<sup>3</sup>

§ 2. A private nuisance is such a continuous infringement of a natural right of property as would in process of time give the wrong-doer an easement or prescriptive right to do an act which was originally tortious.<sup>4</sup> Thus, if a man builds a house so close to mine that his roof overhangs mine, and the water flows off his roof upon mine, this is a nuisance, for which an action will lie. Similarly, if my neighbour carries on a noisy or offensive trade, or if anyone injuriously interferes with my watercourse, market, ferry, or the like. The remedy for a nuisance is either by abatement (*q. v.*, § 1), or by action for damages, injunction, or mandamus.<sup>5</sup> (See *Prescription; Tort; Disturbance.*)

**NUL TIEL RECORD** is the name given to that plea or defence which a defendant sets up to an action brought against him on some matter of record, when he avers that "no such record" as that alleged by the plaintiff exists.<sup>6</sup> (See *Contract*, § 10; *Judgment; Miltimus; Record; Trial.*)

**NULLA BONA** ("no goods") is the name given to the return made by a sheriff, sequestrator, or other officer, to a writ or warrant authorizing him to seize the chattels of a person, when he has been unable to find any to seize. It is a not unfrequent return to a writ of *fi. fa.* (*q. v.*).

**NULLITY OF MARRIAGE.**—Where a marriage is void, on the ground that it was to the knowledge of both parties celebrated without the proper formalities, or that one of them was not single at the time, or that they are within the prohibited degrees of consanguinity or affinity, or that one or both of them were not consenting to the marriage, or are unable to perform the duties of matrimony, then either of them, unless the default or defect invalidating the marriage lies in him or her only, may present a petition to the High Court in the Probate, Divorce and Admiralty Division, and obtain a decree declaring the nullity of the marriage.<sup>7</sup> (See *Decree*, § 2; *Divorce.*)

<sup>1</sup> Steph. Crim. Dig. 108 *et seq.*; Steph. Comm. iv. 270: where a number of statutory nuisances (many of which are now rarely met with) are referred to.

<sup>2</sup> Broom, C. C. L. 718, 914; *Hill v. Metropolitan Asylums Board*, 4 Q. B. D. 433; 6 App. Ca. 193.

<sup>3</sup> See the Public Health Act, 1875, ss. 91 *et seq.*; as to the Metropolitan, see the acts

mentioned in the fifth schedule to that act.

<sup>4</sup> Gale on Easements, 482, 502; the infringement of an acquired right (*e.g.*, an easement) is properly called a disturbance (*q. v.*).

<sup>5</sup> Steph. Comm. iii. 402 *et seq.* See *Vernon v. Vestry of St. James*, 16 Ch. D. 449.

<sup>6</sup> Bl. Comm. iii. 330.

<sup>7</sup> Browne on Divorce, 52 *et seq.*

**NULLUM TEMPUS OCCURRIT REGI:** "Time never runs against the crown," is a maxim grounded on the principle that no laches can be imputed to the sovereign, whose time and attention are supposed to be occupied by the cares of government;<sup>1</sup> and therefore the ordinary Statutes of Limitations do not bind the crown. But by the Nullum Tempus Act (9 Geo. 3, c. 16), and stat. 24 & 25 Vict. c. 62, the common law rule has been altered, and the crown is barred by lapse of time in cases within those acts. The stats. 7 & 8 Vict. c. 106; 23 & 24 Vict. c. 53, and 24 & 25 Vict. c. 62, apply to the lands of the Duchy of Cornwall.<sup>2</sup>

**NUNC PRO TUNC.**—In procedure, the Court sometimes directs a proceeding to be dated of an earlier date than that on which it was actually taken, or directs that the same effect shall be produced as if it had been taken at an earlier date. Thus it will direct a judgment to be antedated if the entry of it has been delayed by the act of the Court, or if the plaintiff has died between the hearing and the date when the judgment was delivered.<sup>3</sup> This is called entering a judgment nunc pro tunc (= "now for then").

**NUNCUPATIVE.** See *Will*.

**NUPER VICECOMES,** an ex-sheriff. See *Distringas*, § 3.

**NURTURE.** See *Guardian*, § 7.

## O.

**OATHS** are of two kinds, according as they relate to the truth of a statement as to past events, or to an intention to do something at a future time. The latter are called promissory oaths.

Evidentiary  
oaths.

§ 2. An oath verifying a statement as to past events is a religious asseveration by which the party calls his God to witness that what he says is the truth; consequently, an oath may be administered to a person who believes in a God, although he is not a Christian; while it cannot, in the case of atheists or very young children who have no religious belief.<sup>4</sup> (See *Affirm*, § 3.) Such an oath is called "judicial" when given in a matter pending before a tribunal, and "extrajudicial" or "voluntary" in other cases. Declarations (*q. v.*, § 6) have been substituted for extrajudicial oaths in most cases.<sup>5</sup> As to the punishment for making a false oath, see *Perjury*; *False Swearing*. See also *Affidavit*; *Deposition*.

Judicial,  
extrajudicial  
or voluntary.

<sup>1</sup> Chitty, Prer. 379.

<sup>2</sup> Brown on Limitation, 239 *et seq.*

<sup>3</sup> See *Turner v. L. & S. W. Rail. Co.*,

L. R., 17 Eq. 561.

<sup>4</sup> Best on Evidence, 62, 228.

<sup>5</sup> Stat. 5 & 6 Will. 4, c. 62.

§ 3. Promissory oaths include the oath of allegiance (see *Allegiance* ; Promissory oaths. *Naturalization*),—the official oath, taken by certain high officers of the crown on accepting office,—the parliamentary oath, taken by members of parliament before taking their seats, and the judicial oath, taken by the principal judges and justices of the peace on accepting office.<sup>1</sup> Jurors, executors, administrators, and some other persons, are also required to take an oath for the due performance of their duties.

**OBITER DICTUM.** See *Dictum*.

**OBJECTION.** See *Exception*.

**OBLATIONS**, or obventions, are offerings or customary payments made to the minister of a church, including fees on marriages, burials, mortuaries, &c. (*q. v.*), and Easter offerings.<sup>2</sup> They may be commuted by agreement.<sup>3</sup>

**OBLIGATION.**—I. § 1. In its most general sense, especially in jurisprudence, obligation signifies the relation between two persons, one of whom can take judicial proceedings or other legal steps to compel the other to do or abstain from doing a certain act.<sup>4</sup> Although it includes both the right of the one and the duty of the other, the term is more frequently used to denote the latter. “Obligation” = “right and duty.”

§ 2. With reference to the origin and nature of obligations, see *Right*.

With reference to their remedies, obligations are either perfect or imperfect. § 3. A perfect obligation is one which can be directly enforced by legal proceedings in the ordinary way: thus, if A. contracts to pay B. 50*l.*, B. can enforce the obligation by bringing an action against A. (See *Remedy*.) Perfect.

§ 4. An imperfect obligation is one which cannot be directly enforced, but still has some legal effects.<sup>5</sup> Imperfect obligations may be divided into two classes: (1) An obligation may have been originally perfect, but have become imperfect from the remedy having been taken away: thus, if an action on a simple contract is not brought within the time prescribed by the Statutes of Limitations, the remedy by action is gone, although the right still exists, and may become available in certain cases; for instance, if a debt is barred by the statute, the debtor may nevertheless, if he has the chance, obtain payment of it by a lien or by appropriation of payment, or the remedy may be revived by an acknowledgment by the debtor (see the various titles). Imperfect. (2) An obligation is imperfect if no proceedings can be taken on it, because it does not satisfy the requirements of the law in regard to form or otherwise: thus, no action can be brought on a contract under the 4th section of the Statute of Frauds (*e. g.*, for the sale of land), so long

<sup>1</sup> Promissory Oaths Acts, 1868 and 1871. As to the coronation oath, see Steph. Comm. ii. 398.

<sup>2</sup> Steph. Comm. ii. 740; Phill. Eccl. Law, 1596.

<sup>3</sup> Stat. 2 & 3 Vict. c. 62, s. 9.

<sup>4</sup> See the definitions of obligation collected in Holland's Jurisprudence, 162.

<sup>5</sup> Pollock on Contract (2nd edit.), 568.

as the contract is not in writing signed by the party to be charged; but the contract nevertheless exists for other purposes, and, therefore, money paid under it cannot be recovered back merely on the ground of its not being enforceable by action. So solicitors, medical practitioners, &c., cannot recover remuneration for their services unless they have complied with the acts requiring them to take out certificates (*q. v.*)<sup>1</sup>

"Obligation"  
= "bond."

II. § 5. In the technical sense of the term, an obligation is the same thing as a bond. In the case of a conditional bond, the operative part is sometimes called the obligation, to distinguish it from the condition. (See *Bond*.)

**OBSCENE—OBSCENITY.**—A publication is said to be obscene when its tendency is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands it is likely to fall.<sup>2</sup> Obscene publications or libels are punishable with fine or imprisonment, being misdemeanors. Several statutes have been passed making obscene exhibitions indictable offences, and giving magistrates power to issue warrants for searching houses for obscene books, pictures, &c., and to have them destroyed.<sup>3</sup> (See *Indecency*.)

**OBVENTION.** See *Oblation*.

**OCCUPANCY—OCCUPANT.**—§ 1. Occupancy is where a person takes possession of an ownerless thing.

Chattels.

§ 2. Occupancy, as a mode of acquiring title to personal property, is of comparatively little importance in English law, being principally confined to the case of goods unclaimed or thrown away (see *Derelict*; *Estrays*; *Waifs*), and game or animals *feræ naturæ* (*e. g.*, fish in the sea or a river) when taken by the finder or pursuer.<sup>4</sup> (See *Game*, § 4.)

General (or  
common)  
occupancy of  
land.

§ 3. As regards land, the doctrine of occupancy was formerly of some importance. If A. granted land to B. during the life of C., and B. died before C., then there was no one entitled to the land, because A. had parted with his right during C.'s life, and B.'s estate had determined with his own death; therefore any one might enter on the land and retain possession during the remainder of C.'s life. A person so entering was called an occupant ("because his title is by his first occupation"<sup>5</sup>), or, more commonly, a general occupant, because any one might enter in this manner.<sup>6</sup> This doctrine of general or common occupancy was abolished by the Statute of Frauds,<sup>7</sup> under which, and subsequent statutes,<sup>8</sup> a tenant *pur auter vie* may dispose of his interest by will, and in default of such disposition it forms part of his personal estate.

Special occu-  
pancy.

§ 4. If A. grants land to B. and his heirs during the life of C., and

<sup>1</sup> Pollock, 578.

<sup>2</sup> See *Reg. v. Hicklin*, L. R., 3 Q. B. 371; cited Shortt on Copyright, 312.

<sup>3</sup> Shortt, 312; Steph. Crim. Dig. 105; stats. 14 & 15 Vict. c. 100, s. 79; 20 & 21 Vict. c. 83.

<sup>4</sup> Bl. Comm. ii. 402. The doctrine has, however, served as the foundation for a theory of the origin of ownership, now

somewhat discredited; see Markby's Elements of Law, §§ 464 *et seq.*

<sup>5</sup> Co. Litt. 41 b.

<sup>6</sup> As to general occupancy in copyholds, see Elton, Copyh. 40.

<sup>7</sup> Stat. 29 Car. 2, c. 3, s. 12.

<sup>8</sup> Stats. 14 Geo. 2, c. 20, s. 9; and 1 Vict. c. 26, ss. 3, 6.



B. dies before C., B.'s heir may enter and hold possession, and in such case he is called a special occupant, having a special right of occupation by the terms of the grant<sup>1</sup> (and see *Estate Tail*, § 8; *Freehold*, § 3).

**OCCUPATION—OCCUPIER.**—I. § 1. In its usual sense, occupation is where a person exercises physical control over land. Thus, the lessee of a house is in occupation of it so long as he has the power of entering into and staying there at pleasure and of excluding all other persons (or all except one or more specified persons) from the use of it. Occupation is therefore the same thing as actual possession.<sup>2</sup> (See *Possession; Use and Occupation.*)

§ 2. Permissive occupation is where the occupier has merely a licence Permissive.  
or permission from the person entitled to the occupation.<sup>3</sup>

§ 3. In the law of rating, occupation signifies actual use and enjoyment, as distinguished from mere possession. Thus a freeholder is in the possession of the minerals beneath the surface of his land, and of a house which is to let, whether empty or in the custody of a caretaker, but he is not in occupation of them for the purpose of rating. To constitute a rateable occupation, it must be exclusive as well as beneficial; therefore lodgers (*q. v.*), licensees (*supra*, § 2), and servants are not rateable occupiers.<sup>4</sup> Rateable  
occupation.

§ 4. In the law of parliamentary and municipal elections, the occupation of a dwelling-house, lands, or lodgings, is one kind of qualification for being registered as a voter.<sup>5</sup> Voting.

II. § 5. In a technical sense, "occupation is a word of art, and signifieth a putting out of a man's freehold in time of warre: and it is all one with a disseisin in time of peace."<sup>6</sup> Such an occupation, however, did not produce a descent cast as a disseisin formerly did.<sup>7</sup> (See *Descent cast.*) And in civilized warfare at the present day, occupation of an enemy's territory is only temporary, and does not interfere with the rights of private owners, even if the territory is permanently annexed by the conquerors.<sup>8</sup> As to moveables, see *Capture; Prize*. Occupatio  
bellica.

ETYMOLOGY.]—Latin, *occupatio*, from *capere*, to take or seize. In Roman law, *occupatio* signified "occupancy."<sup>9</sup>

**OF COURSE.**—A step in an action or other proceeding is said to be of course when the Court or its officers have no discretion to refuse it,

<sup>1</sup> Bl. Comm. ii. 258; Steph. Comm. i. 448; Wms. R. P. 20. Blackstone includes rights of water, air, &c., emblements, copyright and patents among things which are acquired by occupancy (Comm. ii. 402 *et seq.*); see the respective titles.

<sup>2</sup> See *Hadley v. Taylor*, L. R., 1 C. P. 53; *Robinson v. Briggs*, L. R., 6 Ex. 1. Coke also speaks of the occupation of goods (Co. Litt. 172 a), but this use of the word is not common.

<sup>3</sup> See *Parker v. Leach*, L. R., 1 P. C. 312.

<sup>4</sup> Castle on Rating, 26, 82; *Reg. v.*

*Malden*, L. R., 4 Q. B. 326; *L. & N. W. Rail. Co. v. Buckmaster*, L. R., 10 Q. B. 70, 444; *Watkins v. Milton-next-Gravesend*, L. R., 3 Q. B. 350; *Cory v. Bristow*, 2 App. Ca. 262; *Hare v. Overseers of Putney*, 7 Q. B. D. 223.

<sup>5</sup> See stats. 2 Will. 4, c. 45; 30 & 31 Vict. c. 102; 41 & 42 Vict. c. 26; *Durant v. Carter*, L. R., 9 C. P. 261; *Robinson v. Briggs*, L. R., 6 Ex. 1.

<sup>6</sup> Co. Litt. 249 b.

<sup>7</sup> Litt. § 412.

<sup>8</sup> Holtz. Encycl. i. 811.

<sup>9</sup> Just. Inst. ii. 1, 12; Hunter's Roman Law, 109.

provided the proper formalities have been observed. In this sense the issue of a writ of summons is a matter of course. (See *Writ*.) The term is most commonly applied to those orders which are obtained by petition of course at the Rolls Office in the Chancery Division of the High Court, *e.g.*, an order appointing a guardian ad litem for an infant defendant or respondent, orders for leave to attend proceedings (as to which see *Notice of Decree*), and certain orders for amendment and revivor. An order of course improperly obtained may be set aside.<sup>1</sup>

**OFFENCE.**—The word “offence” has no technical meaning in English law, but it is commonly used to signify any public wrong, including, therefore, not only crimes or indictable offences, but also offences punishable on summary conviction.

**OFFER.**—Every agreement in substance consists of an offer made by one party and its unconditional acceptance by the other. An acceptance, with conditions or new terms added, is in effect a new offer, and does not operate as an acceptance of the original offer. An offer may be withdrawn at any time before it has been unconditionally accepted: and if the person to whom an offer is made refuses it, or neglects to accept it within a reasonable time, it is deemed to be at an end, and he cannot afterwards revive it by purporting to accept it.<sup>2</sup> (See *Acceptance; Agreement; Letter*.)

**OFFICE.**—I. § 1. In the usual sense of the word, an office is the right and duty to exercise an employment: thus, we speak of the office of a trustee, executor, guardian, director, sheriff, judge, &c. Offices are either public or private: a public office being one which entitles a man to act in the affairs of others without their appointment or permission.<sup>3</sup> Public offices are granted either for life or during good behaviour (*dum bene se gesserit*), or during the pleasure of the appointor (*durante bene placito*), and some offices are capable of being granted to a man and his heirs (in which case they are incorporeal hereditaments), or of being entailed (in which case they are also tenements).<sup>4</sup> § 2. Public offices are either offices of trust, which cannot be performed by deputy (including offices of judges, justices of the peace and other judicial offices), or ministerial offices, which may be performed by deputy.<sup>5</sup> (See *Oath*, § 3.)

As to private offices, see *Executor; Guardian; Trustee*; and the other titles dealing with them.

II. § 3. “Office” is frequently used in the old books as an abbreviation for “inquest of office” (*q. v.*); when the jury on inquest of office had found the facts to be inquired into, and the verdict or inquest had been returned, the office was said to be found and returned. There are

<sup>1</sup> Daniell, Ch. Pr. 1435; Rules of Court, l. 4.

<sup>2</sup> Chitty on Contracts; Pollock on Contract, *passim*.

<sup>3</sup> Steph. Comm. ii. 620; Co. Litt. 233a.

<sup>4</sup> Co. Litt. 20a; Bl. Comm. ii. 36.

<sup>5</sup> Steph. 621. As to offices of honour, see Co. Litt. 165a; stats. 5 & 6 Edw. 6, c. 16, and 49 Geo. 3, c. 126, prohibit the buying and selling of public offices.

two sorts of offices, the one, called the office of intituling, vests the estate and possession of the land in the king, where he had only right or title before: the other, called the office of instruction, is where the estate is already in the king, but the particularity of the land does not appear of record.<sup>1</sup>

**OFFICE COPY.** See *Copy*, § 1.

**OFFICE OF THE JUDGE.**—In ecclesiastical law, “the office of the judge is promoted” when criminal proceedings are taken. The meaning of the expression is, that inasmuch as all spiritual criminal jurisdiction is in the hands of the bishop or ordinary (*judex ordinarius*), his office or function is set in motion whenever such proceedings are instituted.<sup>2</sup>

**OFFICIAL**, in ecclesiastical law, is the judge of an archdeacon’s Court.<sup>3</sup> (See *Diocesan Courts*.)

**OFFICIAL ASSIGNEE—OFFICIAL LIQUIDATOR.** See *Assignee*, § 2; *Liquidator*, § 3.

**OFFICIAL PRINCIPAL** is an ecclesiastical officer whose duty it is to hear causes between party and party as the delegate of the bishop or archbishop by whom he is appointed. He generally also holds the office of vicar general (*q. v.*) and (if appointed by a bishop) that of chancellor (*q. v.*, § 4). The Official Principal of the province of Canterbury is called the Dean of Arches<sup>4</sup> (*q. v.*, and see *Court of Arches*).

**OFFICIAL REFEREE.** See *Referee*.

**OFFICIAL SOLICITOR TO THE COURT OF CHANCERY** is an officer whose functions are to protect the Suitors’ Fund (*q. v.*), and to administer, under the direction of the Court, so much of it as now comes under the spending power of the Court. He acts for persons suing or defending in formâ pauperis, when so directed by the judge, and for those who, through ignorance or forgetfulness, have been guilty of contempt of Court by not obeying process. He also acts generally as solicitor in all cases in which the Chancery Division requires such services.<sup>5</sup> The office is transferred to the High Court by the Judicature Acts,<sup>6</sup> but no alteration in its name appears to have been made.

**OFFICIAL TRUSTEE OF CHARITY LANDS** is the secretary of the Charity Commissioners. He is a corporation sole for the purpose of taking and holding real property and leaseholds upon trust for an

<sup>1</sup> Tidd’s Pr. 1057, n. (e); 10 Co. 115 a; Gilb, Exch. 109.

<sup>2</sup> Phillimore, Eccl. Law, 1087.

<sup>3</sup> *Ibid.* 243, 1215.

<sup>4</sup> *Ibid.* 1203 *et seq.*

<sup>5</sup> Second Rep. Legal Dep. Comm. (1874), 40.

<sup>6</sup> Jud. Act, 1873, s. 77.

endowed charity in cases where it appears to the Court desirable to vest them in him. He is a bare trustee, the possession and management of the land remaining in the persons acting in the administration of the charity.<sup>1</sup>

**OFFICIAL TRUSTEES OF CHARITABLE FUNDS** are persons in whom the money, stocks or investments of any endowed charity may be vested (either voluntarily or by order of the Court) for the purpose of security or convenient administration. They are appointed by the Lord Chancellor, jointly with the secretary to the Charity Commissioners, and form a corporation.<sup>2</sup>

**OMNIA PRÆSUMUNTUR CONTRA SPOLIATOREM:** "Everything is presumed against a wrongdoer," is a maxim signifying "that if a man by his own tortious act withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted. Thus, if a man withholds an agreement under which he is chargeable, it is presumed to have been properly stamped;"<sup>3</sup> so where A. detained some jewels of unknown value belonging to B., and B. brought an action to recover damages for the detention, their value was calculated as being that of the finest jewels of the same size.<sup>4</sup>

**OMNIS RATIHABITIO RETROTRAHITUR ET MANDATO PRIORI ÆQUIPARATUR:** "Every ratification relates back and is equivalent to a prior authority."<sup>5</sup> Therefore, if A. professes to enter into a contract on my behalf without my authority, and I afterwards ratify it, my ratification relates back, so as to have the same effect as if I had authorized A. to enter into the contract. (See *Ratification*.)

**ONEROUS.**—A contract, lease, share or other right, is said to be onerous when the obligations attaching to it counterbalance or exceed the advantage to be derived from it, either absolutely or with reference to the particular possessor.

As to disclaimer of onerous property by a trustee in bankruptcy, see *Disclaimer*, § 3.

**ONUS PROBANDI.** See *Proof*.

Accounts,  
foreclosure.

**OPEN.**—§ 1. As to open accounts, see *Account*, § 4. As to re-opening accounts, see *Falsify*. As to re-opening a foreclosure, see *supra*, p. 367, note (3).

At trial of  
action.

§ 2. The trial or hearing of an action at nisi prius is commenced by the junior counsel for the plaintiff "opening the pleadings," that is,

<sup>1</sup> Stats. 16 & 17 Vict. c. 137, ss. 47 *et seq.*;  
18 & 19 Vict. c. 124, s. 15.

<sup>2</sup> Stats. 16 & 17 Vict. c. 137, ss. 51 *et seq.*;  
18 & 19 Vict. c. 124, s. 17.

<sup>3</sup> Smith's L. C. i. 367.

<sup>4</sup> *Armory v. Delamirie*, 1 Str. 504.

<sup>5</sup> Chitty on Contracts, 196.

stating shortly the substance of them to the jury, after which the senior counsel for the plaintiff addresses the jury on the whole case.<sup>1</sup> § 3. In the Chancery Division, the trial or hearing of an action commences with the speech of the plaintiff's senior counsel, which is called the opening. (See *Reply*.)

§ 4. Formerly where an estate had been sold under the order of the Court of Chancery, the Court was in the habit of "opening the biddings," that is, of allowing a person to offer a larger price than the estate was originally sold for, and of directing a resale accordingly. But this practice has been abolished, except in the case of fraud or improper management of the sale.<sup>2</sup> Opening biddings.

**OPEN FIELDS** or **MEADOWS** are fields which are undivided, but belong to separate owners; the part of each owner is marked off by boundaries until the crop has been carried, when the pasture is shared promiscuously by the joint herd of all the owners.<sup>3</sup> (See *Dole*, § 2; *Lot Meadows*).

**OPERATIVE PART.**—In a conveyance, lease, mortgage or other formal instrument, the operative part is that which carries out the main object of the instrument. Thus, in a conveyance or lease, the operative part consists of the operative words of conveyance or demise and the parcels; sometimes everything which follows the recitals (*q. v.*) is called the operative part, for the term has no fixed meaning.<sup>4</sup> In a mortgage, the operative part consists of (1) the covenant for payment of the mortgage debt; (2) the conveyance of the mortgaged property; and (3) the proviso for reconveyance.<sup>5</sup>

**OPERATIVE WORDS.**—In the original sense of the phrase, operative words are words which have an operation or effect in the creation or transfer of an estate. Thus, in a gift of land to A. and B. and the heirs of the body of A., the word "heirs" is an operative word, because it creates an estate of inheritance in A.; and the words "of the body" are operative words, because they limit an estate tail.<sup>6</sup> (See *Heir*, § 9.) More often, however, such words are called words of limitation (*q. v.*), and the term "operative words" is applied to those words which pass an estate. Thus, the words "enfeoff," "grant," "bargain and sell," "demise," "alien," "release," and "confirm," are used in conveyances of freehold land as operative words, that is, for the purpose of effecting an alienation of the land from the grantor to the grantee.<sup>7</sup> (See the various titles.)

**OPINION EVIDENCE.** See *Evidence*, § 6.

<sup>1</sup> Chitty, Pr. 383.

<sup>2</sup> Stat. 30 & 31 Vict. c. 48; Williams, R. P. 170; Daniell, Ch. Pr. 1183.

<sup>3</sup> Elton, Comm. 31.

<sup>4</sup> See Davids. Conv. i. 44.

<sup>5</sup> *Ibid.* ii. 508 *et seq.*

See Co. Litt. 26 a.

Davidson, Conv. i. 72 *et seq.*

**OPPRESSION** is the misdemeanor committed by a public officer, who, under colour of his office, wrongfully inflicts upon any person any bodily harm, imprisonment, or other injury.<sup>1</sup> See *Extortion*.

To purchase. **OPTION.**—§ 1. A lease of lands or houses may contain a provision that the lessee shall have the option of purchasing the property within a certain period, upon giving the lessor notice of his intention to exercise it. Such a notice constitutes a contract of purchase, the specific performance of which may be compelled.<sup>2</sup> § 2. The exercise of an option relates back to the date of the lease or other instrument by which it was given, so as to operate a constructive conversion of the property from that date. If, therefore, the lessor (being a freeholder) should die intestate before the option is exercised, the reversion will pass to his heir; but when the option is exercised, the reversion will become personal property, and pass away from the heir to the next of kin of the deceased.<sup>2</sup> (See *Election*.)

Of archbishop. § 3. In ecclesiastical law, an archbishop, when a bishop was consecrated by him, had a customary prerogative to name a clerk or chaplain of his own, to be provided for by such suffragan bishop. In lieu of this right, it was usual for the bishop to make over by deed to the archbishop the next presentation of such dignity or benefice within the bishop's see and disposal, as the archbishop should choose: hence, this was called his option.<sup>3</sup> This privilege was incidentally abolished by stat. 3 & 4 Vict. c. 113, s. 42, which forbids a spiritual person to assign any patronage or presentation belonging to him by virtue of his office.<sup>3</sup>

**ORATOR—ORATRIX** (from Latin, *orare*, to pray) were the names for a male and female plaintiff in a Chancery suit before the stat. 15 & 16 Vict. c. 86.

Bill of exchange, &c. **ORDER.**—§ 1. In its simplest sense, an order is a mandate or direction. Thus, bills of exchange, cheques, &c., are said to be drawn to order when the payee is entitled to transfer the right to claim payment to any person whom he may direct. (See *Bill of Exchange*, § 3; *Bearer*; *Delivery Order*; *Negotiable*.)

Judicial. § 2. More commonly, however, order signifies a direction or command by a court of judicature. As a general rule, "order" is opposed to "judgment;" and therefore denotes (i) orders made in summary proceedings on petition or summons (see *Summary*), and (ii) orders made in actions on interlocutory applications, whether before or after final judgment (see *Interlocutory*). Such are the ordinary orders for discovery and production of documents, orders for time, &c. made in the course of almost every action. § 3. In the practice of the Queen's Bench Division, an order to show cause is an order obtained by one party on an ex parte application, and calls on the other party to show cause within a certain time why a certain order should not be made; and then the order is either discharged or

<sup>1</sup> Russell on Crimes, i. 297; Stephen's Crim. Dig. 71.

<sup>2</sup> Watson's Comp. Eq. 101.

<sup>3</sup> Steph. Comm. ii. 669; Phill. Eccl. Law, 93, 1140.

made absolute. The order to show cause is not granted unless the applicant has a *prima facie* case. On a motion for a new trial, the order is an order to show cause. (See *Rule*.) In some cases an order is made *ex parte* absolute in the first instance.<sup>1</sup>

As to orders of course, see *Of Course*.

§ 4. Orders are also issued by subordinate legislative authorities. Such are Orders in Council, or orders issued by the Privy Council in the name of the Queen, either in exercise of the royal prerogative or in pursuance of an act of parliament.<sup>2</sup> The Rules of Court under the Judicature Act are grouped together in the form of orders, each order dealing with a particular subject-matter. (See *Rule*.)

Orders in Council.

Rules of Court.

**ORDER AND DISPOSITION.**—The “order and disposition clause” of the Bankruptcy Acts<sup>3</sup> is that on which the doctrine of reputed ownership rests. It is so called from its containing the provision that all goods and chattels being at the commencement of the bankruptcy in the possession, order or disposition [that is, in the possession or apparent control] of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner, shall pass to the trustee as if they belonged to the bankrupt. (See *Bankruptcy*; *Reputed Ownership*; *Possession*.)

**ORDER OF REFERENCE.**—In the practice of the Queen’s Bench Division, when an interlocutory judgment (*e.g.*, by default) is obtained in an action brought for a sum which, though unascertained, is “substantially a matter of calculation” (*e.g.*, for principal and interest), the Court or a judge may refer it to a master to be ascertained; this is called an order of reference.<sup>4</sup> (See *Reference*.)

**ORDINANCE.**—According to Coke, “the difference between an act of parliament and an ordinance in parliament, is, for that the ordinance wanteth the threefold consent [of lords, commons, and crown], and is ordained by one or two of them.”<sup>5</sup> According to other writers, an ordinance was in the nature of a declaration by the crown in answer to a petition by the commons, on a question as to the law applicable to a given case, while a statute was an enactment of new law.<sup>6</sup>

**ORDINARY** is the bishop of a diocese when exercising the ecclesiastical jurisdiction annexed to his office, he being *judex ordinarius* within his diocese.<sup>7</sup> (See *Bishop*, § 3.)

<sup>1</sup> Archbold, Pr. 1257; Rules of Court, liii.

<sup>2</sup> Homersham Cox, Inst. 27.

<sup>3</sup> Bankr. Act, 1869, s. 15, § 5; *In re Blanshard*, 8 Ch. D. 601; 21 Jac. 1, c. 19, s. 11; 6 Geo. 4, c. 16, s. 72; Bankr. Act, 1849, s. 125; see Robson’s Bankr. 412, n. The Bills of Sale Act, 1878, s. 20, abolished the doctrine that goods comprised in a

registered bill of sale remain in the order and disposition of the grantor.

<sup>4</sup> Smith’s Action, 188.

<sup>5</sup> Fourth Inst. 25; Co. Litt. 159 b.

<sup>6</sup> Reeves’ Hist. ch. xvi.; Bacon’s Abr. Statute (A.)

<sup>7</sup> Hale, Hist. C. L. 35; Co. Litt. 96 a, 344 a.

**ORDINATION** is the ceremony by which a bishop confers on a person the privileges and powers necessary for the execution of sacerdotal functions in the church.<sup>1</sup> He thereby becomes a clerk in holy orders, and capable of being presented and admitted to a benefice. (See *Admission*, § 1; *Benefice*; *Rector*; *Vicar*.)

**ORE TENUS** means orally. See *Demurrer*, § 4.

**ORIGINAL.** See *Conveyance*, § 4; *Evidence*, § 8; *Title*; *Writ*.

**OUST—OUSTER.**—To oust a person from land is to take the possession from him so as to deprive him of the freehold.<sup>2</sup> An ouster may be either rightful or wrongful.<sup>3</sup> A wrongful ouster is a disseisin (*q. v.*).<sup>4</sup>

Blackstone divides ouster into abatement, intrusion, disseisin, discontinuance and deforcement, and also applies the term to chattels real;<sup>5</sup> but this use of the word does not seem to be warranted by the old writers. (See *Deforcement*.)

**OUSTERLEMAIN** is a writ directing the seisin or possession of land to be delivered out of the hands of the crown into those of a person entitled to it.<sup>6</sup> It was the mode by which an heir in ward of land held of the crown ut de honore obtained possession of it on attaining majority.<sup>7</sup> (See *Wardship*; *Livery*.) § 2. Ousterlemain also meant a judgment on a monstans de droit, deciding that the crown had no title to a thing which it had seized.<sup>8</sup> (See *Amoveas Manus*; *In Capite*.)

**OUTLAW** is a person who is put out of the protection of the law by judgment of outlawry (*q. v.*). See *Waived*.

**ETYMOLOGY AND HISTORY.**—[Anglo-Saxon, *útlaga*, *útlah*, = out of the law.<sup>9</sup> (See *Utlawry*.) “In the reign of king Ælfred, and until a good while after the Conquest, no man could have been outlawed but for felonie, the punishment whereof was death. . . . But in the beginning of the raigne of king Edward the third, it was resolved by the judges, for avoyding of inhumanity and of effusion of Christian blood, that it should not be lawfull for any man, but the sherife onely (having lawfull warrant therefore) to put to death any man outlawed, though it were for felonie.”<sup>10</sup>

**OUTLAWRY.**—§ 1. Where an indictment has been found against a person and summary process (see *Process*) proves ineffectual to compel him to appear, process of outlawry may be issued, though in practice this is rarely or never done. The preliminary process of issuing successively writs of venire facias ad resp., distringas and capias ad resp. (see those titles), is first gone through; and if the defendant still eludes justice, a writ of exigent is awarded, by which the sheriff is required to proclaim the defendant and call him on five County Court<sup>11</sup> days one after another

<sup>1</sup> Phill. Eccl. Law, 110.

<sup>2</sup> Co. Litt. 181 a.

<sup>3</sup> Litt. § 401. \*

<sup>4</sup> *Ibid.* § 279; Co. Litt. 153 b.

<sup>5</sup> Bl. Comm. iii. 167.

<sup>6</sup> Termes de la Ley, s. v.

<sup>7</sup> Co. Litt. 77 a.

<sup>8</sup> Staunforde, Prer. 77 b.

<sup>9</sup> Co. Litt. 122 b; Schmid, Ges. der Angl. Gloss.

<sup>10</sup> Co. Litt. 128 b.

<sup>11</sup> This means the sheriff's County Court: see *County Court*, § 8.



upon pain of outlawry: a writ of proclamation is also issued and executed. If the defendant still fails to appear, judgment of outlawry is pronounced by one of the coroners for the county: judgment may also be signed in the Crown Office, and a *capias utlagatum* (*q. v.*) issued.<sup>1</sup>

§ 2. The effect of outlawry seems to be that the outlaw becomes liable to imprisonment, forfeits his property to the crown (his goods immediately and his chattels real and the profits of his land upon office found) (see *Office*), is incapacitated from maintaining civil proceedings, and becomes subject to other disabilities.<sup>2</sup> (See *Attainder*.)

§ 3. Formerly there were also two kinds of outlawry in civil proceedings, one (called outlawry on mesne process) which was used to compel a defendant to appear in an action, the other (called outlawry after judgment) which was a means of execution to enforce a judgment.<sup>3</sup> The former was abolished by the Common Law Proc. Act, 1852, s. 24; the latter by the Civil Procedure Acts Repeal Act, 1879. Civil proceedings.

**OUTSTANDING.**—Where land is vested in a trustee or mortgagee, the cestui que trust or mortgagor can only deal with the beneficial or equitable interest, the legal estate in the land being, as it is said, outstanding in the trustee or mortgagee. If the trust or mortgage is satisfied without the legal estate being re-vested in the cestui que trust or mortgagor, and he contracts to sell the land, the purchaser may require him to get in the legal estate, that is, to obtain a re-conveyance of it from the trustee or mortgagee.<sup>4</sup>

As to outstanding terms, more often called attendant terms, see *Term*.

**OVER.**—In conveyancing, the word “over” is used to denote a contingent limitation intended to take effect on the failure of a prior estate.

Thus, in what is commonly called the “name and arms clause” (*q. v.*) in a will or settlement, there is generally a proviso that if the devisee fails to comply with the condition the estate is to go to some one else; this is a limitation or gift over.<sup>5</sup>

**OVERDUE.**—§ 1. A bill of exchange is overdue when the time fixed for its payment is passed. Such a bill is subject to the peculiar rule, that any one taking it takes it subject to the equities of prior holders.<sup>6</sup> (See *Bill of Exchange*, § 7; *Equity*, § 10.) Bill of exchange.

§ 2. An overdue ship is one of which news has not been received for such a time as to give rise to the presumption or probability that she has been lost.<sup>7</sup> Ship.

**OVERREACHING CLAUSE**, in a resettlement, is a clause which saves the powers of sale and leasing annexed to the estate for life created

<sup>1</sup> Archbold, *Crim. Pl.* 86.

<sup>2</sup> *Bl. Comm.* iii. 284; *First Rep. Com. Law Comm.* (1851), 5; *Daniell's Ch. Pr.* 52.

<sup>3</sup> *Ibid.*; *Chitty, Pr.* 1309; *Comyns, Dig. Utlagary*; *Co. Litt.* 259 b; *Cro. Jac.* 577.

S.

<sup>4</sup> *Dart, V. & P.* 281, 501.

<sup>5</sup> *Watson's Eq.* 1110.

<sup>6</sup> *Ex parte Swan, L. R.*, 6 *Eq.* 344; *Ex parte Oriental Commercial Bank, L. R.*, 5 *Ch.* 358.

<sup>7</sup> See *Stubley v. Imperial Marine Ins. Co.*, 1 *Q. B. D.* 507.

by the original settlement, when it is desired to give the tenant for life the same estate and powers under the resettlement. The clause is so called because it provides that the resettlement shall be overreached by the exercise of the old powers. If the resettlement were executed without a provision to this effect, the estate of the tenant for life and the annexed powers would be subject to any charges for portions, &c. created under the original settlement.<sup>1</sup> (See *Resettlement*.)

Of the poor. **OVERSEERS.**—§ 1. Overseers of the poor are persons whose duty it is to levy rates for the relief of the poor in a parish, and also, in some cases, to administer the rates so levied, that is, to see to the relief and management of the poor. Originally the two duties were always combined, but under modern statutes guardians of the poor have, in many parishes, been substituted for overseers in all matters relating to the relief and management of the poor, so that the overseers merely levy the rates, while in some other parishes the overseers are bound to conform to the orders of a select vestry (see *Guardians of the Poor*; *Rate*; *Vestry*). The overseers in each parish consist of the churchwardens and two, three or four householders appointed yearly by two justices.<sup>2</sup>

§ 2. Other duties have been imposed on overseers by modern statutes. Thus they have the duty of making out lists of voters for parliamentary and municipal elections.<sup>3</sup> (See *Revising Barrister*.)

Of a will. § 3. Formerly it seems to have been common for a testator after appointing an executor to appoint an overseer, who had no power to intermeddle with the administration, but only to counsel, persuade and advise the executor.<sup>4</sup> This is now obsolete.

Treason. **OVERT ACT** is an open act, or one consisting of something stronger than mere words, and evidencing a deliberate intention in the mind of the person doing it. The phrase is chiefly used in the law of treason, it being a rule that a treasonable intention is not punishable unless it is evidenced by some overt act. Thus, to provide weapons or ammunition for the purpose of killing the king, or to assemble and consult on the means of doing so, is an overt act of treason: but the mere speaking of words is not an overt act.<sup>5</sup>

Conspiracy. § 2. The term is also used in the law of criminal conspiracy to signify any act done by conspirators in pursuance of their intention; the unlawful agreement of which the conspiracy consists constitutes an overt act.<sup>6</sup>

**OWE—OWING.**—To owe a sum of money is to be under an obligation to pay it either at once or at some future time, and such a debt is said to be "owing" as opposed to "payable."<sup>7</sup> (See *Due*.)

<sup>1</sup> Davidson, Conv. iii. 489.

<sup>2</sup> Steph. Comm. iii. 43 *et seq.*

<sup>3</sup> See the Parliamentary and Municipal Registration Act, 1878, and the acts there referred to.

<sup>4</sup> Williams on Executors, 233.

<sup>5</sup> Bl. Comm. iv. 79.

<sup>6</sup> Archbold, Crim. Pr. 982; *R. v. Mulcahy*, L. R., 3 H. L. 306.

<sup>7</sup> *In re Stockton, &c. Co.*, 2 Ch. D. p. 103.

**OWELTY.**—§ 1. Where an exchange of two pieces of land of unequal value is made, and a sum of money or some other compensation is given by the owner of the less valuable land to the owner of the other land, this compensation is said to be given for owelty of exchange, that is, to equalize the value. § 2. So, where a partition is made of property which cannot be divided into shares of equal value (as where two houses descend to coparceners, one being worth ten shillings, the other twenty shillings per annum<sup>1</sup>), the partition may be made on the terms of the person to whom the property of greater value is allotted giving something by way of owelty of partition to the other:<sup>2</sup> as in the case supposed, by the parcener to whom the house worth twenty shillings per annum is allotted granting a rent-charge of five shillings per annum to the other,<sup>3</sup> or paying him a lump sum.<sup>4</sup>

Owelty of exchange.

Owelty of partition.

ETYMOLOGY.]—Norman-French, *ouwele*, equal; from Latin, *equalis*.<sup>5</sup>

**OWNERSHIP** is the most extensive right allowed by law to a person, of dealing with a thing to the exclusion of all other persons, or of all except one or more specified persons. It is therefore a right in rem. (See *Right*.) Ownership is essentially indefinite in its nature, but in its most absolute form it involves the right to possess and use or enjoy the thing, the right to its produce and accessions, and the right to destroy, encumber, or aliene it: or, as the civilians express it, ownership gives the *jus utendi, fruendi, et abutendi*; but the exercise of these rights may be restricted in various manners, and the owner may part with them or limit them in favour of other persons; so long, however, as the grantees have only definite rights of user over the thing, and the original owner retains an indefinite right, he is still owner; but if he parts with the indefinite right and retains only a definite one (*e. g.*, a right of way, in the case of land), he ceases to be owner.<sup>6</sup> § 2. Ownership may exist either in corporeal or incorporeal things. Thus, a man may be owner of an annuity, patent, or copyright, as well as of land or furniture.

Subjects of ownership.

I. With reference to the right of user and alienation, ownership is either absolute (*dominium plenum*), or not (*minus plenum*).

§ 3. Ownership is said to be absolute when it is subject only to those restrictions which are imposed by law on all owners, and are therefore implied in the idea of ownership. These restrictions may arise from the duties of the owner of the thing towards his neighbours and the world at large, which forbid him to make it hurtful or dangerous to those who happen lawfully to come in contact with it. (See *Natural Rights*; *Nuisance*.) Restrictions on alienation exist in the case of persons under disability, and are also imposed by the rule against perpetuities and the Mortmain Acts (*q. v.*). In English law absolute ownership can only exist

Absolute.

<sup>1</sup> Litt. § 251.<sup>2</sup> Co. Litt. 169 b.<sup>3</sup> Litt. § 251.<sup>4</sup> Watson's Comp. Eq. 460; White & Tudor's L. C. ii. 432.<sup>5</sup> Britton, 187 b.<sup>6</sup> As to ownership generally, see Austin's Jurisprudence; Markby's Elements of Law; Holland's Jurisprudence.

in chattels, as all land is subject theoretically to the obligations of tenure ; but practically the fee-simple in land gives absolute ownership. (See *Estate*, § 2 ; *Fee*, § 2 ; *Tenure*.)

- Restricted. § 4. Restricted ownership occurs where either concurrent or successive rights of user are vested in other persons than the owner ; thus land may be subject to easements or rights of common (*q. v.*), or the right of user possessed by the owner for the time being may be restricted by the fact that he has only a limited interest in it, as in the case of a joint tenant, tenant for life, or lessee. (See *Waste*.)
- Modes of ownership. II. § 5. Ownership may be divided among several persons in various manners, so that each is owner to a limited extent, either successively, *i. e.*, one after another, or concurrently, *i. e.*, at the same time. These divisions are called modes of ownership. Hence we obtain the following
- Unlimited. classes of owners. § 6. As to its duration, ownership may be (1) absolute or unlimited (*dominium perpetuum*), as in the case of an estate in fee-simple, or (2) limited (*d. temporale*), that is, liable to determine at a certain time or on the happening of a given event, as in the case of a lessee or tenant for life. § 7. As to the time of enjoyment, ownership may be present, as in the case of an estate in possession, or deferred, as in the case of an estate in reversion or remainder. (See *Estate*, § 9.)
- Limited. § 8. Ownership is called sole or several, where one person only is entitled to the thing at the same time. Concurrent ownership, where several persons are entitled to the thing at the same time, takes the form either (1) of co-ownership, or (2) of nominal and beneficial owner-
- Present, deferred. ship. § 9. Co-ownership occurs where several persons are entitled to the possession, user and benefit of one thing, *pro indiviso*, no one being entitled to any specific part of it, and the right of user of each being subject to a similar right in the others ; as in the case of joint tenancy, coparcenary and tenancy in common (*q. v.*). § 10. Nominal and beneficial ownership occurs where two persons are owners in respect of one thing, although one of them either cannot derive any benefit from it at all, or has only exactly defined rights over it, while the other has the real benefit of the thing. Each is considered owner for certain purposes. Thus, a person (A.) may be owner of a thing as against all the world, except another person (B.), while with regard to that person he may have no rights of ownership at all, being bound, by virtue of a personal relation between them, to allow him to have the use and profits of the property, or even to deal with the property as he may direct. As the rules of the common law only recognize A.'s rights to the property and ignore those of B., A. is called the legal owner, while B. is called the equitable owner, because his rights are only recognized by virtue of the doctrines of equity. The legal owner is the nominal owner, the equitable the beneficial owner. (See *Equity* ; *Mortgage* ; *Trust*.) So, if the owner of land grants a lease of it for 1,000 years, his ownership becomes practically nominal, while the lessee acquires the beneficial ownership.
- Sole. § 11. As to general and special, ordinary and privileged ownership, see
- Co-ownership. *Property*.
- Nominal and beneficial ownership.

See further as to ownership, *Estate* ; *Interest* ; *Right* ; *Title*.

**OYER.**—In the old common law practice, a defendant was said to demand or crave oyer of a deed pleaded by the plaintiff when he asked that it should be read to him, the generality of defendants in early times being incapable of reading themselves; the record then generally went on to set out the deed in full as having been read to the defendant. This copy or setting out of the deed was also called the oyer.<sup>1</sup> (See *Profert.*)

**OYER AND TERMINER.**—The commission of oyer and terminer is the commission which is issued to certain judges of the High Court and other persons as their authority to “inquire, hear, and determine” all treasons, felonies, and misdemeanors committed within the county into which they are sent. This commission only authorizes them to proceed upon an indictment found at the same assizes, for they must first “inquire” by means of the grand jury, before they can “hear and determine” by the help of the petty jury. (See *Jury.*) Their power to try other prisoners is conferred by the commission of gaol delivery<sup>2</sup> (*q. v.*). (See *Assize*, § 3; *Central Criminal Court.*) “Oyer and terminer” is old French for “hear and determine.”<sup>3</sup>

## P.

**PAINTINGS.** See *Copyright*, § 3.

**PAIS.** See *In Pais*.

**PALATINE COURTS** formerly were the Court of Common Pleas at Lancaster, the Chancery Court of Lancaster, and the Court of Pleas at Durham, the second of which alone now exists. (See the respective titles.) The Courts of the County Palatine of Chester were abolished by stat. 11 Geo. 4 & 1 Will. 4, c. 70.<sup>4</sup> Palatine Courts were formerly exempt from the control and process of the Courts at Westminster. (See *County Palatine*; *Court*, § 3, n. (4).)

**PANDECTS** is another name for the Digest of Justinian. See *Corpus Juris Civilis*; *Digest*.

**PANEL** generally means the printed list, made up by the sheriff, of the persons who have been summoned to serve as jurors for the trial of all actions at a particular sittings;<sup>5</sup> but the term is also applied to the list of special jurors returned by the sheriff for the trial of a particular

<sup>1</sup> Litt. § 365; Co. Litt. 35 b, 121 b; Bl. Comm. iii. 299.

<sup>2</sup> Steph. Comm. iv. 313; Jud. Act, 1873, ss. 16, 37.

<sup>3</sup> Britton, 10 a.

<sup>4</sup> Bl. Comm. iii. 77 *et seq.*, notes (6) and (7); Steph. Comm. 347.

<sup>5</sup> Smith's Action, 121.

action after the process of nominating and reducing (*q.v.*). (See *Impanel; Jury.*)

ETYMOLOGY.]—"Pannell is an English word, and signifieth a little part; for a pane is a part, and a pannell is a little part, as a pannell of wainscot, a pannell of a saddle, and a pannell of parchment wherein the jurors' names be written and annexed to the writ."<sup>1</sup>

**PANNAGE.**—A common of pannage is the right of feeding swine on mast and acorns at certain seasons in a commonable wood or forest.<sup>2</sup> It does not prevent the owner of the wood from lopping and cutting down the trees in the ordinary course of management.<sup>3</sup>

**PAPER.**—§ 1. It is the practice to exhibit in each Court a "paper" or list of the business to be transacted, to enable the parties to know when their presence will be required. A solicitor is bound to attend in Court (personally or by a clerk) when a case in which he is concerned is in the paper, and he is entitled to charge a fee for so doing.<sup>4</sup>

§ 2. In the Queen's Bench Division there are numerous varieties of papers, the chief of which are—the crown paper, or list of cases on the crown side of the Court;—the new trial paper, or list of cases in which rules nisi for new trials have been granted;—the special paper, or list of demurrers, special cases, appeals from inferior Courts, &c.;—and the peremptory paper, or list of cases ordered to stand over to a particular day in the next sittings. All these papers contain business to be heard by divisional Courts, and hence the days on which such business is transacted were formerly called paper days. The days on which the Courts will sit at nisi prius are given in the sittings paper, while the list of actions for trial is called the cause list.<sup>5</sup>

**PAPER BOOKS,** in proceedings on a writ of error in a criminal case, are copies of the proceedings with a note of the points intended to be argued, delivered to the judges by the parties two days before the argument.<sup>6</sup>

**Title.** **PARAMOUNT** means superior. Thus, "title paramount" means a superior title:<sup>7</sup> for instance, if A. purports to convey to B. land which really belongs to C., and C. ejects B. from the land, B. is said to be evicted by title paramount, meaning a title superior to that granted to him by A.

**Seignory.** § 2. In the law of tenure, if A. holds land in fee of B., and B. holds the same land in fee of C., then C. is the lord paramount, and he has the seignory paramount, as opposed to A. the tenant paravail, and B. the mesne, whose seignory is called the mesnalty (*q.v.*).<sup>8</sup>

For the etymology of the word, see *Paravail*.

<sup>1</sup> Co. Litt. 158 b.

<sup>2</sup> Elton on Commons, 25; Williams on Commons, 168.

<sup>3</sup> *Chilton v. Corporation of London*, 7 Ch. D. 562.

<sup>4</sup> Rules of Court (Costs), August, 1875.

<sup>5</sup> See Archbold, Pr. 171, 350; Tidd, Pr. 505.

<sup>6</sup> Archbold, Crim. Pl. 205.

<sup>7</sup> Co. Litt. 173 b.

<sup>8</sup> Litt. § 583.

**PARAPHERNALIA** are such apparel and ornaments given to a married woman as are suitable to her condition in life, and are expressly given to her to be worn as ornaments of her person only.<sup>1</sup> They differ from property held by the wife for her separate use in that the husband may dispose of them during his life and that they are liable for his debts, while they differ from her ordinary chattels in that the husband has no power to dispose of them by will, so that if she survives him she is entitled to them, subject to his debts.<sup>2</sup>

**ETYMOLOGY.**—Greek, *παράφρενα*, those things which a bride brings (*φίρειν*) over and above (*παρα*) her dower,<sup>3</sup> hence *bona paraphernalia*.<sup>4</sup>

**PARAVAIL** means inferior or subordinate. Thus, where A. is indebted to B., and B. is indebted to C., B. is the primary debtor and A. is the sub-debtor or debtor paravail.<sup>5</sup>

§ 2. The term is chiefly used with reference to the tenure of estates in land, a tenant paravail being a tenant who holds land in fee of another and has no tenant who holds of him, as opposed to a mesne lord and a lord paramount (*q. v.*).

**ETYMOLOGY.**—Notwithstanding Coke, who says that “the tenant of the land is called tenant *per avails*, because it is presumed that he hath avails and profit by the land,”<sup>6</sup> it seems clear that *paravail* is compounded of *par* and the French *aval* = below, and *paramount* of *par* and *amont* = above.<sup>7</sup>

**PARCEL**, in the law of real property, signifies a part or portion of land. Thus, every piece of copyhold land forms parcel of the manor to which it belongs: that is to say, so far as the freehold is concerned, the copyholds belong to the lord, and form part of his lands, although his beneficial interest in them is comparatively small, being subject to the customary estates of the tenants. (See *Copyhold*; *Demesne*; *Manor*.)

**PARCELS.**—In a conveyance, lease or other deed dealing with property, that part which follows the operative words is called the parcels. It contains the description, either expressly or by reference, of the property dealt with, and in the case of lands generally begins with some such words as “All that piece or parcel of land,” &c. Sometimes the full description is contained in a recital or in a schedule to the deed, with a reference to a map drawn on the deed.<sup>8</sup> (See *Abstract*; *Abutments*; *Deed*; *Operative Part*; *Premises*.)

**PARCENER** is the old-fashioned equivalent for coparcener (*q. v.*).<sup>9</sup>

**PARDON** is where the crown releases a person from the punishment which he has incurred for some offence. A pardon may be granted either

<sup>1</sup> Snell's Eq. 297.

<sup>2</sup> Williams, P.P. 432; Macqueen, Husb. and Wife, 157.

<sup>3</sup> Just. Cod. V. 14, l. 8.

<sup>4</sup> *Tipping v. Tipping*, 1 P. W. 729.

<sup>5</sup> Manning's Exchequer, 8, n. (o), citing Keilway, 187.

<sup>6</sup> Second Inst. 296.

<sup>7</sup> Littré, Dict. s. vv. *Amont* and *Aval*.

<sup>8</sup> Davids. Conv. i. 79, 85.

<sup>9</sup> Litt. § 241.

(1) before or during a prosecution, in which case it may be pleaded in bar, or (2) after conviction, in which case it may be pleaded in arrest of judgment or in bar of execution, so that the offender is discharged from punishment. Some offences, however, cannot be pardoned, *e.g.*, a common nuisance while it remains unredressed: and a pardon cannot be pleaded to a parliamentary impeachment, § 2. A pardon is granted by warrant under the great seal or under the sign manual. It may be either free or conditional, that is, the crown may annex to it a condition on the performance of which the operation of the pardon will depend.<sup>1</sup>

**PARENT AND CHILD.**—§ 1. The relation of parent and child is not one which is much interfered with by the law, almost the only duties arising from it which are capable of legal enforcement being those of maintenance and education. Every parent is bound to provide necessaries for his children if he is able to do so and they are unable to support themselves;<sup>2</sup> and is bound to send them to school.<sup>3</sup> On the other hand, the children of a poor person not able to work are bound to maintain him or her if they are able to do so.<sup>4</sup> These reciprocal obligations of maintenance are only enforceable as public duties, and not by the person liable to be maintained. (See *Maintenance; Poor.*)

§ 2. As regards third persons, the relation gives the parent the right of protecting the person and property of his child, and vice versâ,<sup>5</sup> while in some cases the child is by a fiction considered as the servant of the parent. (See *Seduction.*)

See *Bastard; Guardian; Infant.*

**PARISH** is that district which is committed to the charge of one parson or vicar, or other minister of the Church of England, having cure of souls therein. A parish is, however, a division for civil as well as for ecclesiastical purposes: thus the collection and application of the poor-rate is parochial.<sup>6</sup> By modern statutes provision is made for the subdivision of parishes into districts or parishes for ecclesiastical, poor law and taxation purposes, and for the amalgamation of detached portions of parishes.<sup>7</sup> (See *Chapel; Ecclesiastical Commissioners; Overseers; Perambulation; Poor Law.*)

§ 2. A place not included in a parish is called extra-parochial. Such places are, however, now in substantially the same position for civil purposes as if they were parishes, that is, so far as regards the collection and application of rates, the registration of voters, &c.<sup>8</sup> (See *Tithes.*)

<sup>1</sup> Steph. Comm. iv. 468, 404.

<sup>2</sup> *Ibid.* ii. 288, citing stats. 43 Eliz. c. 2; 5 Geo. 1, c. 8; 59 Geo. 3, c. 12; 5 Geo. 4, c. 83; 4 & 5 Will. 4, c. 76; 7 & 8 Vict. c. 101; 11 & 12 Vict. c. 110; 31 & 32 Vict. c. 122, s. 37.

<sup>3</sup> Stat. 33 & 34 Vict. c. 75.

<sup>4</sup> Steph. iii. 56.

<sup>5</sup> *Ibid.* ii. 292, 296.

<sup>6</sup> *Ibid.* i. 117.

<sup>7</sup> Stephen, i. 22, ii. 751; Phillimore, Eccl. Law, 2167; the principal acts are 58 Geo. 3, c. 45; 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94, and 19 & 20 Vict. c. 104; 39 & 40 Vict. c. 61; *Foster v. Medwin*, 5 C. P. D. 87; Taxes Management Act, 1880, ss. 36 *et seq.*

<sup>8</sup> Steph. i. 119, n. iii. 44, n.; stats. 20 Vict. c. 19; 25 & 26 Vict. c. 61.



**PARK**, in the technical sense of the word, is the same as a chase (*q. v.*) except that it is enclosed, while a chase is always open.<sup>1</sup> A park in the popular sense of the word, namely, one erected without lawful warrant, is sometimes called a nominative park.<sup>2</sup> The parks forming part of the demesnes of the crown are called royal parks.<sup>3</sup> (See *Demesne*, § 5.)

**PARLIAMENT.**—The parliament of the United Kingdom of Great Britain and Ireland is composed of the king or queen and the three estates of the realm, viz., the lords spiritual, the lords temporal, and the commons. These several powers collectively make laws that are binding upon the subjects of the British empire, and also separately enjoy privileges and exercise functions peculiar to each.<sup>4</sup> For details see *House of Lords*; *House of Commons*; *Prerogative*; also *Act of Parliament*; *Borough*; *Contempt of Parliament*; *Impeachment*; *Knight*.

**PARLIAMENTARY AGENTS** are persons (usually solicitors) who transact the technical business involved in passing private bills through the Houses of Parliament. They are required to sign a declaration and give security for compliance with the rules of the House of Commons.<sup>5</sup>

**PAROL**, in its technical sense, as applied to a legal transaction, means that it has been effected without the solemnity of a deed. Therefore an assignment of chattels, or a contract, or a lease, which is either verbal or reduced into a writing not under seal, is called a parol assignment, contract or lease (see *Contract*, § 1). Similarly in the law of evidence, where the contents of a document are brought before the Court either orally or by means of a copy, this is called adducing parol evidence of its contents.<sup>6</sup> Parol evidence also sometimes means extrinsic evidence. (See *Evidence*, §§ 9, 13.)

As to demurrer of the parol, see *Demur*, § 2.

**ETYMOLOGY.**—“Parol” literally means verbal or oral. In early times few persons could write, and therefore when a document was required to record a transaction the parties put their seals to it and made it a deed. Transactions of less importance were testified by word of mouth or by parol, and this use of “parol,” to signify the absence of a deed, remained after simple writing without sealing had come into use.<sup>7</sup>

**PARSON**, “*persona ecclesiæ*, is one that hath full possession of all the rights of a parochial church.”<sup>8</sup> He is called parson, *persona*, because he personates or represents the church. He is a corporation sole.<sup>9</sup> (See *Corporation*, § 2.)

§ 2. “*Parson impersonata*, parson impersonnee, is the rector that is in possession of the church parochiall, be it presentative or impropriate,

<sup>1</sup> Manwood, Forest, 7; Co. Litt. 233 a.

<sup>2</sup> 2 Inst. 199.

<sup>3</sup> Stat. 35 & 36 Vict. c. 15. See also the Public Parks, Schools and Museums Act, 1871.

<sup>4</sup> May's Parliamentary Practice, 2; Hom. Cox, Inst. 8; Co. Litt. 109 b; Bl. Comm.

i. 146; Stephen, Comm. ii. 318.

<sup>5</sup> May, Parl. Pr. 725.

<sup>6</sup> Best on Evidence, 311.

<sup>7</sup> Williams, R. P. 149.

<sup>8</sup> Bl. Comm. i. 384.

<sup>9</sup> *Ibid.*; Co. Litt. 300 a.

and of whom the church is full."<sup>1</sup> In other words, the rector of a presentative advowson is not complete parson until he has been inducted<sup>2</sup> (*q. v.*), while in the case of an impropriate advowson the rector is perpetual parson.<sup>3</sup>

See *Advowson*; *Rector*; *Vicar*.

**PART—PARTY.**—§ 1. A person who takes part in a legal transaction or proceeding is said to be a party to it. Thus, if an agreement, conveyance, lease, or the like, is entered into between A. and B., they are said to be parties to it; and the same expression is often, though not very correctly, applied to the persons named as the grantors or releasors in a deed poll (*q. v.*).<sup>4</sup>

**Instrument.** § 2. Parties to formal instruments are divided into classes or parts according to their estates or interests in the subject-matter of the transaction; thus, if A. mortgages land to B., C. and D., and they all agree to sell it to E. and F., the conveyance would be made between B., C. and D. of the first part, (because the legal estate, which is part of the title to the land, is vested in them jointly), A. of the second part, (because he has the equity of redemption, which is the remainder of the title to the land), and E. and F. of the third part, because the whole title is to be conveyed to them. As to the distinction between parties and privies, see *Privy*.

**Legal proceedings.** § 3. In a legal proceeding, the parties are the persons whose names appear on the record. In chancery practice, those persons who merely have the right of attending the proceedings are sometimes called quasi-parties, to distinguish them from the parties in the strict sense, namely, the plaintiffs and defendants. (See *Notice of Decree*.)

**Action.** § 4. In an action, the parties are divided into plaintiffs and defendants, and, if necessary, they are distinguished according to the manner in which they were introduced into it. Thus, if R. W. brings an action against O. S. and J. B., and the defendant O. S. in his defence raises a counter-claim against the plaintiff R. W. and also against the defendant J. B. and a third person J. W., the parties to the action are divided thus:<sup>5</sup>

Between R. W. . . . .	Plaintiff,
and	
O. S. and J. B. . . . .	Defendants.
(By original action.)	
And between the said O. S. . . . .	Plaintiff,
and	
The said R. W. and J. B. and J. W. . . . .	Defendants.
(By counter-claim.)	

As to who should be made parties to an action, see *Joinder*; *Misjoinder*; *Nonjoinder*.

<sup>1</sup> Co. Litt. 300 b.

<sup>2</sup> *Ibid.* 119 b.

<sup>3</sup> Steph. Comm. ii. 678.

<sup>4</sup> Davids. Conv. i. 37.

<sup>5</sup> Jud. Act, 1875, App. (C.), Form No. 14.

§ 5. In the case of a petition, the parties consist of the petitioners and the respondents. In the case of a summons, the persons at whose instance it is issued are called the applicants, and the persons to whom it is addressed the respondents. Matter.

§ 6. Parties to a proceeding are also divided into necessary and proper. Necessary parties are those who are interested in the subject-matter of the proceedings, and in whose absence, therefore, it could not be fairly dealt with: proper parties are those who, though not interested in the proceedings, are made parties for some good reason; thus, where an action is brought to rescind a contract, any person is a proper party to it who was active or concurring in the matters which gave the right to rescind.<sup>1</sup> Necessary party.  
Proper party.

§ 7. As to the parties to a bill of exchange, see *Bill of Exchange*, § 3; and as to the parts of a bill of exchange, see § 10. Bill of exchange.

**PART PAYMENT**, as the phrase implies, is payment of part of a debt. Such a payment (independently of its effect in satisfying the debt pro tanto) has a legal effect (1) in dispensing with the necessity of writing in contracts for the sale of goods under the Statute of Frauds (*q. v.*);<sup>2</sup> and (2) in reviving a debt (or rather the balance of a debt) which would otherwise be barred by the Statute of Limitations, payment of part being evidence of a fresh promise to pay.<sup>3</sup> Part payment by one joint debtor does not revive the debt against the others.<sup>4</sup>

**PART PERFORMANCE.** See *Performance*.

**PARTIBILITY.** See *Gavelkind*.

**PARTICULAR ESTATE.** See *Estate*, § 9.

**PARTICULARITY**, in a pleading, affidavit, or the like, is the allegation of particulars or details. An excess or deficiency of particularity in a pleading is equally a defect; the latter entitles the opposite party either to an order for particulars (*q. v.*), or to an order requiring the other party to amend his pleading. (See *Amendment*.)

**PARTICULARS OF BREACHES AND OBJECTIONS.**—In an action for the infringement of letters patent, the plaintiff is bound to deliver with his declaration (now with his statement of claim) particulars (that is, details) of the breaches which he complains of.<sup>5</sup> And the defendant in an action for infringement, and the prosecutor in any proceedings by scire facias to repeal letters patent, are bound to deliver with the plea (now statement of defence) or declaration (as the case may be) particulars of any objections to the validity of the patent on which they mean to rely at the trial.<sup>6</sup>

<sup>1</sup> *Bagnall v. Carlton*, 6 Ch. D. at p. 401.

<sup>2</sup> *Chitty on Contracts*, 373.

<sup>3</sup> *Ibid.* 764.

<sup>4</sup> Stat. 19 & 20 Vict. c. 97, s. 14; *Williams*, P. P. 364.

<sup>5</sup> 15 & 16 Vict. c. 83, s. 41.

<sup>6</sup> *Ibid.*; *Chitty*, Pr. 1465.

Q. B.  
Division.

**PARTICULARS OF DEMAND OR SET-OFF.**—§ 1. In an action in the Queen's Bench Division (following the practice of the old common law Courts), where the pleadings of either party contain a general statement on some material subject, the opposite party is frequently entitled to particulars, *i. e.*, a detailed statement of the matters intended to be covered by his opponent's pleading, so that he may be acquainted with the precise nature of the allegation, and enabled to prepare his answer to it. There is another reason for obtaining particulars, namely, that they tie up the party in his proof, and prevent him from taking advantage, as he otherwise might, of very general and comprehensive statements in his pleading.<sup>1</sup> Particulars are generally obtained by summons.<sup>2</sup>

Chancery  
Division.

§ 2. In actions in the Chancery Division there is no fixed practice as to particulars, and they are rarely asked for. Some of the judges have laid down the rule that particulars will only be ordered in "common law actions," that is, in such actions as, before the Judicature Act, could only have been brought in a common law Court.<sup>3</sup>

County Court.

§ 3. In every County Court action (unless it is for the recovery of a sum not exceeding forty shillings) the plaintiff must, on entering the plaint, file particulars showing the nature of his demand or cause of action, and the nature of the relief claimed: a copy is served with the summons.<sup>4</sup> (See *Action*, § 20.)

Bankruptcy.

§ 4. In bankruptcy, before a creditor can issue a debtor's summons (*q. v.*), he must file an affidavit stating (*inter alia*) that an account in writing of the particulars of his demand has been sent to the debtor: another copy of the particulars of demand is served with the debtor's summons.<sup>5</sup>

**PARTICULARS OF SALE.**—When property such as land, houses, shares, reversions, &c., is to be sold by auction, it is usually described in a document called the particulars, copies of which are distributed among intending bidders. They should fairly and accurately describe the property.<sup>6</sup> (See *Conditions of Sale*.)

**PARTITION** is where land belonging to two or more joint tenants, tenants in common, coparceners or heirs in gavelkind is divided among them in severalty, each taking a distinct part. Partition is either voluntary, that is, by agreement between the parties, or compulsory.

Voluntary.

§ 2. At the present day a voluntary partition is effected either by a deed, which varies according to the nature of the property and the tenancy, or by obtaining an order of exchange from the Inclosure Commissioners, which takes effect without any further conveyance.<sup>7</sup>

<sup>1</sup> Smith's *Action at Law*, 105.

<sup>2</sup> Day, *C. L. P. Acts*, 417.

<sup>3</sup> *Augustinus v. Nerinckx*, 16 Ch. D. 13.

<sup>4</sup> County Court Rules, 1875, vii. 1.

<sup>5</sup> Robson's *Bankr.* 140, 141; *Bankr. Rules* (1870), 18, 19, 20, Forms 2, 3.

<sup>6</sup> Dart's *Vendors and Purchasers*, 113;

*Davids. Conv. i.* 511.

<sup>7</sup> *Davids. Conv. v.* (2), 1; Williams, *R. P.* 140; White & Tudor's *L. C. ii.* 407. For the old ways of making partition, see *Litt. §§ 243 et seq.*; *Co. Litt.* 167 a. Coke also uses partition in the sense of severance of the unity of title, as where he says that

§ 3. Compulsory partition is effected by an action for partition in the Chancery Division of the High Court,<sup>1</sup> in which case the details are generally settled by a scheme in chambers. (See *Scheme*.) The Partition Act, 1868 (amended by the Partition Act, 1876), empowers the Court to make an order for the sale of property liable to partition, and the distribution of the proceeds among the persons interested, in cases where that course is more convenient than an actual division of the property itself.<sup>2</sup> (See *Owelly*.)

**PARTNER—PARTNERSHIP.**—Partnerships are of two kinds: (i) true partnerships, and (ii) quasi-partnerships, or partnerships as regards third persons.

I. § 1. A true partnership is a voluntary unincorporated association of persons, formed, mainly from personal knowledge of one another, for the purpose of carrying out a joint operation or undertaking with the object of making a profit to be shared among them.<sup>3</sup> Although these are the essential ingredients in a partnership, its legal nature cannot be understood unless the following principles are borne in mind:—

True partnership.

(1) Every partner is entitled and bound to take part in the conduct of the business, unless it is otherwise agreed between them.

(2) Every partner is liable for the debts of the partnership to the whole extent of his property. As between the partners, each partner is bound to contribute to the debts in proportion to his share of the profits. (See *Contribution*.)

(3) As regards third persons, the act of every partner, within the ordinary scope of the business, binds his co-partners, whether they have sanctioned it or not.

(4) The relation between the partners being personal, no one of them can put a stranger in his place without the consent of the others.

(5) One partner cannot sue another (i) if any matter of partnership account is involved in the dispute; or (ii) if the damages, when recovered, will belong to the firm; but one partner may sue another for breach of an agreement to contribute capital.<sup>4</sup>

As to the analogy between a partnership and a corporation, see *Firm*. As to unincorporated partnerships with transferable shares, see *Association; Company*, § 3 *ad finem*. As to the distinction between partners and part-owners, see *Part-owners*.

§ 2. Where no time for the duration of the partnership is fixed, it is called a partnership at will, and may be dissolved at the pleasure of any partner at a moment's notice.<sup>5</sup> As to other modes of dissolving a partnership, see *Dissolution*, § 2; *Account*, § 5.

At will.

the conveyance by a coparcener of her part operates as a partition in law; Co. Litt. 167 b, Hargrave's note (2); Litt. § 309.

<sup>1</sup> Jud. Act, 1873, s. 34.

<sup>2</sup> Williams, 141; Watson, Comp. Eq. 461.

<sup>3</sup> See Lindley on Partnership; Dixon on Partn., *passim*; Thring on Companies, 2;

Watson's Comp. Eq. 705; *Pooley v. Driver*, 5 Ch. D. 458; *Ex parte Tennant*, 6 Ch. D. 303; Smith's L. C. i. 922.

<sup>4</sup> Lindley, 908.

<sup>5</sup> Smith, M. L. 26. As to the frame of partnership deeds, see *Dauids. Conv. v. (2)* 303.

Retiring and continuing partners.

§ 3. When a partner dies or retires, and the partnership agreement provides that the partnership shall not thereby be dissolved, the remaining partners are called the continuing partners. A retiring partner (and the estate of a deceased partner) is not liable for the partnership debts contracted after his connection ceased, provided, in the case of a retiring partner, that notice of the fact is given. No notice is required in the case of a dormant partner.<sup>1</sup> As to the bankruptcy of partners, see *Joint*, § 7; *Conversion*, § 8; *Firm*, §§ 3, 4.

General partnership.

Particular, limited or special.

True partnerships are of two kinds. § 4. A general partnership is where the business includes all transactions of a particular class, as where A. and B. agree to carry on the business of bankers, grocers, &c. § 5. A particular (limited or special) partnership is where the parties agree to share the profits of one particular transaction: as where A. and B. agree to join in selling a particular cargo of goods, or in working a particular patent.<sup>2</sup>

Sub-partnership.

§ 6. A sub-partnership is where a partner in a firm makes a stranger a partner with him in his share of the profits of that firm. Thus, if A. and B. carry on business as A., B. & Co.; and B. agrees with C. to give him a share of the profits received from the business of A., B. & Co.; C. is a sub-partner with B., but not a partner in the firm of A., B. & Co.<sup>3</sup> (See *Firm*, § 4.)

Quasi-partnerships.

II. § 7. A quasi-partnership, or partnership as regards third persons, is where one person is liable for the debts of another as if he were his partner, although no true partnership exists. The cases in which this occurs are referable to one of two principles. § 8. The first is, that where a person carries on business as agent for another, the latter is liable to third persons for the debts of the business. If the business is not carried on in his name, he is called a dormant or undisclosed partner.<sup>4</sup> Formerly, the doctrine was carried much further, so as to make every person who received a share of the profits of a business liable for its debts;<sup>5</sup> but the better opinion now is, that an agreement entitling one person to share the profits made by another gives rise to nothing more than a presumption that the relation of principal and agent exists between them,<sup>6</sup> and the passing of the Partnership Act, 1865 (*q. v.*), has deprived the question of much of its importance. By the operation of this act, a person who merely lends money to a firm, in consideration of receiving a share of the profits, is not a partner even as regards third persons, but in popular

<sup>1</sup> Lindley, 418 *et seq.*

<sup>2</sup> *Ibid.* 56. It is sometimes said that there is a third kind of partnership, called a universal partnership; but this seems to be inaccurate. It is true that in Roman law there was a *societas omnium bonorum* (Dig. xvii. 2, fr. 1, § 1; fr. 3, § 1, fr. 5, fr. 73); but *societas* is a very different thing from "partnership," for a *societas* might be entered into for charitable purposes, mutual improvement, &c., and it is said that in reality a *societas omnium bonorum* only occurred between married persons. Holtz. Encycl. s. v. *Societas*.

<sup>3</sup> Lindley, 55; Watson, 709.

<sup>4</sup> *Cox v. Hickman*, 8 H. L. C. 268.

<sup>5</sup> See *Waugh v. Carver*, 2 H. Bl. 235; Smith's L. C. i. 922.

<sup>6</sup> Lindley, 33 *et seq.*; Watson, 710; *Mollwo, March & Co. v. Court of Wards*, L. R., 4 P. C. 419. As to whether holders of participating policies in insurance companies are liable for its debts, see *In re Albion Life Ass. Co.*, 16 Ch. D. 83. Holders of policies in a mutual insurance company are not liable for its debts, unless they are members of the company. See *Winstone's Case*, 12 Ch. D. 239, *Re Albion Society*, 16 Ch. D. 83; *In re Great Britain, &c. Society*, 16 Ch. D. 253.

language he is sometimes called a dormant partner,<sup>1</sup> or commanditaire (*q.v.*). § 9. The second principle by which a person may be subjected to the liabilities of a partner is, that where a person holds himself out to third persons as a partner in the firm, he is liable to those persons for debts contracted by the firm: such a person is called an ostensible partner.<sup>2</sup> Generally, the "holding out" consists in his allowing his name to appear in the firm as if he were a partner, and he is then sometimes called a nominal partner.<sup>3</sup>

Ostensible partner.

Nominal partner.

**PARTNERSHIP ACT, 1865** (also called Bovill's Act), is the statute 28 & 29 Vict. c. 86. Its object was to abolish the common law rule that a person who shares in the profits of a firm is *primâ facie* so far a partner as to be liable for the business debts of the firm.<sup>4</sup> And it, therefore, provides that no one of the following facts shall of itself make the person concerned a partner in the firm:—(1) An advance of money to the firm in consideration of a periodical payment out of or varying with the profits; (2) remuneration of the services of a servant or agent by a share of profits; (3) the receipt of an annuity out of the profits by the widow or child of a deceased partner; (4) the receipt of a share of profits in consideration of the sale of the goodwill. If the firm becomes bankrupt, the persons who have advanced money or sold the goodwill to it in consideration of a share of the profits, are not to recover anything until the other creditors have been paid in full.<sup>4</sup>

**PART-OWNERS** are persons who are entitled to property either jointly, in common, or in coparcenary. § 2. Part-owners differ from partners in several respects, the principal of which are:—(1) that a partner is the agent of his co-partners within the ordinary scope of the business, so that he has power to bind them towards third persons even against their will, while a part-owner, in the absence of a special agreement, has no such power, and can only deal with his own interest in the property;<sup>5</sup> (2) that a part-owner can transfer his interest to a stranger, while a partner cannot without the consent of his co-partners. § 3. The term "part-owners" in this relation chiefly occurs in the law of merchant shipping. Part-owners of a ship are tenants in common. Difficult questions often arise as to whether the co-owners of a vessel are partners in respect of her, either generally or for a particular voyage.<sup>6</sup> (See also *Managing Owner*.)

Ship.

**PARTY.** See *Part*.

**PARTY-WALL.**—In the primary and most ordinary meaning of the term, a party-wall is—(1) a wall of which the two adjoining owners are tenants in common. But it may also mean—(2) a wall divided

<sup>1</sup> Thring, 4; Smith's Merc. Law, 20.

<sup>2</sup> Lindley, 47 *et seq.*; Watson, 711; Thring, 6; Smith, M. L. 23. The term seems also to be used to denote a real partner whose name appears, as opposed to a secret partner; Smith's L. C. i. 947.

<sup>3</sup> Lindley, 489; Smith's L. C. i. 947, 951.

<sup>4</sup> See Lindley on Partnership, 35; Watson's Comp. Eq. 710.

<sup>5</sup> Lindley on Partn. 58.

<sup>6</sup> Foard on Merch. Shipping, 31 *et seq.*

longitudinally into two strips, one belonging to each of the neighbouring owners; (3) a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements; the term is so used in some of the Building Acts; or (4) a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favour of the owner of the other moiety.<sup>1</sup>

Party-walls in London are subject to the provisions of the stat. 18 & 19 Vict. c. 122.

Convey-  
ancing.

**PASS.**—I. § 1. In conveyancing, to pass is to transfer or be transferred. Thus, we may either say that a conveyance by a person entitled to make it passes the estate limited by it (see *Operative Words*), or that the estate passes by the conveyance.

Chancery  
practice.

II. § 2. In the practice of the Chancery Division, when the draft (or "minutes") of an order or judgment has been settled by the registrar in the presence of the parties, it is left for engrossment, and when it has been engrossed, the parties again attend to examine the engrossment with the draft; if it is correct they sign it, and this is generally called "passing" the order, but strictly speaking the passing is performed by the registrar, who places his initials at the end: after which the order is entered (*q. v.*, and see *Minutes*, § 2).<sup>2</sup> § 3. When an account has been brought into chambers and vouched, the chief clerk is said to have passed or allowed it, with or without disallowances or surcharges. The term "pass" is also applied to the accounting party who brings in the account. (See *Account*, §§ 5, 6.)

**PASSAGE** is the easement of passing over a piece of private water, analogous to a right of way over land.<sup>3</sup> (See *Easement*; *Way*.)

**PASSAGE COURT.** See *Court of Passage*.

**PASTURAGE—PASTURE.**—§ 1. "Pasture" means both (i) land employed for the pasturage of cattle, &c., and (ii) the right of pasture.<sup>4</sup>

§ 2. A right of pasture is the right of feeding animals on the grass and other wild herbage, and the leaves, mast, acorns, &c. of trees growing on land belonging to another person. Rights of pasture are of three kinds, several, common, and seignorial.

Several.

§ 3. A several pasture is one which entitles the person having the right to exclude the owner of the land from feeding his beasts on it.<sup>5</sup> Such a right may be created by grant or prescription.<sup>6</sup> Sheepheaves (*q. v.*) seem to be several rights of pasture.

<sup>1</sup> *Watson v. Gray*, 14 Ch. D. 192.

<sup>2</sup> *Hunter's Suit*, 87; *Daniell's Ch. Pr.* 876.

<sup>3</sup> *Alban v. Brounsall*, Yelv. 163; *Tailor v. Markham*, 1 Brownl. 215.

<sup>4</sup> "If a man doth grant all his pastures,

*pasturas*, the land itself employed to the feeding of beasts doth passe, and also such pastures or feedings as he hath in another man's soile." Co. Litt. 4 b.

<sup>5</sup> Co. Litt. 122 a.

<sup>6</sup> *Williams on Common*, 9.



§ 4. A common of pasture is where the person having the right can Common. only exercise it in common with the owner of the soil. As to the varieties of common of pasture, see *Common*, §§ 4 *et seq.*

§ 5. A seignorial right of pasture occurs in the case of a fold- Seignorial. course (*q. v.*).

§ 6. By the 113th section of the General Inclosure Act, 1845, any Regulated land directed to be inclosed under that act may be set apart to be stocked pasture. and depastured in common by the persons interested therein. The valuer acting in the matter is to ascertain and allot the stints or rights of pasturage of the persons interested, the numbers and kinds of animals to be admitted to the pasture, the times during which the animals may be kept on the pasture, &c. Such a pasture is called a regulated pasture. (See *Field Reeve*.)

**PATENT.** See *Ambiguity*; *Letters Patent*; *Patent Right*.

**PATENT BILL OFFICE.**—The Attorney-General's Patent Bill Office is the office in which were formerly prepared the drafts of all letters patent other than those for inventions. The draft patent was called a bill (*q. v.*, § 5), and the officer who prepared it was called the Clerk of the Patents to her Majesty's Attorney and Solicitor General. By the Great Seal Act, 1851, warrants were substituted for bills, and by the G. S. Act, 1880, the duty of preparing such warrants was transferred to the Clerk of the Crown in Chancery (*q. v.*, and see *Privy Seal*).

**PATENT OFFICE.**—§ 1. There are two patent offices, namely, the office of the Commissioners of Patents for Inventions, and the Great Seal Patent Office.

§ 2. The office of the Commissioners of Patents is where the business relating to the granting of letters patent for inventions is carried on. Patents for inventions. (See *Commissioners of Patents*; *Patent Right*.)

§ 3. As to the Great Seal Patent Office, see *Great Seal*, § 4. The chief of the office is called the Clerk of the Patents. By the Great Seal (Offices) Act, 1874, power is given to abolish the office of Clerk of the Patents, and to transfer the duties to the Clerk of the Crown in Chancery (*q. v.*). Great Seal Patent Office

**PATENT RIGHT** is a privilege granted by the crown to the first inventor of a new and useful mode of manufacture, that he alone shall be entitled, during a limited period, to use and make a profit by it. It is so called because the privilege is granted by letters patent (*q. v.*). A patent cannot be granted in the first instance for longer than fourteen years, but where an extension is necessary to remunerate the patentee for his expense and labour in perfecting the invention, the term may be extended by the Privy Council for another fourteen years.<sup>1</sup>

<sup>1</sup> Stats. 21 Jac. 1, c. 3; 5 & 6 Will. 4, c. 83; 7 & 8 Vict. c. 69; 16 & 17 Vict. cc. 5 and 115; Williams, P. P. 279;

Stephen's Comm. ii. 25 *et seq.*; *In re Dering's Patent*, 13 Ch. D. 393.

As to the mode of obtaining a patent, see *Specification* ; *Commissioners of Patents*.

§ 2. A patentee may grant licences (which must be registered) for the use of his invention, or may assign the patent by a registered instrument.<sup>1</sup>

§ 3. A patent is incorporeal personal property. (See *Personal Property*, § 6.)

§ 4. The remedy for the infringement of a patent is by action for damages or injunction, or both. (See *Account*, § 6 ; *Inquiry*, § 2.)

See further as to patents under titles *Novelty* ; *Particulars of Breaches and Objections* ; *Scire facias*.

**PATRON** of a living or benefice is the owner of the advowson (*q. v.*).

**PAUPER** means (i) a person in receipt of relief under the poor laws ; (ii) a person suing or defending an action in formâ pauperis. As to the former, see *Poor Law* ; *Guardians of the Poor* ; *Overseer* ; *Parish* ; *Settlement* ; as to the latter, see *In Formâ Pauperis* ; *Dispauper* ; *Dives*.

**PAWN—PAWNBROKER.**—Pawn is sometimes used (especially by the older writers) in the same sense as pledge (*q. v.*),<sup>2</sup> but more usually at the present day it signifies a pledge to a pawnbroker or person who keeps a shop for the purchase or sale of goods, and takes goods by way of security for money advanced thereon. Statutory regulations have been made for preventing frauds and overcharges by pawnbrokers : thus every pawnbroker taking a pledge for a loan not exceeding 10*l.* is bound to give the pawner a pawn ticket, specifying the charges for interest, &c., which he is allowed by the statute to make, the period within which the pledge may be redeemed, &c. ; he is also bound to keep account books showing all sales of pledges by him.<sup>3</sup> He has a statutory power of sale by auction.<sup>4</sup> In other respects he is a bailee, like an ordinary pledgee. (See *Bailment*.)

**PAYABLE.**—A sum of money is said to be payable when a person is under an obligation to pay it. "Payable" may therefore signify an obligation to pay at a future time, but when used without qualification "payable" means that the debt is payable at once, as opposed to "owing" (*q. v.*).<sup>5</sup>

**PAYEE.** See *Bill of Exchange*, § 1 ; *Cheque*, § 1.

**PAYMASTER-GENERAL** is the officer who makes the various payments out of the public money required for the different departments of the State, by issuing drafts on the Bank of England.<sup>6</sup>

§ 2. By the stat. 35 & 36 Vict. c. 44, the duties of the Accountant-General of the Court of Chancery were transferred to the Paymaster-General. (See *Accountant-General*.) The Paymaster-General carries out

Chancery  
business.

<sup>1</sup> Patent Law Am. Act, 1852, s. 35.

<sup>2</sup> *Coggs v. Bernard*, Ld. Raym. 909 ; Smith, L. C. i. 188.

<sup>3</sup> Pawnbrokers Act, 1872 ; Fisher on Mortgage, 70.

<sup>4</sup> Fisher, 503.

<sup>5</sup> *In re Stockton, &c. Co.*, 2 Ch. D. 103.

<sup>6</sup> For the history of the office, see *Return as to Public Income, &c.*, 1869, part ii. 338 ; Homersham Cox, Inst. 697.

the duties so transferred to him at the "Office of the Paymaster-General for Chancery Business" in the Royal Courts of Justice, London. The business transacted there includes the issuing of directions for the payment and transfer into Court of the moneys and securities belonging to the suitors: the payment by drafts on the Bank of England of sums payable out of Court, and of the interest on funds in Court: the keeping of the necessary accounts, and the issuing of certificates and transcripts of the accounts.

See *Account*, §§ 13 *et seq.*; *Certificate*, §§ 12, 13, 14, 18; *Direction*, § 2; *Payment into Court*.

**PAYMENT** is a transfer of money from one person (the payor) to another (the payee). When made in pursuance of a debt or obligation it is sometimes called payment in satisfaction.

§ 2. Payment in fact is an actual payment from the payor to the payee; In fact, payment in law is a transaction equivalent to actual payment: thus, in law, payment in fact by a debtor to one of two or more joint creditors is payment in law to all; and retainer, set-off, allowance in account, acceptance of security, goods or other means of obtaining actual payment, and payment into Court (*q. v.*), are said to be equivalent to payment, because they produce a satisfaction of the debt.

§ 3. Payment in satisfaction is said to be absolute when the debt is Absolute, completely discharged, as by payment of cash without stipulation; conditional payment is where the debt may afterwards revive if the mode of payment does not result in actual payment, as where a creditor is paid by a cheque or bill which is afterwards dishonoured; whether the acceptance by the creditor of a negotiable security operates as conditional or absolute payment is a question of fact in each case.

As to general and appropriated payments, see *Appropriation*, § 5.

As to the effect of part payment, see *Part Payment*.

§ 4. In the law of bills of exchange, payment for honour is where a person pays a dishonoured bill for the honour of some one of the parties. The payor has the rights of a holder against the person for whose honour he has paid, and against all antecedent parties, but the subsequent parties are discharged.<sup>1</sup> (See *Acceptance*, § 5; *Honour*.)

Payment for honour.

**PAYMENT INTO COURT** is the deposit of money with an official or banker of a Court of justice for the purposes of proceedings pending in the Court.

Payment into Court may be made with one of three objects.

I. § 2. Where the defendant in an action for debt or damages admits the plaintiff's claim to a certain amount, he may pay that amount into Court by way of satisfaction or amends, and plead the payment in as a defence. The plaintiff (unless otherwise ordered) is entitled to receive the amount paid in, and if he accepts it in satisfaction of his entire claim the defendant must pay him his costs of the action.<sup>3</sup>

In satisfaction.

<sup>1</sup> Byles on Bills, 266.

<sup>2</sup> Rules of Court, xxx.; *Hawksley v. Bradshaw*, 5 Q. B. D. 22, 302.

To abide the event.

II. § 3. Money may be paid into Court to remain there pending litigation. Thus, where a *prima facie* liability is established against a defendant, the Court may order him to pay the amount in question into Court to remain there until the rights of the parties have been determined, or, in the language of common law, "to abide the event" of the litigation:<sup>1</sup> so where a defendant is a trustee or stakeholder of a fund he may be ordered to pay it into Court.<sup>2</sup> Payment into Court is also a mode of giving security, *e. g.*, for the costs of an appeal.

Under Trustee Relief Act, &c.

III. § 4. In the Chancery Division of the High Court, payment into Court is also a mode by which a person may relieve himself from the responsibility of distributing or administering a fund in his hands. (See *Trustee Relief Act*; *Lands Clauses Consolidation Act*.)

See *Deposit*, § 2; *Paymaster-General*; *Transfer*.

**PEACE.**—In municipal (as opposed to international) law, "peace" or the "king's peace" is used to signify the law relating to public order. Hence, an indictment usually concludes with a charge that the offence complained of was committed "against the peace of our lady the Queen," although the omission of the words is no defect.<sup>3</sup> (See *Articles of the Peace*; *Bill of Peace*; *Breaches of the Peace*; *Commission*, § 10; *Justice of the Peace*.)

**PECULIARS**, in ecclesiastical law, are districts exempt from the jurisdiction of the ordinary of the diocese. Royal peculiars are the king's free chapels.<sup>4</sup> Formerly the peculiar jurisdictions in England amounted to nearly three hundred; but they have been practically abolished by recent legislation.<sup>5</sup> (See *Court of Peculiars*; *Ordinary*.)

Law of evidence.

**PEDIGREE.**—§ 1. In proceedings with reference to the devolution of a deceased person's property, questions as to the relationship of the claimants are called questions of pedigree. They are subject to peculiar rules of evidence. Thus, declarations by deceased persons (see *Declaration*, § 5; *Lis mota*); the general reputation of a family, proved by a surviving member of it; entries contained in family Bibles or other books, produced from the proper custody; inscriptions on tombstones; and charts of pedigrees, made or adopted by deceased members of the family, are admissible as evidence on questions of pedigree, by way of exception to the general rule against derivative evidence.<sup>6</sup> (See *Evidence*, § 9; *Reputation*.)

Chancery practice.

§ 2. In Chancery practice, when a question of pedigree arises (*e. g.*, on an inquiry as to the next-of-kin or heir-at-law of a deceased person), the party having the carriage of the inquiry draws up a pedigree for the use of the Chief Clerk.

**PENAL ACTION** is an action for a statutory penalty. (See *Action*, § 8.)

**PENAL SERVITUDE**, in criminal law, is a punishment which consists in keeping an offender in confinement and compelling him to

<sup>1</sup> Rules of Court, lii. 1; xiv. 3.

<sup>2</sup> See Daniell's Ch. Pr. 1619 *et seq.*; Report of Ch. Funds Comm. 5.

<sup>3</sup> Stat. 14 & 15 Vict. c. 100, s. 12.

<sup>4</sup> Rogers' Eccl. Law, 709.

<sup>5</sup> Phill. Eccl. Law, 1203.

<sup>6</sup> Best on Evidence, 633.

labour.<sup>1</sup> The only distinction between penal servitude and "imprisonment with hard labour" (*q. v.*) seems to be that the latter is carried out within the walls of a gaol, and cannot be inflicted for more than a comparatively short term of years, while penal servitude is carried out in any place appointed for the purpose by the proper authority, and may be for life or any period not less than five years.<sup>2</sup> (See *Transportation; Imprisonment.*)

**PENAL SUM—PENALTY.**—§ 1. A penalty or penal sum is a sum of money payable as an equivalent or punishment for an injury.

§ 2. Some penalties are imposed by law; thus, many statutes creating Statutory. duties of a public nature contain provisions for the recovery of penalties against persons neglecting those duties. Some of these may be enforced by information (*q. v.*),<sup>3</sup> others by an ordinary action.<sup>4</sup> (See *Action*, § 9; *Informers.*)

§ 3. The damages recovered in certain actions for tort are in the nature of penalties. (See *Damages*, § 4.) Penal damages.

§ 4. Penalties may also be agreed on by the parties.<sup>5</sup> Thus, in a bond with a condition, the penalty or penal sum is a nominal sum (*e. g.*, double the amount to be secured) which the obligor binds himself to pay if the condition is not complied with. When the obligee sues on it he only recovers what is due to him under the terms of the condition.<sup>6</sup> (See *Bond.*) Conventional penalties.

§ 5. Where the parties to a contract agree that, in the event of a breach of its provisions, the one shall pay to the other a specified sum of money, and it appears on the true construction of the instrument, apart from the form of words used, that the sum so specified does not represent the amount of damage caused by a breach of the contract, but is merely a nominal sum, as in the case of a bond (*supra*, § 4), then the sum so specified is called a penalty; and if the person injured sues on the contract, he cannot recover the penalty, but only damages for the injury which he has actually sustained.<sup>7</sup> For examples, see *Damages*, § 2. Bonds. For breach of contract.

§ 6. Formerly the Court of Chancery granted relief against penalties in many cases where the Courts of common law allowed them to be enforced. But this distinction has now been abolished. (See *Equity*, § 7.)

**PENANCE** is an ecclesiastical punishment affecting the body of the penitent, by which he is obliged to give public satisfaction to the Church for the scandal which he has given by his evil example; an open confession generally forms part of the penance, while in some cases the penance may be commuted for a sum of money to be applied for pious

<sup>1</sup> Stephen, *Crim. Dig.* 2.

<sup>2</sup> *Reg. v. Mount*, L. R., 6 P. C. at p. 291; Russell on Crimes, i. 72; stats. 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47; Prevention of Crime Act, 1879.

<sup>3</sup> See stat. 11 & 12 Vict. c. 43; Steph. Comm. 330.

<sup>4</sup> For an instance see *Girdlestone v. Brighton Aquarium Co.*, 3 Ex. D. 137.

<sup>5</sup> Leake on Contracts, 573.

<sup>6</sup> As to a bond for a sum payable by instalments, see *Protector Loan Co. v. Grice*, 5 Q. B. D. 592.

<sup>7</sup> Chitty on Contracts, 807; Leake on Contracts, 573.

uses. But in modern times this punishment is rarely enforced.<sup>1</sup> (See *Censure*.)

**PENDENCY—PENDENT—PENDENTE LITE.**—An action, arbitration or other proceeding is said to be pendent after it has been commenced and before the final judgment or award has been given. Pendency is the state of being pendent. "Pendente lite" means during the pendency of a suit. (See *Alimony*; *Allowance*, § 2; *Grant*, § 8; *Lis pendens*; *Lis alibi pendens*.)

**PENSION.**—When a pension is granted by the crown to one, who though not for the time engaged in any active duties is still liable to be called to active service, and is therefore to be considered in the service of the crown, as in the case of an officer on half-pay, the pension cannot be assigned, attached or otherwise made liable to his debts. But a pension granted entirely as a compensation for past services may be assigned by the grantee, or it may be taken in execution by his creditors.<sup>2</sup>

**PEPPERCORN RENT.** See *Rent*.

**PER.** As to actions in the per, see *Writ of Entry*.

**PER AUTER VIE.** See *Tenant for Life*.

**PER CAPITA—PER STIRPES.**—When property is given to the descendants or relations of two or more persons, the question frequently arises whether the donees are to take per stirpes, that is, as representatives of their respective ancestors or relations; or per capita, that is, whether they together form one class, each member of which is to take an equal share. The question chiefly arises in gifts to descendants. If a testator leaves property to his issue and dies leaving children who are living and grandchildren who are the issue of deceased children, then the property is divided per capita, that is, each child and grandchild takes an equal share of the whole.<sup>3</sup> But if there is a gift to two or more persons, with a substitutional gift to the children of such of them as shall die before the gift takes effect, then the distribution takes place per stirpes.<sup>4</sup> Thus, if there were three original donees, A., B. and C., and B. has died leaving three children, and C. has died leaving two children, the property is divided into three parts, one going to A., another to B.'s three children, and the third to C.'s two children. The expressions *per capita* and *per stirpes* are also used in the law of descent and distribution with reference to the rule of representation. (See *Descent*; *Distribution*; *Next of Kin*; *Representation*.)

**PER MY ET PER TOUT.** See *Joint Tenancy*.

<sup>1</sup> Phill. Eccl. Law, 1367, where instances are given.

<sup>2</sup> *Willcock v. Terrell*, 3 Exch. Div. 323,

and the cases there cited.

<sup>3</sup> Jarman on Wills, ii. 101, 194.

<sup>4</sup> *Ibid.* 195.

**PER QUÆ SERVITIA** was a real action by which the grantee of a seignory could compel the tenants of the grantor to attorn to himself.<sup>1</sup> It was abolished by stat. 3 & 4 Will. 4, c. 27, s. 35. (See *Attornment*.)

**PER QUOD** = whereby. In the old common law system of pleading the per quod was that part of the declaration in which the plaintiff stated the special damage which the wrongful act of the defendant had caused him, as in an action for slander. (See *Damage*, § 3.) *Per quod servitium amisit* ("whereby he has lost the benefit of his service"), and *per quod consortium amisit* ("whereby he has lost the benefit of her society"),<sup>2</sup> were allegations used in actions against persons for injuring a man's servant or wife. (See *Husband and Wife*; *Service*.)

**PERAMBULATION** is the act of walking over the boundaries of a district or piece of land, either for the purpose of determining them or of preserving evidence of them. Thus in many parishes it is the custom for the parishioners to perambulate the boundaries of the parish in Rogation Week in every year. Such a custom entitles them to enter any man's land and abate nuisances in their way.<sup>3</sup> (See *Purlieu*.)

**PERDURABLE**, as applied to an estate, signifies lasting long or for ever: thus, a disseisor or tenant in fee upon condition has as high and great an estate as the rightful owner or tenant in fee simple absolute, but not so perdurable. The term is chiefly used with reference to the extinguishment of rights by unity of seisin, which does not take place unless both the right and the land out of which it issues are held for equally high and perdurable estates.<sup>4</sup>

**ETYMOLOGY.**—Old French, *perdurable*, eternal; from Latin, *per* (intensive), and *durabilis*, lasting.<sup>5</sup>

**PEREMPT.**—In ecclesiastical procedure an appeal is said to be perempted when the appellant has by his own act waived or barred his right of appeal: as where he partially complies with or acquiesces in the sentence of the Court.<sup>6</sup>

**PEREMPTORY.**—An order, writ or other judicial command, is said to be peremptory when no excuse for non-compliance with it is admitted. Thus, in an action in the High Court, a peremptory order for time is final, and the party must either take the step within the time fixed by it, or incur the consequences of not doing so.

As to peremptory challenges, see *Challenge*, § 3. As to a peremptory mandamus, see *Mandamus*, § 2. As to the peremptory paper, see *Paper*. As to peremptory pleas, see *Plea*, § 4.

**PERFECTING BAIL.** See *Bail*, § 10.

<sup>1</sup> Shepp. Touch. 254.

<sup>2</sup> Steph. Comm. iii. 378, 439, 442.

<sup>3</sup> Phill. Eccl. Law, 1867; Hunt's Bound. 103. See also Britton, 124 b; 4 Inst. 302.

<sup>4</sup> Co. Litt. 313 a, b; Gale on Easements, 582.

<sup>5</sup> Littré, Dict. s. v.

<sup>6</sup> Phillimore, Eccl. Law, 1275; Rogers' Eccl. Law, 47; Macpherson, Priv. C. Pr. 202.

**PERFORMANCE**, with reference to a contract or condition, is the act of doing that which is required by the contract or condition. The effect of performance, in the case of a contract, is to discharge the person bound to do the act from liability, and, in the case of a condition, to create or establish the right dependent on the condition. Thus, where A. contracts to supply goods to B., he is not only bound to supply them, but he cannot claim their price until he has done so (condition precedent); if he performs the contract by supplying them, he discharges his liability, and at the same time entitles himself to claim their price.

Partial performance.

§ 2. Partial performance is where the contract, &c. is not fully performed; it is only in a few instances that this gives rise to any rights by the performing person.<sup>1</sup>

Part performance.

§ 3. Part performance is where the contract has been partly carried into effect; what is called the doctrine of part performance is the rule that where a contract is not enforceable for want of some formality, (*e.g.*, by reason of not being in writing, as required by the Statute of Frauds), and it has been partly carried into effect by one of the parties, the other cannot set up the informality as a defence: as where possession has been taken under a parol contract for the sale of land.<sup>2</sup> (See *Part Payment*.)

In equity.

§ 4. In equity, the doctrine of performance is applied to cases where A. has covenanted to purchase and settle or leave by will property in favour of B., and B. has obtained the benefit stipulated for, although the covenant has not been strictly performed. Thus, where A. covenanted to purchase lands of 200*l.* a year, and settle them on his wife and the children of the marriage, and purchased lands of that value, but did not settle them, it was held that this was a performance of his covenant, and that the eldest son was therefore not entitled to have both the benefit of the lands which had descended to him as heir-at-law and to have the covenant performed by the purchase of other land.<sup>3</sup>

See *Discharge*; *Essence of the Contract*; *Payment*; *Satisfaction*.

**PERIL.** See *Insurance*, § 3; *Risk*.

**PERJURY** is an assertion, upon an oath or affirmation duly administered in a judicial proceeding pending before a competent Court, of the truth of some matter of fact material to the question depending in that proceeding, which assertion the person making it does not believe to be true, or on which he knows himself to be ignorant.<sup>4</sup> In some cases a false oath amounts to perjury, although not taken in a judicial proceeding.<sup>5</sup>

§ 2. The evidence of two witnesses at least is required to support a conviction for perjury.<sup>6</sup>

<sup>1</sup> Chitty on Contracts, 666. See *Apportionment*; *Freight*; *Quantum meruit*; *Quantum valebant*.

<sup>2</sup> Chitty on Contracts, 278; Pollock on Contract, 557. As to performance generally, see Leake on Contracts, 435.

<sup>3</sup> Haynes's Eq. 346; Snell's Eq. 184; White & Tudor's L. C. ii. 379.

<sup>4</sup> Stephen's Crim. Dig. 82.

<sup>5</sup> See Archbold, Crim. Pr. 851, 864.

<sup>6</sup> Steph. Comm. iv. 427.



§ 3. Perjury is a misdemeanor, punishable in ordinary cases by penal servitude, or imprisonment for seven years.<sup>1</sup>

See *Affirm*, § 3; *Declaration*, § 6; *False Swearing*; *Oath*; *Subornation of Perjury*.

**PERMISSIVE WASTE.** See *Waste*.

**PERNANCY—PERNOR.**—Pernancy is the act of taking or receiving rents or other profits of land: the person who takes them is called the pernor.<sup>2</sup> The terms are now antiquated. (From Norman-French, *pernour*; <sup>3</sup> from *prendre*; Latin, *prendere*, to seize.)

**PERPETUAL CURATE.** See *Curate*.

**PERPETUATION OF TESTIMONY.**—By the stat. 5 & 6 Vict. c. 69, any person who would, under circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity or office, or to any estate or interest in any property, real or personal, the right or claim to which he cannot bring to trial before the happening of that event, might file a bill in chancery to perpetuate any testimony material for establishing his claim. In a proper case, the Court made an order that the witnesses whose testimony was required should be examined, cross-examined and re-examined in the usual way: and, when this had been done, the cause was at an end.<sup>4</sup> This jurisdiction has been transferred to the High Court of Justice in the Chancery Division.<sup>5</sup> Bills to perpetuate testimony as to legitimacy were formerly of not unfrequent occurrence; but now the same object may be attained under the Legitimacy Declaration Act.<sup>6</sup> (See *De bene esse*; *Legitimacy*, § 2.)

**PERPETUITY.**—§ 1. Perpetuity properly signifies a disposition of property by which its absolute vesting is postponed for ever; as, for instance, if property were conveyed to trustees upon trust to pay the income to A. for life, and after his death to his eldest son for life, and after *his* death to *his* eldest son, and so on. Such dispositions are contrary to the policy of the law, because they “tie up” property and prevent its free alienation. Accordingly, it has long been a rule in the law relating to contingent remainders, that an estate cannot be given to an unborn person for life, followed by any estate to any child of such unborn person.<sup>7</sup> But the rule which is commonly known as the rule against perpetuities is that applicable to executory interests (*q. v.*): it forbids any disposition by which the absolute vesting of property is or may be postponed beyond the period of the life or lives of any number of persons living at the date of the disposition, and the further period of twenty-one years after the death of the survivor.<sup>8</sup> Thus, property may be given upon trust for A. for life,

<sup>1</sup> Stat. 2 Geo. 2, c. 25; Russell on Crimes, iii. 23 *et seq.*, where the provisions of the other statutes are referred to.

<sup>2</sup> Co. Litt. 323 b, 351 a.

<sup>3</sup> Britton, 36 b.

<sup>4</sup> Daniell's Ch. Pr. 1419; Haynes' Eq. 174; Snell's Eq. 490.

<sup>5</sup> Judicature Act, 1873, s. 16.

<sup>6</sup> Daniell.

<sup>7</sup> Williams, R. P. 276.

<sup>8</sup> *Ibid.* 320; Watson's Comp. Eq. 748.

and after his death for such of his children as attain twenty-one. § 2. Hence "perpetuity" has come to mean any disposition which is void, because it infringes this "rule against perpetuities;" such as a gift to A. for life, and after his death to such of his children as shall attain twenty-five.<sup>1</sup>

§ 3. The principal exceptions to the rule are estates tail and limitations following estates tail (*q. v.*), charitable dispositions, and grants of property to particular families for public services.<sup>2</sup> (See *Accumulation*, § 3; *Appointment*, § 2; *Mortmain*; *Remoteness*.)

**PERSON.**—§ 1. In jurisprudence, a person is the object of rights and duties, that is, capable of having rights and of being liable to duties, while a thing is the subject of rights and duties.<sup>3</sup>

Natural.

Artificial.

§ 2. Persons are of two kinds, natural and artificial. A natural person is a human being (see *Monster*). Artificial persons include (i) a collection or succession of natural persons forming a corporation (*q. v.*); (ii) a collection of property to which the law attributes the capacity of having rights and duties. The latter class of artificial persons is only recognized to a limited extent in English law: examples are—the estate of a bankrupt or deceased person, and the assets of a company or partnership.<sup>4</sup> (See *Personalty*; *Status*.)

**PERSONA DESIGNATA** is a person pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character. Thus, if a testator bequeaths property to his children as a class, only those who fill that character at his death, that is, the survivors, can participate in the gift, while if he bequeaths it to them as *personæ designatæ*, the children of such of them as have died in his lifetime will take their parents' shares under the 33rd sect. of the Wills Act (see *Lapse*, § 1).<sup>5</sup> So property may be given to an illegitimate child as *persona designata*, but not as a child simply (see *Child*, § 2).

**PERSONAL** is that which has reference to the person of an individual, as in the case of a personal contract<sup>6</sup> (see *Contract*, § 11). A personal injury is an injury to the person of an individual, such as an assault, as opposed to an injury to his property, such as a trespass. (See *Actio personalis moritur cum Personâ*.)

Actions.

§ 2. In the division of actions, a personal action originally meant one which was brought to enforce a remedy against a specific person, while in a real action the remedy was against a thing. Thus, an action on a contract or tort was a personal action, while an action to recover land was a real action, because the land itself could always be recovered. (See *Action*, § 22; *In Personam*; *In Rem*.) Hence also arose the distinction between real and personal property, as to which see the respective titles.<sup>7</sup>

Property.

<sup>1</sup> *Leake v. Robinson*, 2 Mer. 363.

<sup>2</sup> *Watson*, 748.

<sup>3</sup> See *Holland's Jurisp.* 64.

<sup>4</sup> As to the Roman law on the subject, see *Hunter's Roman Law*, 169, 559;

*Holtz. Encycl.* i. 274.

<sup>5</sup> *In re Stansfield*, 15 Ch. D. 84.

<sup>6</sup> *British Waggon Co. v. Lea*, 5 Q. B. D. 149.

<sup>7</sup> *Williams*, R. P. 6.

§ 3. A system of law is said to be personal when its operation is limited to one of several races inhabiting a state, as in the case of India.

See also *Act of Parliament*, § 3; *Service*.

**PERSONAL PROPERTY** or **PERSONALTY** may be said generally to include (i) everything the subject of ownership not being land, or an interest in land, and also (ii) a few exceptional interests in land which from historical reasons are nevertheless personalty.

§ 2. Personal property differs from realty chiefly in the following respects:—(1) Realty is in theory only capable of being held for an estate (*q.v.*), while personalty is essentially the subject of absolute ownership. A chattel is accordingly incapable of being entailed. But limited and reversionary interests in chattels, analogous to certain estates in land, may be created under the doctrines of equity: thus, a personal property may be vested in trustees in trust for A. for life, and after his death for B.; but the rules governing contingent remainders in land do not apply to personal property. Chattels may also be made the subject of joint ownership and ownership in common (see *Joint*; *Joint Tenancy*; *Tenancy in Common*), and of appointment under a power (see *Power*).<sup>1</sup> (2) On the death of its owner, personalty (with few exceptions) passes to the executor or administrator of the deceased; and if he died intestate, it is divisible among his next-of-kin according to the Statutes of Distribution, while realty passes to the devisee of its owner if he has disposed of it by will, or descends to his heir if he has died intestate, subject in either case to his debts.<sup>2</sup> (See *Animals Feræ Naturæ*, § 2; *Descent*; *Donatio Mortis Causâ*; *Fixture*; *Goods*; *Growing Crops*; *Heir*; *Heirloom*; *Next-of-Kin*; *Title Deeds*.) As to the administration of the real and personal property of a deceased person, see *Administration*, § 2; *Executor*.) (3) Personal property is capable of being transferred or conveyed by modes inapplicable to real property. (See *Assignment*, §§ 3 *et seq.*)

Difference between personalty and realty.

Estates and interest.

Devolution on death.

Transfer inter vivos.

Personal property is subject to several divisions.

§ 3. As to the distinction between chattels real and chattels personal, see *Chattel*. Chattels personal are further divisible into choses in possession and choses in action. (See *Chose*).

§ 4. Mixed or impure personalty consists of leaseholds, terms of years, estates at will, land directed to be converted into money (see *Conversion*), and money secured on land, *e.g.* by mortgage. The term impure personalty is generally used, with reference to the Mortmain Act, to denote property which, though personalty, is not allowed to be given to charitable uses by will, &c. (See *Charitable Trusts Act*; *Debenture*, § 11; *Mortmain*, § 2.) § 5. Pure personalty comprises all personal property not connected with land in such a manner as to fall within the Mortmain Act.

Mixed or impure.

Pure.

§ 6. Personal property is also divisible into (i) corporeal personal property, which includes moveable and tangible things, such as animals, ships, furniture, merchandise, &c.; and (ii) incorporeal personal property, which consists of such rights as personal annuities, stocks, shares, patents and copyrights.

Corporeal.

Incorporeal.

<sup>1</sup> Williams, P. P. 306 *et seq.*

<sup>2</sup> *Ibid.* 381, 415.

**PERSONATION** is the act of representing oneself to be someone else, whether living or dead, real or fictitious. At common law personation for the purpose of fraud is a misdemeanor.<sup>1</sup> By various statutes<sup>2</sup> personation for the purpose of obtaining property, dividends, wages, &c., or of giving votes at elections, is made felony.

**PETITION** is a written statement addressed to a Court or public officer setting forth facts on which the petitioner bases a prayer for remedy or relief. With the exception of Petitions of Right (*q. v.*), petitions are merely a peculiar mode of applying to a Court, and do not necessarily indicate that the right sought to be maintained is different in its nature from ordinary rights.<sup>3</sup> (See *Action; Motion; Summons.*)

The person by whom a petition is presented is called the petitioner, and the persons on whom it is served, in order that they may appear at the hearing and oppose or consent to the granting of the prayer, are called the respondents.

I. § 2. Petitions in the High Court of Justice are practically confined to the Chancery and Probate, Divorce and Admiralty Divisions, although they were not unknown in the old Common Law Courts.<sup>4</sup>

Chancery.  
In a cause.

Petitions in the Chancery Division are of two kinds, those presented in a pending action or suit, and summary or statutory petitions. § 3. Petitions presented in pending actions are of various kinds according to the nature of the application: thus, if an administration action has been heard and the further consideration has not been reserved, the only way by which, while the action is still pending, a party can afterwards apply to the Court to do anything not directed by the order or judgment, is by presenting a petition. As to petitions of course, see *Of Course*.

Summary and  
statutory  
petitions.

§ 4. Sometimes a petition may be presented without the institution of an action, *e. g.*, for the maintenance of an infant. (See *Maintenance*.) Usually these petitions are of statutory origin, having been introduced to save the expense of a regular action in simple cases. The examples of most usual occurrence are petitions under the Trustee Acts, the Trustee Relief Acts, the Settled Estate Acts, the Lands Clauses Consolidation Acts, and winding-up petitions under the Companies Acts. (See those titles.) As to petitions by trustees, executors, &c., for the opinion or direction of the Court, see *Executor*, § 10.

Divorce.

§ 5. In the Probate, Divorce and Admiralty Division every matrimonial suit is commenced by a petition praying the relief sought, *e. g.*, a decree of nullity or dissolution of marriage, &c.<sup>5</sup> In addition to these original petitions, subsidiary or incidental petitions of various kinds are sometimes required to be presented in a suit, *e. g.*, to claim the custody of children, for alimony, &c.<sup>6</sup>

<sup>1</sup> Russell on Crimes, ii. 886.

<sup>2</sup> Especially 24 & 25 Vict. c. 98; the Ballot Act, 1872; and the False Personation Act, 1874; Stephen, Crim. Dig. 290.

<sup>3</sup> See Daniell's Ch. Pr. 1434.

<sup>4</sup> See Tidd's Pr. index v. *Petition*. At

the present day almost the only kind of petition used in the Queen's Bench Division seems to be that for admission to sue in forma pauperis (*q. v.*); Archbold, P. 1070.

<sup>5</sup> Browne on Divorce, 195.

<sup>6</sup> *Ibid.* i. 157, 202.

§ 6. Formerly the pleadings in Admiralty actions commenced with a Admiralty. petition by the plaintiff in the nature of a declaration at common law.<sup>1</sup> (See now *Statement of Claim; Protest.*)

II. § 7. In Bankruptcy, a petition is the mode by which proceedings Bankruptcy. to administer an insolvent's estate are commenced. It may be a petition for adjudication presented by a creditor, or a petition for composition or liquidation, presented by the insolvent. (See *Adjudication; Bankruptcy*, § 3; *Composition*, § 4; *Declaration*, § 4; *Liquidation*, § 1.)

III. § 8. In the House of Lords and Privy Council, every appeal is commenced by a petition of appeal praying that the judgment appealed from may be reversed or varied. Interlocutory petitions are also sometimes required, *e.g.*, to extend the time for lodging the printed cases.<sup>2</sup> (See *Appeal*, §§ 4 *et seq.*) Petition of appeal.

IV. § 9. Proceedings in lunacy are instituted by a petition for an Lunacy. inquiry, and after inquisition every matter requiring to be brought before the Court forms the subject of a petition.<sup>3</sup> (See *Lunacy.*)

**PETITION OF RIGHT** is the mode by which a subject can claim relief from the crown for certain kinds of injury arising from the acts of the crown or its servants, *e.g.*, an illegal seizure of goods, wrongful possession of land, or a money claim consisting of a debt or damages for breach of contract.<sup>4</sup> The petition itself is a document in which the petitioner set out his right, legal or equitable, to that which is demanded by him, and prays the Queen to do him right and justice, and, upon a due and lawful trial of his right and title, to make him restitution.<sup>5</sup> The petitioner is called the suppliant, and the persons against whom relief is prayed (for any person in enjoyment of the property or right claimed is made a party) are called the respondents. The petition may be presented in any of the divisions of the High Court on the Home Secretary granting his fiat for that purpose. The act regulating the proceeding by petition of right<sup>6</sup> provides that, if the petition is presented in Chancery, the subsequent proceedings up to judgment are to follow those in a suit in equity; and if in one of the common law Courts, they follow those in an action at law. As petitions of right are not affected by the Judicature Act, the rules of the former common law and equity practice are still applicable to them.<sup>7</sup> (See *Amoveas Manus*, § 2; *Monstrans de Droit; Traverse.*)

**PETTY BAG OFFICE** is the principal office on what was formerly the common law side of the Court of Chancery, and is under the management of an officer called the Clerk of the Petty Bag. It is now an office of the High Court of Justice. Out of it issue all original writs, certain kinds of writs of error and certiorari, commissions of charitable uses, idiocy, and lunacy, commissions to seize escheated and forfeited lands,

<sup>1</sup> Williams & Bruce, Admiralty, 246.

<sup>2</sup> Macpherson, Privy C. Pr. 81, 87.

<sup>3</sup> See Elmer on Lunacy and Pope on Lunacy, *passim*.

<sup>4</sup> *Thomas v. The Queen*, L. R., 10 Q.

B. 31.

<sup>5</sup> Daniell, Ch. Pr. 121.

<sup>6</sup> 23 & 24 Vict. c. 34.

<sup>7</sup> *Rustomjee v. The Queen*, 1 Q. B. D. 487; 2 Q. B. D. 69.

&c., writs of *dedimus potestatem*, *congé d'élire*, *scire facias* to repeal letters patent and enforce recognizances, &c., and writs on the calling of a new parliament. In it are filed traverses of inquisitions and returns to various commissions, including commissions for production of a *cestui que vie*. (See the various titles.) In it is also transacted the business connected with the admission of solicitors.<sup>1</sup> The practice of the office is regulated by the Petty Bag Office and Enrolment in Chancery Amendment Act, 1849, and the general orders.<sup>2</sup> § 2. By the Judicature (Officers) Act, 1879, s. 14, the office of Clerk of the Petty Bag will be abolished on the occurrence of the next vacancy.

ETYMOLOGY AND HISTORY.]—The Petty Bag Office was so called because in it the proceedings in which the crown was concerned were preserved in a little sack or bag, *in parva bagā*, instead of being enrolled on rolls as in the case of other proceedings. (See *Chancery*, § 4; *Hanaper*.)<sup>3</sup>

PETTY JURY—PETTY LARCENY. See *Jury*, § 7; *Larceny*.

PETTY SERJEANTY.—“Tenure by petite serjeanty is where a man holds his land of our sovereign lord the king, to yield to him yearly a bow, or a sword, or a dagger, or a knife, or a lance, or a paire of gloves of maile, or a pair of gilt spurs, or an arrow, or divers arrowes, or to yield such other small things belonging to warre.”<sup>4</sup> “And such service is but socage in effect.”<sup>5</sup>

The act 12 Car. 2, c. 24, took away from this tenure the incidents of livery and primer seisin, but does not seem to have affected it in other respects.<sup>6</sup> (See *Grand Serjeanty*; *Socage*; *Tenure*.)

PETTY SESSIONS is an occasional meeting of two or more justices of the peace arranged between themselves for the transaction of business for which the presence of more than one justice is either necessary or desirable. Petty sessions are commonly held weekly.<sup>7</sup> In cities, boroughs, and towns corporate having a separate commission of the peace, every sitting of justices of the peace or of a stipendiary magistrate is deemed a petty sessions of the peace.<sup>8</sup> (See *Special Sessions*.)

PEW.—§ 1. An exclusive title to pews and seats in the body of an ordinary parish church may be maintained in virtue of a faculty, or by prescription. All other pews and seats in the body of the church are the property of the parish; and the churchwardens, as the officers of the ordinary, and subject to his control, have authority to place the parish-

<sup>1</sup> See Report, Comm. on Fees, 8; Second Rep. Legal Depart. Comm. 124; 4 Inst. 80; Bl. Comm. iii. 49; Daniell, Ch. Pr. ii. 1910; *Castro v. Murray*, L. R., 10 Ex. 213; Archbold, Pr. 63. See also Solicitors Act, 1877, s. 9.

<sup>2</sup> 12 & 13 Vict. c. 109; Daniell, Ch. Pr. ii. 1606; *Dale's Case*, 6 Q. B. D. 376.

<sup>3</sup> Bl. Comm. iii. 49; 4 Inst. 80.

<sup>4</sup> Litt. § 159.

<sup>5</sup> *Ibid.* § 160.

<sup>6</sup> Co. Litt. 108 b, 2 (1).

<sup>7</sup> Stone's Justice of the Peace, 51.

<sup>8</sup> Stat. 12 & 13 Vict. c. 18, s. 1; Pritchard's Quarter Sessions, 2.

ioners therein. § 2. A pew annexed by prescription to an ancient messuage cannot be severed from it.<sup>1</sup>

As to the chief pew in the chancel, see *Chancel*.

§ 3. In the case of churches erected under the Church Building Acts, the distribution of the pews and seats is vested in the Ecclesiastical Commissioners and the bishop of the diocese, and they have power to fix rents for pews, subject to the provisions of the acts.<sup>2</sup> Church Building Acts.

**PICKETING** by members of a trade union on strike consists in posting members at all the approaches to the works struck against, for the purpose of observing and reporting the workmen going to or coming from the works, and of using such influence as may be in their power to prevent the workmen from accepting work there.<sup>3</sup> It having been found that picketing led to molestation, threats and even violence, the Conspiracy and Protection of Property Act, 1875,<sup>4</sup> makes picketing an offence punishable by fine or imprisonment. (See *Molestation*; *Trade Unions*.)

**PIERS.** See stats. 46 Geo. 3, c. 153; 10 & 11 Vict. c. 27; 24 & 25 Vict. c. 45; 25 & 26 Vict. c. 69; and titles *Harbour*; *Port*.

**PILOTAGE—PILOTS.**—§ 1. A pilot is a person who, in consequence of his special knowledge of a particular water, is taken on board a vessel to superintend the steering where the navigation is difficult and dangerous. A "qualified pilot" is a person duly licensed by a "pilotage authority," that is, a body or person authorized to exercise jurisdiction in respect of pilotage, the most important of which is the Trinity House. § 2. Compulsory pilotage is where every ship, navigating within a certain district (and not coming within the exemptions in favour of small ships, regular coasting vessels, &c.), is bound to employ a qualified pilot if he offers his services. In such a case the owner of the ship is not responsible for the negligence of the pilot.<sup>5</sup> § 3. A pilotage certificate may be granted to the master or mate of a ship, authorizing him to pilot his ship (or any other ship belonging to the same owner) within certain limits.<sup>6</sup> Qualified or licensed. Pilotage authority. Compulsory pilotage.

**PIN MONEY** is a yearly allowance settled upon a married woman, before the marriage, for the purchase of dress or ornaments, or otherwise for her separate and private expenditure.<sup>7</sup>

**PIRACY.**—I. § 1. In private or civil law, piracy is the infringement of copyright; in other words, where a person reproduces the whole or part of a work which is the subject of copyright, so as to interfere with Copyright.

<sup>1</sup> Shelford, R. P. Stat. 115.

<sup>2</sup> Phill. Eccl. Law, 2160.

<sup>3</sup> Davis on Friendly Societies, 212.

<sup>4</sup> Stat. 38 & 39 Vict. c. 86; repealing 34 & 35 Vict. c. 32, containing similar provisions.

<sup>5</sup> *The Calabar*, L. R., 2 P. C. 238. See *The Siquasi*, 5 P. D. 241; *Spaight v.*

*Tedcastle*, 6 App. Ca. 217.

<sup>6</sup> Maude & Pollock, Merchant Shipp. 194 *et seq.*; M. S. Act, 1854, part v.; Steph. Comm. iii. 156.

<sup>7</sup> Snell's Eq. 295, citing *Howard v. Digby*, 8 Bligh, N. R. 265; Elphinstone's Conv. 330; Macqueen, Husb. & Wife, 355.

the profit of the owner, he commits a piracy, unless the new work is a bonâ fide abridgment of the other.<sup>1</sup> The importation of pirated copies from abroad is an infringement of copyright. The remedy for a threatened piracy or continued infringement, is by injunction ; for a past infringement the remedy is damages, or in certain cases a penalty is imposed by statute.<sup>2</sup>

Law of  
nations.

II. In criminal law, piracy is of two kinds. § 2. Piracy by the law of nations is the offence of taking a ship on the high seas or within the jurisdiction of the Lord High Admiral from the possession or control of those who are lawfully entitled to it, and carrying away the ship or any of its goods, tackle, &c., under circumstances which would have amounted to robbery if the act had been done within the body of an English county.<sup>3</sup> § 3. Piracy is punishable with penal servitude for life, unless it is accompanied by attempted murder, or violence dangerous to life, in which case the punishment is death.<sup>4</sup> § 4. Several offences have been made piracy, and punishable with penal servitude for life, by various statutes.<sup>5</sup> (See *Slave Trading*.)

Statutory.

**PISCARY.** See *Fishery*.

**PLAINT.**—§ 1. Every action in a County Court is commenced by the registrar entering, in a book kept for the purpose, at the request of the intended plaintiff, a "plaint in writing," stating the names and the addresses of the parties, and the substance of the action: on this a summons is issued.<sup>6</sup> (See *Summons*.) The registrar gives the plaintiff a note called a plaint note, containing the date of the entry, the day fixed for the trial, and some notices for the guidance of the plaintiff.<sup>7</sup> (See *Particulars of Demand*, § 3.)

Plaint note.

Customary  
plaints.

§ 2. Before the abolition of real actions a copyholder could only plead and be impleaded in respect of his copyhold land in the Court of the manor, by what were called customary plaints, which were analogous to the common law writs in real actions, and called after them, *e. g.*, plaints in the nature of writs of entry, plaints in the nature of writs of right, &c.<sup>8</sup>

**PLAINTIFF** is a person who brings an action. (See *Part*, § 4.)

To writ, &c.

**PLEA.**—I. § 1. A plea is a mode of putting forward a defence to certain proceedings. Thus, if a writ of scire facias, prohibition or the like is issued against a person, and he wishes to put forward facts in answer to the writ, he does so by plea: or, if a return is made to such a writ, and the person at whose instance the writ was issued wishes to contest it, he puts in a plea to the return.<sup>9</sup> (See *Traverse*.)

<sup>1</sup> Shortt on Copyright, 168 *et seq.*

<sup>2</sup> *Ibid.* 216.

<sup>3</sup> Stephen's Crim. Dig. 64; Co. Litt. 391 a; Manning's Law of Nations, 120, 159; Russell on Crimes, i. 253.

<sup>4</sup> Stat. 1 Vict. c. 88.

<sup>5</sup> Stats. 8 Geo. 1, c. 24; 18 Geo. 2, c. 30; 11 & 12 Will. 3, c. 7; 1 Vict. c. 88.

<sup>6</sup> County Courts Act, 1846, s. 59; Pollock's C. C. Pr. 77.

<sup>7</sup> See County Court Forms, 1875, numbers 7 *et seq.*; Pollock, 593.

<sup>8</sup> Scriven, Copyh. 562.

<sup>9</sup> *Lee v. Bude, &c. Railway Co., L. R., 6 C. P. 576.* See an instance of a plea to the return to a mandamus, *The Queen v. Postmaster-General*, 1 Q. B. D. 658.



§ 2. In a criminal prosecution, the prisoner has to plead to the indictment, which he may do either—(1) by pleading to the jurisdiction, that is, alleging that the Court has no jurisdiction to try him; or (2) by demurring (see *Demurrer*, § 13); or (3) by pleading in abatement, that is, showing some defect in the indictment in point of form; or (4) by pleading some plea in bar, namely, either a general plea “guilty,” or “not guilty,” or a special plea, such as “auterfois acquit,” “auterfois convict,” or “pardon.”<sup>1</sup> (See the various titles.) As formal defects are now almost always capable of amendment, pleas in abatement are practically obsolete.<sup>2</sup>

To indictment.

§ 3. In the ecclesiastical Courts, all the pleadings are called pleas. The first plea is either articles or a libel, and every subsequent plea is an allegation.<sup>3</sup> (See those titles.)

Ecclesiastical practice.

§ 4. Formerly a plea was the principal mode of putting forward a defence to a civil action or suit. In an action at common law, the plea was similar to the statement of defence under the present practice in so far that it stated facts as an answer to the declaration, as opposed to a demurrer (*q. v.*); but differed from a statement of defence in stating the facts vaguely and in a peculiar form. Pleas were of two kinds, dilatory and peremptory. The first class included pleas to the jurisdiction, that is, pleas denying the jurisdiction of the Court, and pleas in abatement; the second class consisted of pleas in bar.<sup>4</sup> § 5. A plea in abatement did not give an answer to the plaintiff's case, but showed that he had committed some informality, *e. g.*, that he had not joined the proper parties to the action.<sup>5</sup> § 6. A plea in bar showed a substantial defence to the action, either by *traverse* or by *confession and avoidance* (*q. v.*). § 7. Formerly pleas were distinguished as *general issues*, in which the defendant simply traversed the plaintiff's allegations, and *special pleas*, in which the defendant stated the grounds of his defence; from the latter term arose the expression *special pleading*.<sup>6</sup> (See *Pleader*; *Issue*, § 7.) § 8. A plea *puis darrein continuance* (“after the last continuance”) was a plea setting up a ground of defence which had arisen after the defendant had pleaded in the ordinary course: thus if, after the defendant had delivered his plea, the plaintiff gave him a release, the defendant could set up the release by plea *puis darrein continuance*.<sup>7</sup> (See *Continuance*.)

Common law practice.

§ 9. In equity, pleas were very rare in practice, and were only used in cases where the defendant was in a position to state one or more facts, which if inserted in the bill would make it demurrable; in such a case the defendant by filing a plea (which generally had to be sworn to by him) might avoid putting in an answer, and bring the suit to an end at once. Pleas were of various kinds, of which pleas to the jurisdiction and pleas in bar were the principal.<sup>8</sup>

Chancery practice.

II. § 10. In its original sense, “plea” meant any legal proceeding. “Pleas of the crown” were criminal proceedings, while civil actions were called “common pleas,” or “pleas,” simply.<sup>9</sup> The Court of Queen's Bench was formerly said to have a crown side and a plea side, the former being its jurisdiction in crown business, and the latter its jurisdiction in ordinary actions: so the jurisdiction of the Court of Exchequer in ordinary

Pleas of the crown.

Plea side.

<sup>1</sup> Broom's Common Law, 992, 993, n. (p); Roscoe's Crim. Ev. 202; Steph. Comm. iv. 397; Archbold, Crim. Pl. 128.

<sup>2</sup> Archbold, 130.

<sup>3</sup> Phill. Eccl. Law, 1254.

<sup>4</sup> See Smith's Action (11), 85 *et seq.*; Steph. Pl. (5), 50 *et seq.*; Fisher's Digest, *Pleading*, v., vi.

<sup>5</sup> Pleas and defences in abatement are

abolished; Rules of Court, xix. 13.

<sup>6</sup> Stephen, Pl. (5), 189.

<sup>7</sup> Smith's Action (11), 103; Chitty, Pr. 919.

<sup>8</sup> Hunter's Suit, 36; Mitford, Pl. 218; Daniell's Ch. Pr. 520. As to pleas in Probate causes, see Browne's Practice, 285.

<sup>9</sup> Co. Litt. 287 a.

actions was called its plea side, as opposed to its jurisdiction in revenue matters.<sup>1</sup> (See *Pleading*.)

**PLEAD.**—I. § 1. In its general sense, to plead is to answer the previous pleading of the opposite party in an action or other proceeding by denying the facts therein stated, or by alleging some fresh facts; pleading is opposed to demurring: the former raises a question of fact, the latter a question of law. Thus, if a plaintiff delivers a statement of claim which is not only demurrable but also fails in stating the facts correctly, the defendant may apply for leave to plead and demur,<sup>2</sup> and, if he obtains leave to do so, he delivers a statement of defence and a demurrer.

II. § 2. To plead also signifies to plead a plea: thus, in a criminal prosecution the prisoner pleads guilty or not guilty, &c.; and under the old common law practice, a defendant was said to plead to the jurisdiction, to plead in bar, &c., according to the nature of his plea. To plead issuably, was to demur or plead some substantial defence to the action, so that it might be determined on its merits.<sup>3</sup>

Pleading  
issuably.

Pleading over,

§ 3. In criminal practice, a prisoner charged with treason or felony is said to plead over when in addition to, or after, pleading in abatement or specially, he pleads "not guilty."<sup>4</sup>

See *Plea*, § 2; *Respondent Ouster*.

**PLEADER** is a person whose business it is to draw pleadings. Formerly, when pleading at common law was a highly technical and difficult art, there was a class of men known as "special pleaders not at the bar," who held a position intermediate between counsel and attorneys. The class is now almost extinct, and the term "pleaders" is generally applied to junior members of the common law bar.

Action in  
High Court.

**PLEADING.**—§ 1. The pleadings in an action in the High Court are written or printed statements delivered alternatively by the parties to one another, until the questions of fact and law to be decided in the action have been ascertained. They begin after the defendant has appeared. (See *Action*, § 2.) § 2. Each pleading commences with the title of the action, and states concisely the material facts<sup>5</sup> on which the party pleading relies, but not the evidence by which they are to be proved.<sup>6</sup> § 3. The first pleading is the plaintiff's statement of claim (*q. v.*), unless the indorsements on the writ of summons are so full that either the plaintiff or the defendant considers a statement of claim unnecessary. § 4. The next pleading is delivered by the defendant, and is either a demurrer, a statement of defence, a statement of defence and counter-claim (*q. v.*), or a combination of these. § 5. The next pleading is either a demurrer or a reply (*q. v.*), or a combination of both.<sup>7</sup> § 6. If

<sup>1</sup> Steph. Comm. iii. 332, 340.

<sup>2</sup> Rules of Court, xxviii. 5.

<sup>3</sup> Smith's Action (11), 101; Chitty, Pr. 247.

<sup>4</sup> Archb. Crim. Pl. 128, 139; Roscoe,

Crim. Ev. 205.

<sup>5</sup> As to what are material facts, see *Millington v. Loring*, 6 Q. B. D. 190.

<sup>6</sup> Rules of Court, xix. 4.

<sup>7</sup> *Ibid.* xix., xxi. *et seq.*

the reply is not merely a joinder of issue (*q. v.*), the next pleading is delivered by the defendant. This and the subsequent pleadings, if any, follow the names of the old pleadings at common law, viz., rejoinder, surrejoinder, rebutter and surrebutter (*q. v.*); but the rule that no pleading subsequent to reply, other than a joinder of issue, shall be pleaded without leave of the Court or a judge,<sup>1</sup> coupled with the power of the judge to order issues to be settled (see *Issue*, § 4), and the power of amendment (*q. v.*), will in general prevent the pleadings from going so far. § 8. In any case, however, unless either party demurs simply, or makes default, or unless issues are settled, the ultimate result must be that one party joins issue upon the preceding pleading of his adversary, and then the pleadings are said to be closed.<sup>2</sup> § 9. If the plaintiff does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading within the proper time, the pleadings are then deemed to be closed, and the statements of fact in the pleading last delivered are deemed to be admitted.<sup>3</sup> The next step is the notice of trial (*q. v.*). As to judgment by default in other cases, see *Judgment*, § 7.

Close of pleadings by joinder of issue.

Close of pleadings by default.

§ 10. There are some miscellaneous proceedings in which the pleadings are different from those in an action, *e. g.*, petitions of right (*q. v.*), in which the pleadings after the petition itself follow the same course as those in an action at law or suit in equity under the old practice (*infra*, §§ 11, 12): and proceedings by scire facias, extent, traverse of office or inquisition, and criminal proceedings, as to which see *Indictment*; *Information*, §§ 8 *et seq.*; *Plea*.

Miscellaneous proceedings.

§ 11. Formerly different systems of pleadings, except as to demurrers, prevailed in the common law and equity Courts. In a common law action the pleadings consisted of (1) the declaration, (2) plea, (3) replication, (4) rejoinder, (5) surrejoinder, (6) rebutter, (7) surrebutter.<sup>4</sup> § 12. In a suit in equity the pleadings consisted of (1) the bill of complaint; (2) either (a) a demurrer, (b) a plea, (c) an answer, (d) a disclaimer, or (e) a combination of these; and (3) replication.<sup>5</sup> Formerly rejoinders were also used in Chancery pleadings,<sup>6</sup> but they had been disused long before the Judicature Act. According to modern practice, if the plaintiff required to state fresh facts after the defendant had filed his answer or plea, he amended his bill.

Common law.

Chancery.

ETYMOLOGY AND HISTORY.]—Norman-French, *pli*; *plee*, an action or suit;<sup>7</sup> from Latin, *placitum*, which meant (1) a constitution or statute,<sup>8</sup> and later (2) meetings of legislative and judicial bodies for passing laws and deciding litigation, and hence (3) the suits themselves.<sup>9</sup> In the early ages of the common law the pleadings were oral statements, or arguments by the parties or their counsel, made alternately until the question in dispute was ascertained.<sup>10</sup>

**PLEDGE.**—§ 1. A pledge is where the owner of a chattel agrees with another person that it shall be held by the latter (the pledgee) as security for the payment of a debt or performance of an obligation. This

<sup>1</sup> Rules of Court, xxiv. 2.

<sup>2</sup> *Ibid.* xxv.

<sup>3</sup> *Ibid.* xxix. 12.

<sup>4</sup> Co. Litt. 303 b; Smith's Action at Law (11), 77 *et seq.*; Stephen on Pleading, *passim*.

<sup>5</sup> Hunter's Suit, 12 *et seq.*; Mitford on Pleading, *passim*.

<sup>6</sup> Mitford, 323.

<sup>7</sup> Britton, 23 a.

<sup>8</sup> Dirksen, Man. Lat. vv. *Placere*; *Placitum*.

<sup>9</sup> Diez. Etym. Würtb. v. *Piato*; Stephen on Pleading, App. n. (1).

<sup>10</sup> Smith's Action at Law (11), 77; (12), 58; Stephen, 23.

entitles the pledgee to hold the chattel until payment or performance, and, upon failure of payment or performance at the proper time, to sell it; but until he does so, the pledgor may redeem it by payment or performance.<sup>1</sup>

§ 2. Specific appropriation is sometimes called an equitable pledge.<sup>2</sup> (See *Appropriation*, § 3.)

See *Bailment*; *Charge*; *Mortgage*; *Pawn*.

**PLEDGES TO RESTORE.**—Before the plaintiff in foreign attachment can issue execution against the property in the hands of the garnishee, he must find “pledges to restore,” consisting of two householders, who enter into a recognizance for the restoration of the property, as a security for the protection of the defendant; for, as the plaintiff’s debt is not proved in any stage of the proceedings, the Court guards the rights of the absent defendant by taking security on his behalf, so that if he should afterwards disprove the plaintiff’s claim he may obtain restitution of the property attached.<sup>3</sup> (See *Foreign Attachment*.)

**PLENARTY.**—Under the old practice, when a defendant in an action of quare impedit pleaded that the church was full (that is, that a clerk had been previously presented and instituted), he was said to plead plenarty.<sup>4</sup> (See *Vacation*.)

Confession.

**PLENARY.**—§ 1. An admission or confession, whether in civil or in criminal law, is said to be plenary when it is, if believed, conclusive against the person making it.<sup>5</sup>

Cause.

§ 2. As to plenary causes in ecclesiastical practice, see *Cause*, § 2.

**PLENE ADMINISTRAVIT** is the name given to the defence set up by an executor or administrator when sued upon a debt of his testator which he has no assets to satisfy: if he has some assets, but not enough to satisfy the debt, his defence is called a plea of *plene administravit præter*.<sup>6</sup> (See *Judgment*, § 12.)

**PLOUGHBOTE.** See *Estovers*.

**PLOUGHLAND**, or **POWLAND**, is a quantity of land “not of any certain content; but as much as a plow can by course of husbandry plough in a year.”<sup>7</sup>

**PLURALITIES.**—By several modern statutes no spiritual person can hold any two benefices at the same time except in certain cases, in some of which a licence or dispensation by the bishop is required. These are acts forbidding pluralities, that is, the holding of benefices in plurality.<sup>8</sup> (See *Cession*, § 2.)

<sup>1</sup> Fisher on Mortgage, 7, 485.

<sup>2</sup> *Ranken v. Alfaro*, 5 Ch. D. 786.

<sup>3</sup> Brandon, For. Attach. 93.

<sup>4</sup> 2 Inst. 360.

<sup>5</sup> Best on Evidence, 664; Roscoe, Crim. Ev. 39.

<sup>6</sup> Williams, Ex. 1803 *et seq.*

<sup>7</sup> Co. Litt. 69 a.

<sup>8</sup> Stats. 1 & 2 Vict. c. 106; 13 & 14 Vict. c. 98; 4 & 5 Vict. c. 39; Phillimore’s Eccl. Law, 1170.

**PLURIES.**—When an original and alias writ have been issued and proved ineffectual, a third writ, called a pluries writ, may frequently be issued; it is to the same effect as the two former, except that it contains the words “as we have often commanded you” (“*sicut pluries precepimus*”) after the usual commencement “we command you.”<sup>1</sup> (See *Alias*, § 1.)

**POACHING** is the popular name for the offence of unlawfully taking or destroying game (*q. v.*).

**POLICE.** See *Constable*.

**POLICE SUPERVISION.**—Subjection to police supervision is where a criminal offender is subjected to the obligation of notifying the place of his residence and every change of his residence to the chief officer of police of the district, and of reporting himself once a month to the chief officer or his substitute.<sup>2</sup> Offenders subject to police supervision are popularly called habitual criminals.

**POLICY**, as applied to a statute, regulation, rule of law, course of action, or the like, refers to its probable effect, tendency or object, considered with reference to the social or political well-being of the state.

§ 2. Thus certain classes of acts are said to be against public policy when the law refuses to enforce or recognize them on the ground that they have a mischievous tendency so as to be injurious to the interests of the state,<sup>3</sup> apart from illegality (*q. v.*) or immorality (*q. v.*). Thus, trading with an enemy without licence from the crown,<sup>4</sup> marriage brokerage contracts,<sup>5</sup> and agreements in general restraint of marriage or trade (*q. v.*),<sup>6</sup> are instances of acts against public policy. § 3. The “policy of the law” seems to be the same thing as public policy.

§ 4. The “policy of a statute,” or “of the legislature,” as applied to a penal or prohibitive statute, means the intention of discouraging conduct of a mischievous tendency.<sup>7</sup> (See *Mala in se.*)

**ETYMOLOGY.**—Greek, πολιτεία, from πόλις, a city or state; mediæval Latin, *politia* = government of a state.<sup>8</sup>

**POLICY OF ASSURANCE.**—§ 1. A policy is an instrument containing a contract of insurance, and is called a maritime (or marine), fire, life or accident policy, according to the nature of the insurance.

§ 2. Maritime policies are either open or valued. An open policy is where the value of the thing insured is not stated in the policy, and open—

<sup>1</sup> Bl. Comm. iii. 283; Archbold, Pr. 585.

<sup>2</sup> Stat. 34 & 35 Vict. c. 112; Prevention of Crime Act, 1879; Stephen, Crim. Dig. 5; Russell on Crimes, i. 68, 78.

<sup>3</sup> Chitty on Contracts, 613; *Chesterfield v. Janssen*, White & Tudor's L. C. i. 483.

<sup>4</sup> *Potts v. Bell*, 8 T. R. 548.

<sup>5</sup> *Cole v. Gibson*, 1 Ves. 503.

<sup>6</sup> *Mitchel v. Reynolds*, Smith, L. C. i. 356; *White & Tudor's L. C.* ii. 125; *Egerton v. Brounlow*, 4 H. L. C. 1. For further details see Chitty, *ubi supra*; Pollock on Contract, 251 *et seq.*

<sup>7</sup> See *Barton v. Muir*, L. R., 6 P. C. 134; *Bensley v. Bignold*, 5 B. & Ald. 335; Pollock, 235.

<sup>8</sup> Diez. Etym. Wörtl. v. *Polizia*.

valued— must therefore be proved if a loss happen. A valued policy is where the value of the thing is settled by agreement between the parties and inserted in the policy.<sup>1</sup> § 3. An insurance may be effected either for a voyage or for a number of voyages, in either of which cases the policy is called a voyage policy; or the insurance may be for a particular period, irrespective of the voyage or voyages upon which the vessel may be engaged during that period, and the policy is then called a time policy. § 4. In addition to the two last-mentioned kinds of policy, there is a third, which is usually called a mixed policy, as, for instance, where a ship is insured “from A. to B. for a year.” This is in effect a time policy with the voyage specified.<sup>2</sup>

“Interest or no interest” or wager policies. § 5. Before the acts forbidding insurances by persons having no interest in the subject-matter of insurance, it was sometimes provided in the policy that it should be valid whether the insurer had any interest or not, in order to dispense with proof of interest in case of loss; these were called “interest or no interest policies” or “wager policies.”<sup>3</sup> (See *Interest*, § 7.)

*Life :* whole life policies. § 6. Life policies for the whole life of the cestui que vie, *i.e.* payable whenever the death happens, are called whole life policies; a policy for a term of years gives no right to the sum insured, unless the life drops within the period.

*Fire :* time—floating. § 7. When a fire insurance is made for a limited period (*e.g.* a year) it is called a time policy.<sup>4</sup> When it is made to insure not any specific goods, but the goods which may at the time of the fire be in a certain building, it is called a floating policy.<sup>5</sup>

§ 8. As to the assignment of life and marine policies, see *Assignment*, § 4. See *Lost or not Lost*; *Memorandum*; *Underwriter*.

ETYMOLOGY.—Italian, *pólizza*, an instrument under seal; from Latin, *pollex*, in its secondary sense of “seal.”<sup>6</sup>

POLL. See *Deed*, § 2; *Challenge*, § 3.

POOR LAW is that part of the law which relates to the public or compulsory relief of the indigent poor. The subject is regulated by a series of acts of parliament from 27 Hen. 8, c. 25, to the present time.<sup>7</sup> By stat. 43 Eliz. c. 2, overseers of the poor were appointed in every parish, to provide for the relief of paupers settled in their parish (see *Settle*), the necessary funds being produced by a poor-rate levied on property within the parish. (See *Rate*.) The system of overseers being unsatisfactory, the stat. 22 Geo. 3, c. 83, authorized any parish to appoint guardians in lieu of overseers, and also to enter into a voluntary union with one or more other parishes for the more convenient accommodation, maintenance and em-

<sup>1</sup> Smith's Merc. Law, 344; Maude & Pollock, Merch. Shipp. 343.

<sup>2</sup> Maude & Pollock, 345.

<sup>3</sup> *Ibid.* 333.

<sup>4</sup> *Isaacs v. Royal Insurance Co.*, L. R., 5 Exch. 296.

<sup>5</sup> *North British, &c. Co. v. London, &c. Co.*, 5 Ch. D. 569.

<sup>6</sup> Diez. Etym. Wörtl. v. *Pólizza*.

<sup>7</sup> See the Index to the Statutes, tit. *Poor*, and the notes to Steph. Comm. iii. 42 *et seq.*

ployment of their paupers in common. (See *Guardians of the Poor; Overseer; Vestry*.) In 1833, the general management of the poor, and of the funds for their relief, was placed under the superintendence and control of a body called the Poor Law Commissioners, whose functions were in 1847 transferred to a new authority called the Poor Law Board, and in 1871 to the Local Government Board (*q. v.*), who have the power of making general poor law rules (subject to the approval of the Privy Council), and of compulsorily consolidating any two or more parishes into one union for the relief and management of their paupers,<sup>1</sup> or for constituting separate parishes or amalgamating parts of parishes with other parishes.<sup>2</sup>

§ 2. All those who stand in need of relief are entitled to be relieved in the parish (or union) in which they happen to be, whether they are "settled" or "casual" poor. (See *Settlement; Removal; Irremovability*.) But in many cases there is a person bound to maintain a pauper in exoneration of the guardians: as where the pauper has a wife, husband, child, parent or grandparent, able to maintain him. There are also numerous statutes imposing penalties and punishments on persons who refuse or neglect to work to maintain their families, or desert them, leaving them chargeable to the parish.<sup>3</sup>

#### POPULAR ACTIONS. See *Action*, § 8.

**PORT.**—§ 1. A port is a harbour where customs officers are established, and where goods are either imported or exported to foreign countries, as distinguished from a mere harbour or haven, which is simply a place, natural or artificial, for the safe riding of ships. It is said that every port comprehends a city or borough (sometimes called *caput portus*), with a market and accommodation for sailors. No person may land customable goods on his own land or elsewhere than at a port. The privilege of erecting ports and taking dues and tolls as incident thereto is part of the royal prerogative, and can only belong to a subject as a franchise by grant or prescription from the crown, or by act of parliament. The owner of the port is bound to keep it in repair.<sup>4</sup> (See *Toll*.)

§ 2. In other respects a port is the same thing as a harbour (*q. v.*).

See *Sanitary Authority*.

**PORTION.**—§ 1. When land is settled in strict settlement, that is to say, on the husband for life, with remainder in tail to the eldest son, it is usual to provide for the payment to the "younger children" (that is, all except the one who takes the estate) of gross sums of money, on their attaining twenty-one, or, in the case of daughters, marrying. To enable

<sup>1</sup> Stats. 34 & 35 Vict. c. 70; 28 & 29 Vict. c. 79.

<sup>2</sup> Stat. 39 & 40 Vict. c. 61; Poor Law Act, 1879.

<sup>3</sup> Steph. Comm. iii. 56 *et seq.*; 39 & 40 Vict. c. 61, s. 19.

<sup>4</sup> Coulson & Forbes on Waters, 42. Under the Customs Laws Consolidation Act, 1878 (s. 11), the Commissioners of the Treasury may for the purposes of the customs laws appoint ports and quays, and alter or annul any existing port.

these portions to be raised, the land is generally limited to trustees for a long term of years with power to mortgage it.<sup>1</sup> (See *Settlement*; *Term*.)

§ 2. As to the operation of the rule against double portions, by which a child is prevented from taking both a sum paid to him as a portion and a legacy bequeathed to him as a portion, see *Satisfaction*.

**POSSE COMITATUS** (literally "the power of the county") is an assemblage of the able-bodied male inhabitants of a county, except peers and clergymen. The sheriff of the county may summon the posse comitatus either to defend the county against the king's enemies, or to keep the peace, or to pursue felons. Persons failing to obey the summons are liable to fine and imprisonment.<sup>2</sup>

**POSSESSIO FRATRIS.**—Under the old law of descent, where A. had a son and a daughter by one marriage, and another son by a subsequent marriage, and died intestate seised of land in fee simple, then if the eldest son entered on the land and died without issue, the daughter took the land, because the descent was traced from the person last seised; and in this case the younger son, being of the half-blood to his brother, could not inherit to him. This was called a *possessio fratris*, the rule being *possessio fratris de feodo simplici facit sororem esse hæredem* (the possession of the brother makes the sister heir).<sup>3</sup> Now descent is traced from the purchaser and not from the person last seised, so that the *possessio fratris* has been abolished.<sup>4</sup>

**POSSESSION.**—I. § 1. In its primary sense, possession is the visible possibility of exercising physical control over a thing, coupled with the intention of doing so, either against all the world, or against all the world except certain persons. There are, therefore, three requisites of possession. First, there must be actual or potential physical control.<sup>5</sup> Secondly, physical control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person, he has not possession of it.<sup>6</sup> Thirdly, the possibility and intention must be visible or evidenced by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed; hence, if a piece of land is deserted and left without fences or other signs of occupation, it is not in the possession of anyone, and the possession is said to be vacant. The question whether possession of land is vacant is of import-

Vacant  
possession.

<sup>1</sup> Elphinstone, Conv. 335; Watson's Comp. Eq. 586.

<sup>2</sup> Steph. Comm. ii. 628, iv. 254; stat. 13 Hen. 4, c. 7.

<sup>3</sup> Litt. § 8; Co. Litt. 14 b.

<sup>4</sup> Williams on Seisin, 76.

<sup>5</sup> "Whoever holds a piece of gold in his hand is the possessor of it, of this there is no doubt; and from this and similar cases the idea of *actual bodily contact* has been abstracted, and thus is made the essential in every acquisition of possession. But in the above case something else exists, which is not necessarily connected with any bodily contact, viz. the physical power of dealing with the subject immediately and of excluding any foreign agency. . . . Whoever at any moment is able to take up some-

thing which lies before him has just as much uncontrollable dominion over it as if he had in fact taken it up." Savigny on Possession, § 15. See further as to possession, Bruns (Das Recht des Besitzes im Mittelalter), Holtz. Encycl. i. 292; Bentham's Works, i. 327; iii. 188; Austin, Jurisp. 53; Hunter's Roman Law, 199 *et seq.*, where a new theory of the doctrine of possession in Roman law is developed, and the whole subject discussed with much learning.

<sup>6</sup> "Furius, et pupillus sine auctoritate, non potest incipere possidere, quia affectionem tenendi non habent, licet maxime corpore suo rem contingant, sicuti si quis dormienti aliquid in manu ponat." Dig. xli. 2, fr. 1, § 3.



ance in actions for recovering possession, as in such cases service of the writ is effected by posting a copy of it on part of the land.<sup>1</sup> (See *Service*.)

§ 2. Possession does not necessarily imply use or enjoyment; thus a warehouseman has possession of the goods entrusted to him, without having the use of them. But inasmuch as the use of property cannot be had without possession, the term "possession" is frequently used as implying use and enjoyment, and in this sense is opposed to "reversion," "remainder," "expectancy," "action," &c.; thus a tenant for life in possession is one who has the immediate benefit of the property (*e. g.*, by occupation, receipt of the rents or income, &c.), as opposed to a tenant in remainder, whose right to the enjoyment of the property is deferred (see *Estate*, §§ 9 *et seq.*): a chose in possession is a chattel which can be immediately used, such as a book, while a chose in action is merely the right to obtain possession of a chattel, as in the case of a debt.<sup>2</sup> (See *Chose*; *Reduction into Possession*.)

"Possession" as opposed to "enjoyment."

to "reversion," &c.

§ 3. Possession gives rise to peculiar rights and consequences. The principal is that a possessor is presumed to be absolute owner until the contrary is shown,<sup>3</sup> and is protected by law in his possession against all who cannot show a better title to the possession than he has. Thus, if a person takes possession of a piece of deserted land no one can eject him from it except the rightful owner,<sup>4</sup> and even he only by taking legal proceedings to prove his title.<sup>5</sup> This is called the right of possession.<sup>6</sup> Ordinarily, possession (unless combined with other elements) does not affect the question of ownership; and therefore if A., being wrongfully in possession of a thing, conveys it to B., B. cannot retain it against the true owner, even though he may have believed A. to be the true owner and paid him the value of the thing. But in a few cases possession is sufficient to enable a person without title to give a perfect title to a *bonâ fide* acquirer: thus if A. steals money or a negotiable instrument from B. and transfers it for value to C., who has no notice of the theft, B. cannot claim it from C.<sup>7</sup> (See *Earmark*; *Negotiable*; *Market Overt*.) So under the Factors Acts (*q. v.*) a person in possession of goods belonging to another may, in certain cases, sell or pledge them, so as to give a good title to the purchaser or pledgee. As to long-continued adverse possession, see *infra*, § 10.

Right of possession.

§ 4. In criminal law, possession frequently gives rise to a presumption against the possessor, so as to shift the burden of proof on him. Thus the possession of stolen goods, where recent and exclusive, is, in many cases, sufficient to raise a presumption of larceny against the possessor, which he must rebut by showing that he came honestly by them.<sup>8</sup>

Criminal law.

<sup>1</sup> Rules of Court, ix. 8.

<sup>2</sup> Bl. Comm. 396.

<sup>3</sup> Williams on Seisin, 7; Best on Evidence, 477.

<sup>4</sup> Similarly in the case of a chattel: *Armory v. Delamirie*, 1 Strange, 504; Smith, L. C. i. 357.

<sup>5</sup> As to the reason for this protection, see Savigny, § 6; Holland, Jurisp. 129.

<sup>6</sup> It is hardly necessary to point out the distinction between the right of possession and the right to possession (*supra*, § 2, and *infra*, § 5). The latter is one of the rights of ownership (*q. v.*).

<sup>7</sup> *Miller v. Race*, 1 Burr. 452; Smith's L. C. i. 538.

<sup>8</sup> Best on Evidence, 293.

I. With reference to its origin, possession is either with or without right.

Rightful  
possession.

Right to  
possession.

1. § 5. Rightful possession is where a person has the right to the possession of (that is, the right to possess) property, and is in the possession of it with the intention of exercising his right. This kind of possession necessarily varies with the nature of the right from which it arises; a person may be in possession of a thing by virtue of his right of ownership, or as lessee, bailee, &c.; or his possession may be merely permissive, as in the case of a licensee; or it may be a possession coupled with an interest, as in the case of an auctioneer.<sup>1</sup> So the right may be absolute, that is, good against all persons: or relative, that is, good against all with certain exceptions; thus a carrier or borrower of goods has a right to their possession against all the world except the owner.

Derivative  
possession.

§ 6. In jurisprudence, the possession of a lessee, bailee, licensee, &c., is called derivative possession, while in English law the possessory interest of such a person, considered with reference to his rights against third persons who interfere with his possession, is usually called a special or qualified property, meaning a limited right of ownership.<sup>2</sup> (See *Property*.)

Wrongful  
possession.

2. § 7. Possession without right is called wrongful or adverse according as the rights of the owner or those of the possessor are considered. Wrongful or naked possession is where a person takes possession of property to which he is not entitled, so that the possession and the right of possession are in one person, and the right to possession in another. Where an owner is wrongfully dispossessed he has a right of action to recover it, or, if he has an opportunity, he can exercise the remedy of recaption in the case of goods, or of entry in the case of land (see *Recaption*; *Entry*, § 3). Formerly the doctrine of wrongful possession was of more importance than now, owing to the peculiar rules applicable to disseisin, intrusion, feoffments, &c.<sup>3</sup>

Adverse  
possession.

§ 8. Adverse possession is a possession inconsistent with the right of the true owner; in other words, where a person possesses property in a manner in which he is not entitled to possess it, and without anything to show that he possesses it otherwise than as owner, that is, with the intention of excluding all persons from it, including the rightful owner, he is in adverse possession of it. Thus, if A. is in possession of a field of B.'s, he is in adverse possession of it, unless there is something to show that his possession is consistent with a recognition of B.'s title.<sup>4</sup>

Adverse ab  
initio, or by  
matter sub-  
sequent.

§ 9. Adverse possession is of two kinds, according as it was adverse from the beginning, or has become so by matter subsequent. Thus, if a mere trespasser takes possession of A.'s property, and retains it against him, his possession is adverse ab initio. But if A. grants a lease of land

<sup>1</sup> *Williams v. Millington*, 1 II. Bl. 81; cited in *Woolfe v. Horne*, 2 Q. B. D. p. 358.

<sup>2</sup> *Holland*, 127 *et seq.*

<sup>3</sup> See the subject discussed in *Taylor v. Horde*, 1 Burr. 60; *Smith's L. C.* ii. 681.

<sup>4</sup> *Ward v. Carttar*, L. R., 1 Eq. 29.

to B., or B. obtains possession of the land as A.'s bailiff, or guardian, or trustee, his possession can only become adverse by some change in his position. In the case of a lessee, his possession becomes adverse (i) if he discontinues payment of rent,<sup>1</sup> or (ii) if he pays rent to a person claiming the land adversely to the rightful owner, and does not afterwards pay any rent to the rightful owner; in the latter case the rule only applies if the rent amounts to 20s. or upwards.<sup>2</sup> In the case of persons other than lessees, the rule seems to be that possession is never considered adverse if it can be referred to a lawful title, and that where a person obtains possession by a permissive or fiduciary title, or by his own agreement, or by judgment of law (*e.g.*, under an *elegit*), he and all claiming under him are presumed to hold possession according to that right.<sup>3</sup>

§ 10. Adverse possession not only entitles the adverse possessor, like every other possessor, to be protected in his possession against all who cannot show a better title (*supra*, § 3), but also, if the adverse possessor remains in possession for a certain period of time, produces the effect either of barring the right of the true owner,<sup>4</sup> and thus converting the possessor into the owner, or of depriving the true owner of his right of action to recover his property<sup>5</sup> (see *Limitation*, § 6; *Prescription*); and this although the true owner is ignorant of the adverse possessor being in occupation.<sup>6</sup>

Effects of  
adverse  
possession.

II. With reference to the mode of its exercise, possession is of several kinds.

1. § 11. A person has actual possession (*de facto* possession, possession in fact) of a thing when he exercises physical control over it. Thus a person who holds a thing in his hand has actual possession of it, and the lessee of a house is in actual possession of it while he occupies it.<sup>7</sup>

Actual, or in  
fact.

2. § 12. A person has constructive possession (or possession in law) (1) when someone representing him has actual possession of the thing. Thus if A., the owner of the land, leases it to B., A. has constructive possession by B., and if A. dies intestate leaving C. his heir, C. is immediately in constructive possession of the land by B., although he has never had actual possession; (2) a person may have constructive possession of one thing because he has actual possession of another; thus if a person is in legal possession of a house he is ordinarily in constructive possession

Constructive,  
or in law.

<sup>1</sup> Stat. 3 & 4 Will. 4, c. 27, s. 3. This section abolished the contrary rule which formerly prevailed, and it is hence sometimes said that the statute abolished the old rule of non-adverse possession.

<sup>2</sup> Sect. 9.

<sup>3</sup> *Thomas v. Thomas*, 2 K. & J. 83; *Pelly v. Bascomb*, 4 Giff. 394; *Saunders v. Annealey*, 2 Sch. & L. 73; *Nepean v. Doe*, Smith, L. C. ii. 584, and the cases referred to in *Shelford*, R. P. Stat. 148.

<sup>4</sup> The Land Transfer Act, 1875, provides (s. 21) that as against a registered proprietor under the act there is to be no acquisition of title by adverse possession.

<sup>5</sup> Smith's L. C. ii. 681 *et seq.* Formerly the term adverse possession was used to signify the possession of a person who had

ousted the seisin of the true owner, *e.g.*, by disseisin, abatement, &c., as opposed to non-adverse possession, which existed when a person was in the actual enjoyment of land without having technically dispossessed the owner, so that during that time the period of limitation under the stat. 21 Jac. 1, c. 16, did not run. This doctrine was abolished by stat. 3 & 4 Will. 4, c. 27 (2 Bl. Comm. 266, note).

<sup>6</sup> *Rains v. Buxton*, 14 Ch. D. 537.

<sup>7</sup> For instances of actual possession, see *Lewis v. Telford*, 1 App. Cas. 414; *Coverdale v. Charlton*, 4 Q. B. D. 118. As to what is "actual possession" within the meaning of the Reform Act, see Williams on Settlements, 14; *Hadfield's Case*, L. R., 8 C. P. 306.

of the goods in it, or if he is in legal possession of a portion of an estate or farm he is in constructive possession of the whole of it.<sup>1</sup>

Joint or  
concurrent.

3. § 13. Joint or concurrent possession is where two or more persons have possession of the same thing at the same time.<sup>2</sup>

"Apparent"  
and "formal"  
possession.

4. § 14. Under the Bills of Sale Act<sup>3</sup> the validity of an unregistered bill of sale frequently depends upon whether the owner of the goods remains in "apparent possession" of them, having merely given "formal possession" to the creditor. Thus where the holder of an unregistered bill of sale of furniture put a man into the house, but did not interfere with the furniture in such a manner as to show that it had been taken out of the debtor's control, it was held that the possession so taken was merely formal, and that the goods remained in the apparent possession of the debtor.<sup>4</sup> (See *Bill of Sale*, § 5.)

5. As to possession in the law of bankruptcy, see *Order and Disposition; Reputed Ownership*.

Criminal law.

6. § 15. In criminal law, possession is sometimes distinguished from custody. Thus if the owner of a chattel gives it to his servant to keep for him for a specific purpose or until he requires it again, the chattel is in the custody of the servant and in the possession of the master; if, however, the servant receives anything for his master from a third person (not being a fellow-servant), *e.g.*, a tradesman, he has the possession and not merely the custody of it until he places it in his master's possession by putting it into a place or thing belonging to his master, or by some similar act. The importance of the distinction is with reference to the difference between larceny and embezzlement<sup>5</sup> (*q. v.*, and see *Custody*).

"Possession"  
= "seisin."

II. § 16. Possession is sometimes used in the old books in the technical sense of seisin or feudal possession of land. "It is to be knowne that there is a *jus proprietatis*, a right of ownership, *jus possessionis*, a right of seisin or possession, and *jus proprietatis et possessionis*, a right both of property and possession; and this is antiently called *jus duplicatum*, or *droit droit*. For example, if a man be disseised of an acre of land, the disseisee hath *jus proprietatis*, the disseisor hath *jus possessionis*;<sup>6</sup> and if the disseisee release to the disseisor, hee hath *jus proprietatis et possessionis*."<sup>7</sup> (See *Seisin; Droit; Possessio Fratr.*)

"Possession"  
and "seisin."

III. § 17. Possession is also sometimes opposed to seisin. "The difference between possession and seisin is: lessee for years is possessed, and yet the lessor is still seised; and therefore the terms of law are, that of chattels a man is possessed, whereas in feoffments, gifts in tail, and leases for life, he is described as seised."<sup>8</sup>

See *Enjoyment; Quasi-possession*.

<sup>1</sup> The doctrine of constructive possession does not apply to a wrongdoer or person without title; *Ex parte Fletcher*, 5 Ch. D. 809; *Bristow v. Cormican*, 3 App. Ca. at p. 661; *Coverdale v. Charlton*, 4 Q. B. D. 104. See also *Kinsman v. Rouse*, 17 Ch. D. 104.

<sup>2</sup> *In re Fells*, 4 Ch. D. 509.

<sup>3</sup> Stat. 41 & 42 Vict. c. 31; Robson's Bankruptcy, 459.

<sup>4</sup> *Ex parte Lewis*, L. R., 6 Ch. 626.

See ss. 4 and 8 of the act. As to possession excluding the doctrine of reputed ownership, see *Ex parte National Ass. Co.*, 10 Ch. D. 408.

<sup>5</sup> Steph. Crim. Dig. 195, 376.

<sup>6</sup> But see 2 Bl. Comm. 195.

<sup>7</sup> Co. Litt. 266 a.

<sup>8</sup> Noy's Maxims, 64. See Savigny, § 8 (p. 67); and for a classification of "possessions," see Bentham's Works, i. 451 *et seq.*

**POSSESSION MONEY** is the fee to which a sheriff's officer is entitled for keeping possession of property under a writ of execution.<sup>1</sup> (See *Poundage*.)

**POSSESSORY** is that which arises out of or is concerned with possession. Thus a possessory action, in the days of real actions, was an action to recover the possession of land (see *Droit*). An action of possession is a different thing (see *Action*, § 16). As to possessory liens, see *Lien*, § 4.

**POSSIBILITY** is a future event, the happening of which is uncertain. In the law of real property, the term also signifies an interest in land which depends on the happening of such an event. In this sense a possibility is said to be either bare or coupled with an interest. Thus, Bare : the expectation of an eldest son of succeeding to his father's land is a bare possibility, which is not recognized by law as being capable of transfer, though it may form the subject of a covenant to settle after-acquired property. If land is conveyed to A. for life, and if C. should be living at his death, then to B. in fee, B.'s contingent remainder is a possibility coupled with an interest : such a possibility may be devised by will or conveyed by deed.<sup>2</sup>

§ 2. In the old books a distinction is drawn between (i) a common or near possibility, and (ii) a double or remote possibility, or possibility on a possibility. Thus, the chance that a man and a woman, both married to different persons, shall themselves marry one another, is a common possibility, and therefore a gift to two such persons, and the heirs of their two bodies, gives them an estate tail ; but "if land is given to a man and two women and the heires of their bodies begotten, in this case they have a joynt estate for life and every of them a severall inheritance, because they cannot have one issue of their bodies, neither shall there be by any construction a possibility upon a possibility, viz. that he shall marry the one first and then the other."<sup>3</sup> (See further as to the effect of a gift of this kind, under titles *Estate Tail*, § 4 ; *Inheritance*, § 5.)

§ 3. Formerly, also, there was a rule that a contingent remainder could not be created to take effect on the happening of a double possibility. But this is now obsolete.<sup>4</sup>

See *Tenant in Tail after Possibility of Issue extinct*.

**POST.**—As to contracts entered into through the post, see *Letter*. As to actions in the post, see *Writ of Entry*.

**POST LITEM MOTAM.** See *Lis móia*.

<sup>1</sup> *Sneary v. Abdy*, 1 Ex. D. 299.

<sup>2</sup> Steph. Comm. i. 229 ; Williams, R. P. 279 ; stat. 8 & 9 Vict. c. 106, s. 6. When an estate in fee simple conditional at the common law is created, the donor

has what is called a possibility of reverter, as to which see *Reverter*.

<sup>3</sup> Co. Litt. 25 b, 184 a ; Williams, R. P. 275 ; Williams on Seisin, 124.

<sup>4</sup> Williams, R. P. 275.

**POST-NATI.** See *Calvin's Case*.

**POSTEA**, in the former common law practice, was a formal statement, indorsed on the nisi prius record, which gave an account of the proceedings at the trial of the action.<sup>1</sup> Under the new practice, the associate makes an entry of the findings of the jury, and of the directions and certificates given by the judge at the trial, in a book kept for that purpose.<sup>2</sup> (See *Certificate*, § 2.)

**POSTHUMOUS.** See *In Ventre sa Mère*.

**POSTLIMINIUM** is the name given to the rule of international law by which, in certain cases, persons or property captured by an enemy revert to their original owner, when recaptured from the enemy by individuals belonging to the nation from which they were captured. To what cases the rule is applicable depends to a great extent on the practice of each particular nation: for it properly belongs to private international law, though the term postliminium is also said to apply to those cases where captured property has come into the hands of neutrals, and is reclaimed by the belligerent from whom it was taken.<sup>3</sup> As to the English law on the subject, see *Recapture*.

**POST-MAN.**—"In the Court of Exchequer, two barristers, called the post-man and the tub-man (from the places in which they sit), have a precedence in motions." (See *R. v. Bishop of Exeter*, 7 Mee. & W. 188.)<sup>4</sup> This right of pre-audience would seem not to have been abolished by the merger of the Court of Exchequer into the Queen's Bench Division of the High Court (*q. v.*), the judges having intimated that whenever a divisional Court might be sitting in the old Court of Exchequer, the tub-man would be permitted to retain his right of precedence.<sup>5</sup>

**POTHIER.**—Robert Joseph Pothier was born on the 9th January, 1699, at Orleans, where he afterwards became professor: he died on the 2nd March, 1772. He wrote *Pandectæ Justinianæ in novum ordinem digestæ*: and treatises on many important branches of private law: they enjoy considerable reputation. Complete editions of his works were published in 1820-22, 1825, 1845 and 1861.<sup>6</sup>

**POUND.**—§ 1. A pound is a building or piece of land where goods which have been seized as distress are placed by the distrainor; as soon as this has been done the goods are in the custody of the law.<sup>7</sup> (See *Rescue*; *Pound-break*.)

§ 2. A pound is either overt (open) or covert (close). A pound overt is practically only used for cattle, and may be either a common pound overt, which is a pinfold or structure of wood made for such purposes on a public piece of land:<sup>8</sup> or a special pound overt, which is where the cattle are impounded on the land where the distress was made,<sup>9</sup> or on that of the distrainor, or of some other person by his consent, in which two latter

<sup>1</sup> Smith's Action, 167.<sup>2</sup> Rules of Court, xxxvi. 23.<sup>3</sup> Manning's Law of Nations, 190; Naval Prize Act, 1864. "Dictum est autem postliminium a limine et post . . . quia eodem limine revertebatur, quo amissus erat." Just. Inst. i. xii. § 5; Dig. xlix. 15.<sup>4</sup> Steph. Comm. iii. 274, note.<sup>5</sup> Solicitors' Journal, 11th June, 1881.<sup>6</sup> Holtz. Encycl.<sup>7</sup> Co. Litt. 47 b.<sup>8</sup> Generally on the waste of a manor, and hence formerly called the lord's pound: Blount, Law Dict. s. v.<sup>9</sup> Made lawful by stat. 11 Geo. 2, c. 19, s. 10.

cases the distrainor must give notice to the owner of the cattle, because where cattle are impounded in a pound overt their owner is bound to supply them with food and drink. A pound overt is so called, either because it is open overhead<sup>1</sup> (which seems to be the true reason), or because the owner of the cattle may go to it wherever it is, without being liable for a trespass.<sup>2</sup> § 3. A pound covert or close is where the distrainor impounds the cattle or goods in some part of a house (e.g. a stable), and then he is bound to supply the cattle with food and drink. Goods which are liable to be damaged by the weather or stolen must always be impounded in a pound covert.<sup>3</sup>

Covert or close.

§ 4. Formerly a distrainor could not impound the distress on the land of the tenant, but had to remove it. Now however the distrainor may convert any part of the premises, upon which a distress is taken, into a pound pro hac vice.<sup>4</sup>

ETYMOLOGY.]—Old English, *pond-fold*, *pynfold*; from Anglo-Saxon, *pyndan*, to shut in.<sup>5</sup> (See *Pound-breach*.)

**POUNDAGE** is a fee payable to an officer of a Court, or to the public revenue, in respect of services performed by him: it is so called because it is calculated at so much for every pound sterling of the amount with which he has to deal. Thus a sheriff, on executing a *fi. fa.*, is entitled to a poundage of one shilling in the pound if the sum levied does not exceed 100*l.*, and sixpence in the pound above that sum.<sup>6</sup>

**POUND-BREACH** is the act of taking goods out of a pound before the distrainor's claim has been satisfied, and that whether the distress was lawfully made or not, because impounded goods are in the custody of the law. The distrainor's remedy is either by action for treble damages, or by proceedings for a penalty before justices.<sup>7</sup> (See *Double Damages*; *Rescue*.)

ETYMOLOGY.]—Anglo-Saxon, "*pundbreche*, i. e. *infractura parci*."<sup>8</sup>

**POWER** is sometimes used in the same sense as "right," as when we speak of the powers of user and disposition which the owner of property has over it, but strictly speaking a power is that which creates a special or exceptional right, or enables a person to do something which he could not otherwise do. Powers are either public or private.

I. § 2. Public powers are those conferred by the crown, by the legislature (parliamentary powers), or by a delegate of the crown or legislature, such as the Privy Council or Board of Trade, for a public purpose,

Public Powers.

<sup>1</sup> Bl. Comm. iii. 12.

<sup>2</sup> Co. Litt. 47 b.

<sup>3</sup> *Ibid.*

<sup>4</sup> Stat. II Geo. 2, c. 19.

<sup>5</sup> Müller's Etym. Würtb. vv. *Pinfold*, *Pound*.

<sup>6</sup> Stat. 28 Eliz. c. 4; Archbold, Pr. 541. This is in addition to his fees on the warrant, &c. (*ibid.* 1483); *Mortimer v. Cragg*, 3 C. P. D. 216; *Bissicks v. Bath Colliery*

*Co.*, 3 Ex. D. 174.

<sup>7</sup> Co. Litt. 47 b; Bl. Comm. iii. 12, 146; stats. 2 W. & M. (sess. 1), c. 5; 6 & 7 Vict. c. 30.

<sup>8</sup> *Leges Henrici Primi*, c. 40; Schmid, *Ges. der Ang. glossary*, from which it seems that this is the only instance of the word occurring in Anglo-Saxon records. It occurs in Britton (72 a) under the form of *pountbreche*.

Compulsory. *e.g.*, the construction of a railway. When a parliamentary power authorizes acts by which the rights of private persons may be affected against their will, it is called a compulsory power; such are the powers given to railway companies for the compulsory purchase of land required for their undertakings. (See *Act of Parliament*, § 5.)

Private. II. § 3. Private powers are those conferred on private persons. Some are created by the parties themselves, in which case the person conferring the power is called the donor, and the person to whom it is given the donee; others are statutory, that is, conferred by statute.

§ 4. Powers must be distinguished from trusts: "powers are never imperative—they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative."<sup>1</sup> Powers are, however, sometimes divided into (i) mere, bare or naked powers (or powers in the proper sense of the word), and (ii) powers coupled with a trust, or powers in the nature of trusts, which the donees are bound to exercise; they are, therefore, really trusts and powers only in form.<sup>2</sup>

General. § 5. Powers are of two principal kinds, viz. (1) those which are by law incident to an office (sometimes called general powers), such as the ordinary powers of directors, solicitors, guardians, executors, trustees, &c.; and (2) those conferred specially (special powers), such as a power of sale or leasing, or an authority conferred by a power of attorney, procuration, warrant, &c.<sup>3</sup> Special powers are of infinite variety, but for practical purposes they may be divided into those which enable the donees to create or modify estates or interests in property (called in conveyancing "powers" *par excellence*), and those conferred for other purposes.

Powers of creating estates, &c. A. § 6. Powers which enable the donees to create or modify estates or interests in property "confer the right of alienation as opposed to that of enjoyment;"<sup>4</sup> that is, the power enables the donee to declare in whom and in what manner the property is to vest, but gives him (quâ donee) no right of ownership over it. Such a power is said to be legal when it operates upon or passes the legal estate in the property, and equitable when it only operates on or passes a beneficial or equitable estate or interest.<sup>5</sup>

Legal: (a) § 7. Legal powers (which are confined to land) operate either under by use, the Statute of Uses, under the Statute of Wills, or by custom. Powers under the Statute of Uses operate in the following manner: if land is conveyed to A. and his heirs<sup>6</sup> to such uses as B. shall appoint, and B. appoints or declares the uses to C. for life, and after C.'s death to himself in fee, then the legal estate passes to C. for his life with remainder to B., as if the estates had been originally so conveyed to them. (See *Appointment*, § 2; *Use*.) § 8. Powers operating under the Statute of Wills are similar to those operating by way of use, except that they can be created and take effect with greater freedom: thus, if a testator directs his executors to sell his land, without devising it to them, a sale by them operates as by will,

<sup>1</sup> *Att.-Gen. v. Lady Downing*, Wilm. 23.

<sup>2</sup> *Brown v. Higgs*, 8 Ves. 570, cited in Lewin on Trusts, 428; Sugden on Powers, 588; Co. Litt. 236 a.

<sup>3</sup> Lewin on Trusts, 414.

<sup>4</sup> Burton, Comp. § 173.

<sup>5</sup> Sugden, 45.

<sup>6</sup> A. is sometimes called (especially in the case of settlements) the "trustee of the power," Elphinstone, Conv. 328.



the execution of a power to dispose of the land, although they have no ownership in it, and the purchaser takes as devisee under the will.<sup>1</sup> (See *Executory Interest*.) § 9. Powers operating by virtue of a custom (*e.g.*, a custom applicable to copyholds) resemble those under the Statute of Uses in their effect, but they are less flexible in their application.<sup>2</sup>

§ 10. Legal powers are (α) *appendant* or *appurtenant* when the donee has an estate in the land and the power is to take effect wholly or in part out of that estate, as in the case of a tenant for life having a power of leasing, or a mortgagee having a power of sale; (β) *in gross* or *collateral*, either (i) where the donee has an estate in the land, but the power does not take effect out of it, as where a tenant for life has power to appoint an estate to commence after his death, or (ii) where the donee has no present estate, but may exercise the power for his own benefit; (γ) *merely collateral* or *naked*, where the donee neither has an estate nor can exercise the power for his own benefit, as in the case of executors having a mere power of sale. If lands are devised to an executor with a trust or power of sale, this is sometimes called a power coupled with an interest, to distinguish it from a bare or naked power.<sup>3</sup> This classification of powers is of importance with reference to the ability of the donee to release, suspend or extinguish the power. Thus, executors who have a merely collateral power to sell land cannot release or extinguish it.<sup>4</sup>

(b) § 11. Equitable powers are analogous to legal powers. Thus, if land or stock is vested in trustees upon such trusts as B. shall appoint, and B. appoints it to C., the legal ownership of the land or stock remains in the trustees, but the equitable ownership passes to C., and he can compel the trustees to convey the land or transfer the stock to him.<sup>5</sup>

§ 12. Powers are also divisible into (a) powers of revocation, which give only the right of revoking existing estates, and (b) powers of appointment, which enable the donees to create or appoint new estates. When a power of appointment is not preceded by an existing estate, it is sometimes called a primary power; when it is preceded by an existing estate which the donee may revoke, it is called a power of revocation and new appointment, or a subsidiary power.<sup>6</sup> As to the operation of appointments with reference to the rule against perpetuities, see *Appointment*, § 2.

§ 13. Powers are either general [absolute] or limited. A general power enables the donee to appoint the property to any person or persons (including himself), for any estates, and on any conditions, and is therefore equivalent to ownership.<sup>7</sup> If he dies having exercised it by will in favour of a volunteer, or if he becomes bankrupt, the power forms part of his assets for payment of his debts.<sup>8</sup> (See *Administration*, § 2.)

<sup>1</sup> Williams, R. P. 314.

<sup>2</sup> Chance on Powers, 3, 27.

<sup>3</sup> Co. Litt. 113 a.

<sup>4</sup> Sugden, 46 *et seq.*, 906; Co. Litt.

265 b, 237 a; Watson, Comp. Eq. 758.

<sup>5</sup> Williams, P. P. 319.

<sup>6</sup> Watson, Comp. 759; Leake, P. L. 374.

<sup>7</sup> Sugden, 394.

<sup>8</sup> Williams on Settlement, 40. In the case of a person dying after having exercised a general power by his will, the doc-

- Limited : § 14. A limited power is either special or particular. A special power is  
special, one which is restricted as to the nature or duration of the estates or  
interests to be created under it, as in the case of the power to grant  
leases by appointment for certain terms frequently given to the tenant  
particular. for life under a settlement. § 15. A particular power is one which is  
restricted as to its objects or the persons in whose favour it may be  
exercised, as in the case of a power to appoint property among a certain  
class only (*e. g.*, the children of the donee); but the terms "special" and  
Distributive. "particular" are frequently used as synonymous.<sup>1</sup> § 16. When a power  
of appointment among a class requires that each shall have a share, it is  
called a distributive or non-exclusive power; when it authorizes, but does  
not direct, a selection of one or more to the exclusion of the others, it  
Exclusive. is called an exclusive power, and is also distributive; when it gives the  
power of appointing to a certain number of the class, but not to all, it is  
Mixed. exclusive only, and not distributive.<sup>2</sup> A power authorizing the donee  
either to give the whole to one of a class, or to give it equally amongst  
such of them as he may select (but not to give one a larger share than  
the others), is called a mixed power.<sup>3</sup> Formerly, if the donee of a non-  
exclusive power excluded one of the objects from his appointment, or  
only gave him an illusory share, the appointment was held void; but this  
rule has been abolished. (See *Appointment*, § 4.) As to frauds on  
powers, see *Fraud*, § 13.
- Miscellaneous B. § 17. Powers not given for the purpose of creating or modifying  
powers. estates or interests in property are of great variety. In most cases their  
names explain themselves. Thus, a power of appointing new trustees is  
incident to every modern settlement created by will or deed, either by  
express provision, or by statutory enactment. So a power of distress and  
entry may be inserted in a deed to enable the donee to enter and distrain  
on certain land of the donor, to enforce the performance of some  
covenant, *e. g.*, the payment of an annuity. (See *Distress*, § 8.) For  
other examples of powers, see *Power of Attorney*.

**POWER OF ATTORNEY** is a formal instrument by which one person empowers another to represent him, or act in his stead for certain purposes. A power of attorney is usually a special instrument in the form of a deed poll, but it may form part of a deed containing other matter; thus a deed of dissolution of partnership often contains a power of attorney from the retiring to the continuing partner, to enable the

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trine is, that by exercising it he is in ordinary cases presumed to have meant to take the property out of the instrument creating the power for all purposes, so as to make it form part of his estate; and therefore if the appointment fails (*e. g.*, by the appointee dying in the appointor's lifetime), the property results to the appointor's estate, and not to that of the donor of the power. If, however, the donee only exercises the power partially, so that he does not appear

to have intended to make the property part of his estate for all purposes, then if the appointment fails the property results to the donor of the power (see *In re Van Hagen*, 16 Ch. D. 18). An analogous rule prevails in cases of conversion: see that title, § 5.

<sup>1</sup> Williams, R. P. 306 *et seq.*; Sugden, 394.

<sup>2</sup> Leake, 389.

<sup>3</sup> Sugden, 448.

latter to wind up the business, and collect the assets. A power which authorizes the execution of a deed must itself be conferred by deed.<sup>1</sup>

§ 2. The donor of the power is called the principal or constituent ; the donee is called the attorney.

§ 3. A power of attorney which authorizes the attorney to do all acts of a certain class from time to time, such as to carry on a business, collect debts, &c., is sometimes called a general power, as opposed to a special or particular power, or one which is confined to a specified act or acts. A limited power is one containing precise instructions as to the mode of executing it, while an unlimited power leaves this to the discretion of the attorney.<sup>2</sup>

General,  
special.

Limited,  
unlimited.

§ 4. As to the persons who can empower others to act for them by power of attorney, see *Agent ; Authority ; Delegatus non potest delegare ; Ministerial*. As to the cases in which a power of attorney is revocable, see *Authority*, § 4 ; *Revocation*. By stat. 22 & 23 Vict. c. 35, a trustee, executor or administrator making any payment or doing any act bonâ fide in pursuance of a power of attorney, in ignorance of the death of the person who gave the power, or of his having done some act to avoid it, is not liable for the money so paid, or the act so done.

Protection of  
trustees, &c.

**PRACTICE.**—The law of practice or procedure is that which regulates the formal steps in an action or other judicial proceeding. It therefore deals with writs of summons, pleadings, affidavits, notices, summonses, motions, petitions, orders, trial, judgment, appeals, costs and execution. In jurisprudence it forms part of adjective law. (See *Law*, § 8.)

**PRÆCIPE**, in the practice of the High Court, is a slip of paper on which a party to a proceeding writes the particulars of a document which he wishes to have prepared or issued ; he then hands it to the officer of the Court whose duty it is to prepare or issue the document. Thus, when a party wishes to issue a writ of execution, he must file a præcipe containing the title of the action, the reference to the record, the date of the judgment, and the name of the party against whom the execution is to be issued.<sup>3</sup>

§ 2. In admiralty actions præcipes are longer and more important than in other actions.<sup>4</sup>

§ 3. Formerly a præcipe was a species of original writ, so called because it required the sheriff to *command* the defendant either to do a certain thing or to show cause why he had not done it ;<sup>5</sup> *e. g.*, the præcipe quod reddat, commanding the defendant to give up land to the demandant,<sup>6</sup> which was the writ by which a common recovery was commenced against the tenant of the freehold. In order to have a recovery with double voucher to bar an entail it was usual for the tenant in tail to convey an estate of freehold to a friend against whom the præcipe was brought ; this was called making a tenant to the præcipe.<sup>7</sup> (See *Recovery ; Voucher*.)

Tenant to the  
præcipe.

<sup>1</sup> Stokes on Powers of Attorney ; Davids. Conv. i. 475, n.

<sup>2</sup> *Ibid.*

<sup>3</sup> Rules of Court, xlii. 10 (rule 17 of June, 1876).

<sup>4</sup> See the forms : Roscoe's Admiralty, clxxix. *et seq.* ; Williams & Bruce, 186, xlvii.

<sup>5</sup> Bl. Comm. iii. 274.

<sup>6</sup> Co. Litt. 101 a.

<sup>7</sup> Steph. Comm. i. 569.

The instructions for issuing an original writ consisted of a copy of the writ required, and therefore began with the word "præcipe;"<sup>1</sup> hence probably the use of the word in its modern sense.

**PRÆMUNIRE** is the offence of directly or indirectly asserting the supremacy of the pope over the crown of England, as by procuring excommunications or bulls from Rome. The punishment is for the offender to be put out of the king's protection, to forfeit his lands and goods to the king, and to be imprisoned. The mandatory part of the writ used to enforce the provisions of the acts against præmunire began *præmunire facias*, "that you cause [the accused] to be forewarned;" hence the name. It is now quite obsolete.<sup>2</sup>

**PREAMBLE** of a bill in parliament is that part which contains the recitals showing the necessity for the bill. When a private bill is referred to a select committee, and is opposed on the question of its general expediency, the promoters have to adduce arguments and evidence in support of it; this is called proving the preamble. If it is not proved, the bill is generally rejected by the house.<sup>3</sup>

**PRE-AUDIENCE.**—The right of pre-audience in a Court of law is the right which one person has of being heard before another, in business which is not set down to be heard in a particular order, *e. g.*, motions. Thus the Attorney-General has precedence of other counsel in most matters, the Queen's counsel over junior barristers, &c.<sup>4</sup> (See *Postman.*)

**PRECATORY.** See *Trust*.

Judicial.

**PRECEDENT.**—§ 1. A judicial precedent is a judgment or decision of a Court of law cited as an authority for deciding a similar state of facts in the same manner, or on the same principle, or by analogy. The original rules of common law and equity are contained in precedents established by the Courts, that is, they have to be arrived at by ascertaining the principle on which those cases were decided. (See *Law*, § 4; *Report.*)

Convey-  
ancing.

§ 2. In conveyancing, a precedent is a copy of an instrument, used as a guide in preparing another instrument of a similar description.

As to precedent as applied to conditions, see *Condition*, § 6.

**PRECEPT.**—§ 1. A precept is an order or direction given by one official person or body to another, and requiring him to do some act within his province.

§ 2. Thus rates levied by school boards, sanitary authorities, and the

<sup>1</sup> Tidd's Pr. 105; Lee's Pr. Dict. 980.

<sup>2</sup> Stats. 35 Edw. 1; 16 Ric. 2, c. 5; 27 Eliz. c. 2, and many others, cited in Bl. Comm. iv. 103 *et seq.*; Steph. Comm. iv. 168 *et seq.*; Co. Litt. 129 b, 391 a and

Butler's note.

<sup>3</sup> See May, Parl. Pr. 799 *et seq.*

<sup>4</sup> A table showing the order of pre-audience is given in Steph. Comm. iii. 274, note.

like, are collected by the overseers of the respective parishes in accordance with precepts issued to them,<sup>1</sup> because they, as the collectors of the poor rate, have the materials and machinery available for the collection of other rates. § 3. So jurors for the trial of actions in the High Court are summoned by the sheriff under precepts directed to him by the judges.<sup>2</sup>

**PREDECESSOR.**—§ 1. When a person who is a corporation sole, such as a bishop or parson, dies, and the land held by him in his corporate capacity passes to his successor, the person so dying is called the predecessor, just as a natural person from whom land descends to his heir is called the ancestor.<sup>3</sup> (See *Successor*.)

§ 2. As to the meaning of "predecessor" in the Succession Duty Act, see *Succession*. Corporation sole.  
Succession Duty Act.

**PRE-EMPTION.**—§ 1. The right of pre-emption is the right of Land. purchasing property before or in preference to other persons. § 2. By the Lands Clauses Consolidation Act, 1845, where a company under its compulsory powers has purchased land which is not required for the purposes of its undertaking, and is not situate in a town, or used for building purposes, the company must first offer it for sale to the person owning the lands from which it was originally severed. This is commonly called the right of pre-emption.<sup>4</sup>

§ 3. Pre-emption was formerly part of the royal prerogative, and consisted in the right of buying up provisions and other necessities for the use of the royal household, at an appraised value, in preference to all others, and without the consent of the owner. This right was surrendered by Charles II. at his restoration.<sup>5</sup> Prerogative of.

§ 4. In international law pre-emption is the right of a government to purchase, for its own use, the property of the subjects of another power in transitu, instead of allowing it to reach its destination. Formerly the right appears to have been exercised in times of peace on any cargoes which entered the port of the purchasing state, but this practice has long fallen into disuse, and at the present day pre-emption is confined to time of war, and to cases where the goods are of such a description that their transport to the enemy of the pre-empting state would be manifestly to the disadvantage of the latter, while on the other hand the law of contraband does not justify their confiscation.<sup>6</sup> International law.

**PREFERENCE—PREFERENTIAL.** See *Fraudulent Preference*. As to preferential debts, see *Debt*, § 12.

**PREGNANCY.** See *De Ventre inspiciendo*; *Jury*, § 10.

**PREJUDICE** means injury. An offer which is made "without prejudice" cannot be construed as an admission of liability, or given in

<sup>1</sup> Public Health Act, 1872, s. 18; 1875, s. 222.

<sup>2</sup> Smith's Action, 121; Juries Act, 1870, s. 16.

<sup>3</sup> Co. Litt. 78 b.

<sup>4</sup> Dart's Vendors & Purchasers, 761.

<sup>5</sup> Steph. Comm. ii. 537.

<sup>6</sup> Manning's Law of Nations, 395.

evidence at all,<sup>1</sup> except for a wholly collateral purpose, *e. g.*, to account for delay in asserting or prosecuting a claim.

**PRELIMINARY ACT.**—In actions for damage by collision between vessels, unless the Court otherwise orders, the solicitor for each party, before any pleading is delivered, must file a sealed-up document, called a Preliminary Act, which is not opened until ordered by the Court. It contains a statement as to the names of the vessels and their masters, the time and place of the collision, the state of the wind, weather and tide, the course, speed and lights of each vessel, and other particulars tending to show how the collision happened. If both solicitors consent, the Court may order the preliminary acts to be opened and the evidence to be taken thereon without any pleadings being delivered.<sup>2</sup> “The object of the rule requiring preliminary acts is to obtain a statement *recenti facto* of the leading circumstances, and to prevent either party varying his version of facts, so as to meet the allegations of his opponent. The Court will never allow a party to contradict his own preliminary act at the hearing.”<sup>3</sup>

**PREMISES.**—§ 1. In the primary sense of the word, “premises” signifies that which has been before mentioned. Thus, after a recital of various facts in a deed, it frequently proceeds to recite that in consideration of the premises, meaning the facts recited, the parties have agreed to the transaction embodied in the deed.<sup>4</sup> (See *Agreement*, § 1.)

§ 2. In a conveyance, when the property to be dealt with has been fully described, it is generally referred to in the subsequent parts of the deed, as “the premises hereinbefore described and intended to be hereby assured,” or similar words.<sup>5</sup> § 3. From this use of the word, “premises” has gradually acquired the popular sense of land or buildings. Originally, it was only used in this sense by laymen, and it is never so used in well-drawn instruments, but it is frequent in badly-drawn agreements and in acts of parliament.<sup>6</sup>

§ 4. In its technical sense, the “premises” is that part of a deed which precedes the habendum, and therefore includes—the introduction, and (in indentures) the date—the parties, or (in deed polls) the name of the grantor, &c.—the recitals—the consideration—and the grant, release or other operative part.<sup>7</sup> (See the various titles.)

**PREMIUM.**—In granting a lease, part of the rent is sometimes capitalized and paid in a lump sum at the time the lease is granted. This is called a premium. A limited owner, such as a tenant for life, cannot as a rule take a premium on granting a lease under a power, as the power generally forbids him to do so. (See *Settled Estates Act*.)

As to premiums of insurance, see *Insurance*, § 1.

<sup>1</sup> Best on Evidence, 670.

<sup>2</sup> Rules of Court, xix. 30.

<sup>3</sup> Williams & Bruce's Admiralty, 253.

<sup>4</sup> Williams, P. P. 14.

<sup>5</sup> Davids. Conv. i. 80.

<sup>6</sup> *E. g.*, the Licensing Act, 1872, where “licensed premises” means premises in respect of which a licence has been granted and is in force.

<sup>7</sup> Co. Litt. 6 a; Shepp. Touch. 74; Davids. Conv. i. 32.

**PREROGATIVE** means those exceptional powers, pre-eminences and privileges which the law gives to the crown.<sup>1</sup> They are either direct or by way of exception.<sup>2</sup> Those by way of exception are such as exempt the crown from some general rules binding on the rest of the community, as that lapse of time is no bar to a claim by the crown, though this rule has been modified by statute.<sup>3</sup> (See *Nullum Tempus occurrit Regi; Regalia.*)

By way of exception.

§ 2. The direct prerogatives may be divided into three kinds: as they regard the royal character, the royal authority and the royal income. To the first class is generally referred the rule that the king can do no wrong: in other words, that he is not liable to be sued or punished for any act or default. (See *Petition of Right.*) The second class includes the right of sending and receiving ambassadors, making treaties, declaring war and peace, assembling, proroguing and dissolving parliament, raising and regulating fleets and armies (see *Mutiny Act*), appointing ports and harbours (*q. v.*), appointing judges and magistrates, creating titles and offices, and coining money.<sup>4</sup> The third class, or fiscal prerogatives, are the sources of the royal revenue: these, however, though nominally belonging to the crown, have for long past been surrendered to the public use, and now form part of the public income known as the Consolidated Fund (*q. v.*), out of which the crown receives an annual sum, called the Civil List (*q. v.*), for the expenses of the royal household and establishment.<sup>5</sup> The ancient fiscal prerogatives included the profits of the demesne lands of the crown, the right to royal fish, wrecks, treasure-trove, waifs and estrays, escheats, &c. The rest of the public income consists chiefly of taxes, duties and other imposts voted by parliament.<sup>6</sup>

Direct.

§ 3. The crown also has certain protective prerogatives, such as its prerogatives in connection with charities, idiots and lunatics, and the foreshore of lands adjoining the sea.<sup>7</sup>

Protective.

**PREROGATIVE COURTS.**—Before the Probate Court (*q. v.*) was established there was an ecclesiastical Court held in each province, before a judge appointed by the archbishop, for granting probates and administrations in cases where the deceased left bona notabilia (*q. v.*) in different dioceses. It was called a Prerogative Court because the archbishop claimed the jurisdiction by way of special prerogative.<sup>8</sup>

**PREROGATIVE WRITS.** See *Writ.*

**PRESCRIBE.**—§ 1. To prescribe is to claim a right by prescription. As to the meaning of the expression “to prescribe in a que estate,” see *Prescription*, § 5.

§ 2. In modern acts of parliament relating to matters of an administrative nature, such as procedure, registration, &c., it is usual to indicate in

<sup>1</sup> Co. Litt. 90 b; Bl. Comm. i. 239; Hom. Cox, Instit. 592; Chitty on the Prerogative. The term seems formerly to have been applied to other persons, *e. g.* archbishops. See *Prerogative Court*.

<sup>2</sup> Stephen, Comm. ii. 475.

<sup>3</sup> Co. Litt. 90 b; Brown on Limitation, 239.

<sup>4</sup> Bl. i. 252 *et seq.*; Stephen, ii. 484 *et seq.*; May, Parl. Pr. 42 *et seq.*

<sup>5</sup> Bl. 334; Stephen, 578.

<sup>6</sup> Bl. 282 *et seq.*; Stephen, 529 *et seq.*

<sup>7</sup> *Att.-Gen. v. Tomline*, 12 Ch. D. 214; 14 Ch. D. 58.

<sup>8</sup> Steph. Comm. iii. 305, note.

general terms the nature of the proceedings to be adopted, and to leave the details to be "prescribed" or regulated by rules or orders to be made for that purpose in pursuance of an authority contained in the act. (See *Order; Rule.*)

**PRESCRIPTION** is where a right, immunity or obligation exists by reason of lapse of time (*infra*, § 3).<sup>1</sup> Thus, where a number of persons in succession have acted and been treated as a corporation from time immemorial without being able to show any express creation, they constitute a corporation by prescription.<sup>2</sup> § 2. More commonly, however, prescription is applied to incorporeal hereditaments and rights or obligations connected with the user of land, to signify that they have been enjoyed as of right,<sup>3</sup> and without interruption for a certain period. Thus, prescription is one of the principal modes by which easements, profits à prendre, franchises and other incorporeal hereditaments are created or evidenced. So, also, a privilege or exemption may be prescriptive, *e.g.*, a *modus decimandi*, a *de non decimando*, and an exemption from toll or stallage\* (*q. v.*). § 3. Prescription differs from custom in being personal: that is, when a person claims a right by prescription, he must allege that it has been enjoyed by him and his ancestors or predecessors in title.<sup>5</sup> (See *Custom.*) Prescription differs from limitation in being applicable only to incorporeal hereditaments and similar rights,<sup>6</sup> and not to land or other corporeal hereditaments.<sup>7</sup>

I. With reference to the length of time required, prescription is either at common law or by statute. § 4. At the common law, a title by prescription is where a right has been enjoyed from time immemorial, or time out of mind. By analogy to the old Statutes of Limitation, "time out of mind" was held to mean the first year of Richard I.'s reign;<sup>8</sup> but when this period became inconveniently long, it was held to be sufficient if evidence of the enjoyment of the right was carried back as far as living memory would go. And when the statute 21 Jac. 1, c. 16, limited the time for bringing a possessory action to twenty years, the Courts held by analogy that if a right had been enjoyed for twenty years, it should be presumed to have been enjoyed from time immemorial: the presumption being based, according to some, on the fiction of a lost grant (see *Lost Grant*); according to others, on the analogy between prescription and limitation.<sup>9</sup> According to some of the older writers,

<sup>1</sup> Co. Litt. 113 a.

<sup>2</sup> *Mellor v. Spateman*, 1 Wms. Saund. 339. So persons may be tenants in common of land by prescription; Litt. § 310.

<sup>3</sup> See *Enjoyment*.

<sup>4</sup> Shelford, R. P. Stat. 35; see also *Lawrence v. Jenkins*, L. R., 8 Q. B. 274.

<sup>5</sup> Co. Litt. 113 b; *Austin v. Amhurst*, 7 Ch. D. 689.

<sup>6</sup> Co. Litt. 114 a.

<sup>7</sup> Shelford, 36. This, however, does not seem to have been always the case, for Britton (1 a, 29 a) uses prescription in the sense both of limitation and particular cus-

tom. Villenage could also exist by prescription (Litt. § 175), and Littleton says that two persons may be tenants in common of land by title of prescription (§ 310); and from Coke's remarks on the point it seems that this is still law; Co. Litt. 195 b; Williams on Commons, 18.

<sup>8</sup> Litt. § 170.

<sup>9</sup> Gale on Easements, 159. See on this point and also on the question whether the presumption was rebuttable or not by proof of the modern origin of the right, *Angus v. Dalton*, 3 Q. B. D. 85.



however, the real common law prescription was when a right had been enjoyed "from time whereof the memory of man runneth not to the contrary, that is as much as to say, when such a matter is pleaded, that no man then alive hath heard any proove of the contrary, nor hath no knowledge to the contrary;"<sup>1</sup> but subsequently the two expressions "time out of mind," and "time whereof the memory of man runneth not to the contrary," became synonymous.<sup>2</sup> (See *Memory*.)

As to the statutory periods of prescription, see *Prescription Act*.

Statutory.

II. § 5. With reference to the manner in which a prescriptive right is claimed, prescription is of three kinds, namely:—(1) where the person claiming the right proves that it has been enjoyed by him and his ancestors during the time required by law; as in the case of an advowson or common in gross; (2) where the members of a corporation and their predecessors have enjoyed the right for the period required by law;<sup>3</sup> and (3) where the person claiming the right proves that it has been enjoyed by him and his predecessors in title; or, as the old writers say, he must claim that the right is *en luy et en ceux que estate il ad*,<sup>4</sup> that is, "in him and in those whose estate he hath:"<sup>5</sup> hence this is called prescribing in a que estate.<sup>6</sup> A prescription in a que estate is simply a right annexed to and going along with certain lands, as where a man claims a right of advowson as appendant to a manor belonging to him.<sup>7</sup> § 6. The rule of common law pleading used to be that a prescription in a que estate could only be claimed by a tenant in fee, and that if a tenant for a less estate wished to claim such a right, he was obliged to allege it as belonging to the tenant in fee. The most important practical result of this rule was that copyholders, being in theory mere tenants at will, were obliged to prescribe in the name of the lord of the manor, in whom the fee is vested; hence they were allowed to claim rights of common against the lord by custom instead of prescription.<sup>8</sup> (See *Custom*, § 1.) The rule of pleading above referred to was abolished by the Prescription Act: and now a tenant for any estate may prescribe in his own name.

Que estate.

See *Possession*; *Interruption*; *Enjoyment*.

ETYMOLOGY.—In Roman law the *præscriptio* was a clause placed at the head of the pleadings (*præ*, before, and *scribere*, to write), in order to raise a kind of preliminary objection or reservation. One of the cases in which a defendant could make use of a *præscriptio* was where he wanted to raise the defence that the plaintiff's claim was barred by a Statute of Limitations:<sup>9</sup> hence the modern use of the word.

**PRESCRIPTION ACT** is the statute 2 & 3 Will. 4, c. 71, passed to limit the period of prescription in certain cases. § 2. In the case of rights of common and other profits à prendre, the period of enjoyment as of right required to establish the claim is thirty years, subject to an

<sup>1</sup> Litt. § 170.

<sup>2</sup> See Co. Litt. 114 b.

<sup>3</sup> Co. Litt. 113 b; *Mellor v. Spateman*, Wms. Saund. i. 339.

<sup>4</sup> Litt. § 183.

<sup>5</sup> Co. Litt. 121 a.

<sup>6</sup> As to the manner in which a prescription is pleaded, see 2 & 3 Will. 4, c. 71, s. 5; *Shelford*, R. P. Stat. 21.

<sup>7</sup> Bl. Comm. ii. 266.

<sup>8</sup> Williams on Commons, 16.

<sup>9</sup> Ortolan, Inst. iii. 532.

extension in case the person against whom it is claimed was under disability during part of that period; but in any case enjoyment for sixty years establishes an absolute and indefeasible right. § 3. In the case of rights of way, watercourses and other affirmative easements, the terms are respectively twenty and forty years; in the case of lights, enjoyment for twenty years gives an absolute and indefeasible right. As to what is "enjoyment as of right," see *Enjoyment*; and as to the effect of interruption, see that title. The act does not apply to any negative easements except that of lights.<sup>1</sup>

Bill of  
exchange.

**PRESENT—PRESENTATION.**—§ 1. Primarily, to present is to tender or offer. Thus, to present a bill of exchange for acceptance or payment is to exhibit it to the drawee or acceptor (or his authorized agent), with an express or implied demand for acceptance or payment.<sup>2</sup> (See *Bill of Exchange*, § 5; *Honour*.)

Presentation  
to benefice.

§ 2. In ecclesiastical law, presentation is where the patron or owner of an advowson offers a clerk in holy orders to the bishop of the diocese to be instituted as parson or vicar of the living.<sup>3</sup>

See *Advowson*; *Institution*; *Next Presentation*; *Simony*.

Customary  
Court.

**PRESENT—PRESENTMENT.**—§ 1. A presentment is a kind of report by a jury or other body of men. Thus, formerly, at every Customary Court of a manor, all events relating to the alienation of the copyhold lands of the manor were presented by the homage for the information of the lord. But by a modern statute a presentment is made unnecessary for the alienation of copyholds.<sup>4</sup>

Jury.

§ 2. Most commonly, however, presentment signifies one made by a jury acting in a judicial capacity; and, in its general sense, it includes inquiries of office (*q. v.*), and indictments by a grand jury. But in the narrower sense of the word a presentment is the notice taken by a grand jury of any matter or offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the crown: such as the presentment by them of a nuisance, a libel, or the like, upon which the officer of the Court must afterwards frame an indictment.<sup>5</sup> This procedure is practically obsolete.<sup>6</sup>

**PRESENTATION OFFICE** is the office of the Lord Chancellor's official, the Secretary of Presentations, who conducts all correspondence having reference to the twelve canonries and 650 livings in the gift of the Lord Chancellor, and draws and issues the fiats of appointment.<sup>7</sup>

**PRESUMPTION.**—§ 1. In the law of evidence, a presumption is a conclusion or inference as to the truth of some fact in question, drawn from some other fact judicially noticed, or proved or admitted to be true.

<sup>1</sup> See Shelford, R. P. Stat. 1; Gale on Easements, 164 *et seq.*; *Angus v. Dalton*, 3 Q. B. D. 85.

<sup>2</sup> Byles on Bills, 183, 201.

<sup>3</sup> Bl. Comm. i. 388; Phill. Eccl. Law, 348; Co. Litt. 120 a.

<sup>4</sup> Williams on Seisin, 36; 4 & 5 Vict. c. 35. See *Phillips v. Salmon*, 3 C. P. D. 97; Britton, 9 a *et seq.*

<sup>5</sup> Bl. Comm. iv. 301.

<sup>6</sup> Pritchard, Q. S. 172.

<sup>7</sup> Second Rep. Leg. Dep. Comm. 34; Rep. Comm. on Fees, 10.

Presumptions are of three kinds. § 2. Irrebuttable or conclusive pre- Irrebuttable  
sumptions (*præsumptiones juris et de jure*) are absolute inferences or conclusive.  
established by law: they are called irrebuttable because evidence is not  
admissible to contradict them. Thus an infant under the age of seven years  
is presumed to be incapable of committing a felony, and the presumption  
cannot be rebutted by the clearest evidence of a felonious intention.<sup>1</sup>  
Irrebuttable presumptions are more properly called rules of law or fictions  
of law, according as the fact presumed is probably true, or is known  
to be false. (See *Fiction*.)

§ 3. Inconclusive or rebuttable presumptions of law (*præsumptiones Rebuttable*  
*juris tantum*) are inferences which the law requires to be drawn from  
given facts, and which are conclusive until disproved by evidence to the  
contrary; thus an infant between seven and fourteen is presumed to be  
incapable of committing a felony, but evidence may be given to prove a  
felonious intention.<sup>2</sup>

§ 4. Presumptions of fact (*præsumptiones hominis vel facti*) are Of fact.  
inferences which the tribunal (*e.g.* a jury) is at liberty, but not compelled,  
to draw from the facts before it: if the tribunal thinks that the facts do  
not support the inference suggested, the presumption fails from its own  
weakness. This class is divisible into strong presumptions, or those  
which shift the burden of proof, and slight presumptions, which do not.  
Thus, possession is a strong presumption or *primâ facie* evidence of  
property, while the presumption of guilt arising from the fact of a person  
having a pecuniary interest in the death of a murdered person is too slight  
to put him on his defence.<sup>3</sup> (See *Possession*, § 3.) § 5. Mixed pre- Mixed.  
sumptions, or presumptions of facts recognized by law, or presumptions  
of mixed law and fact, are certain presumptive inferences, which from  
their strength, importance, or frequent occurrence, attract as it were the  
observation of the law. The presumption of a "lost grant" (*q. v.*) falls  
within this class.<sup>4</sup>

As to presumptive evidence, see *Evidence*, § 4.

**PREVIOUS CONVICTION.**—Under stats. 7 & 8 Geo. 4, c. 28,  
s. 11; 24 & 25 Vict. c. 96, s. 7, and 27 & 28 Vict. c. 47, s. 2, persons  
convicted of certain offences, after a previous conviction for felony, are  
liable to severer sentences than they would otherwise be. And where a  
person is convicted of felony or of certain misdemeanors, and a previous  
conviction for a like offence is proved against him, he may in addition  
to the ordinary punishment for the offence, be subjected to police super-  
vision (*q. v.*).<sup>5</sup>

**PRIMAGE** is a small payment made by the owner or consignee of  
goods to the master of the vessel in which they are shipped for his care  
and trouble, and varies in amount according to the particular trade in

<sup>1</sup> Best on Evidence, 418; Co. Litt. 373a.

<sup>2</sup> Best, 425.

<sup>3</sup> *Ibid.* 431. For other divisions, see  
*ibid.* 428; Co. Litt. 6 b.

<sup>4</sup> Best, 436.

<sup>5</sup> Stat. 34 & 35 Vict. c. 112; Steph.  
Crim. Dig. § 19.

which the ship is engaged. The payment of this sum is generally stipulated for in the bill of lading (*q. v.*).<sup>1</sup> (See *Average*, note (6).)

**PRIMARY.** See *Conveyance*, § 4; *Evidence*, § 8.

**PRIMATE** is an archbishop. The Archbishop of Canterbury is styled primate of all England: the Archbishop of York is primate of England simply.<sup>2</sup> Primacy is the office or authority of a primate.

**PRIMER SEISIN** was a payment due by a tenant of land held of the crown in capite ut de coronâ if he succeeded to it by descent when of full age. The payment consisted of one year's profits of the land if it was in possession, and half a year's profits if it was in reversion.<sup>3</sup> Primer seisin was abolished by stat. 12 Car. 2, c. 24. (See *In Capite*; *Livery*; *Ousterlemain*.) (*Primer* = first, *seisin* = possession.)

**PRIMOGENITURE** (from *primo-genitus*, first-born) is the rule of inheritance according to which the eldest of two or more males in the same degree succeeds to the ancestor's land to the exclusion of the others. It was a matter of far greater consequence in ancient times, before alienation by will was permitted, than it is at present, and from it has arisen the modern English custom of settling the family estates on the eldest son.<sup>4</sup> (See *Descent*, § 5; *Estate Tail*, § 10; *Settlement*.)

Principal and agent.

**PRINCIPAL.**—§ 1. A person who authorizes another to act on his behalf is called the principal, and the person so authorized is called the agent. The law of principal and agent deals both with the rights and duties of the principal and agent inter se, and with those of each of them toward third persons.<sup>5</sup> (See *Agent*; *Authority*; *Power of Attorney*.)

Undisclosed.

§ 2. When an authorized agent does an act in his own name and professedly on his own behalf, though really on behalf of his principal, the latter is said to be undisclosed: the general rule is that an agent contracting for an undisclosed principal is himself personally liable to the person contracting with him, and that the latter also has the option of suing the principal as soon as he discovers his existence, unless in the meantime the principal has bonâ fide paid his agent, in which case he is discharged from liability.<sup>6</sup>

Principal and surety.

§ 3. A person who owes a debt for which another person is liable in case of his default in paying it, is called the principal or principal debtor, the other being his surety (*q. v.*).<sup>7</sup> (See *Guarantie*; *Indemnity*.)

Principal and accessory.

§ 4. In criminal law, whoever actually commits, or takes part in the actual commission of a crime, is a principal in the first degree; whoever aids or abets the actual commission of a crime is a principal in the

<sup>1</sup> Maude & Pollock, *Merch. Shipp.* 88; *Smith's Merc. Law*, 319.

<sup>2</sup> Phillimore, *Eccl. Law*, 36, 1203.

<sup>3</sup> *Co. Litt.* 77 a; *Staunf. Prer.* 11 a.

<sup>4</sup> *Wms. R. P.* 99, 49.

<sup>5</sup> As to the law of principal and agent generally, see *Smith's Merc. Law*, 109 *et seq.*; *Chitty on Contracts*, 189 *et seq.*

<sup>6</sup> *Smith, Merc. Law*, 163; *Chitty*, 205; *Irvine v. Watson*, 5 Q. B. D. 102, which was the case of an agent contracting on behalf of a disclosed but unnamed principal. Such a principal cannot discharge himself by merely paying his agent.

<sup>7</sup> *Chitty on Contracts*, 470.

second degree; both being opposed to accessories (*q. v.*). Thus, if A., B., C. and D. go out with a common design to rob: A. commits the robbery, B. stands by ready to help, and C. is stationed some way off to keep watch; here A. is a principal in the first degree, and B. and C. are principals in the second degree.<sup>1</sup> The distinction is not of itself of much importance, as all the principals to a crime are, as a rule, liable to the same punishment.<sup>2</sup>

**PRIOR PETENS** ("the person first applying"). . . . . } —In pro-  
**PRIORI PETENTI** ("to the person first applying").. } bate prac-  
 tice, where there are several persons equally entitled to a grant of  
 administration (*e. g.*, next-of-kin of the same degree), the rule of the  
 Court is to make the grant *priori petenti*, to the first applicant.<sup>3</sup>

**PRIORITY.**—§ 1. When two persons have similar rights in respect of the same subject-matter, but one is entitled to exercise his right to the exclusion of the other, he is said to have priority. § 2. The question is chiefly of importance with reference to securities on property; thus, if A. mortgages his land first to B. by a deposit of title-deeds, then to C. by a formal deed of mortgage, and then to D. by an agreement of charge, the question arises who is entitled to realize his security in priority to the others. The general rule is that he who has the first mortgage and has the legal estate has priority over all other incumbrancers, and that where there is a prior equitable mortgage, a subsequent incumbrancer who obtains the legal estate without notice of the equitable mortgage, is entitled to priority over it. In the case supposed, therefore, C. would have priority over B. unless he had notice of B.'s charge, or was guilty of gross negligence, *e. g.*, in omitting to inquire as to the deeds.<sup>4</sup> (See also *Consolidation of Securities; Tacking.*) Priority is of various kinds according as it arises by the doctrines of tacking (*q. v.*), of consolidation (*q. v.*), or of salvage (*q. v.*),—by simple priority in point of time or date,—or by a statutory provision (statutory priority), as under the various registration acts, which usually make instruments take effect in the order of date in which they are registered. § 3. Important questions as to priority also arise in administering estates and assets, where the contending claims of creditors, legatees, &c. have to be considered. (See *Administration*, § 2; *Legacy*.)

**PRISAGE** was an ancient hereditary revenue of the crown, consisting in the right to take a certain quantity from cargoes of wine imported into England. In Edward I.'s reign it was converted into a pecuniary duty called butlerage.<sup>5</sup> The present duties on wines are regulated by the Customs Acts. (See *Civil List; Consolidated Fund; Customs*.)

<sup>1</sup> Stephen, *Crim. Dig.* 22.

<sup>2</sup> Criminal Law Acts of 1861; Russell on Crimes, i. 81; Stephen, 27.

<sup>3</sup> Browne's Probate Pr. 174; Coote's Probate Pr. 173, 180.

<sup>4</sup> *Hewitt v. Loosemore*, 9 Hare, 449; *Hopgood v. Ernest*, 3 D. G. J. & S. 116; Fisher on Mortgage, 593, 869.

<sup>5</sup> Steph. Comm. ii. 561.

**PRISON-BREACH**, or prison-breaking, is where a person, being lawfully detained on a charge of or under sentence for an offence, breaks out of the place where he is detained, that is, escapes with force. The degree of the offence and its punishment varies with that of the offence for which he was detained.<sup>1</sup>

**PRISONS** are places in which persons are kept either for safe custody until they have been tried for an offence of which they stand charged, or for punishment after being tried and convicted. The general administration of prisons is vested in the Home Secretary, assisted by Prison Commissioners appointed by the crown, and each prison is further under the more immediate jurisdiction of a visiting committee of the justices of the peace or magistrates in the district.<sup>2</sup> (See *Imprisonment*; *Habeas Corpus*; *Penal Servitude*.)

**PRIVATE.** See *Act of Parliament*, § 3; *Bill*, § 2; *Chapel*, § 4; *Committee*, §§ 2 *et seq.*; *Law*, § 6.

**PRIVATEERS** are ships commissioned by letters of marque (*q. v.*) to exercise general reprisals (see *Reprisals*). Privateering was practically abolished as between European nations by the Declaration of Paris in 1856.<sup>3</sup>

**PRIVILEGE.**—§ 1. A privilege is an exceptional or extraordinary right, immunity or exemption. It may exist in respect of a person, or in respect of a thing.

Personal.

I. § 2. With reference to the persons who enjoy them, personal privileges are of various kinds: the principal are those belonging to the royal family, the Houses of Parliament,<sup>4</sup> peers, ambassadors, barristers, solicitors and clergymen. § 3. With reference to the nature of the right or exemption, the principal privileges are—the freedom from arrest enjoyed by ambassadors (*q. v.*) and peers;<sup>5</sup> the exemption from serving on juries enjoyed by peers, members of parliament, ministers, barristers, solicitors, medical practitioners, &c.; the privileges exempting solicitors and barristers from giving discovery or evidence of matters communicated to them by their clients in professional confidence,<sup>6</sup> &c. (see *Confidential Communications*). § 4. With reference to their duration, privileges are either permanent or temporary: thus, a member of parliament is privileged from arrest on civil process during the sitting of the house, and for forty days before and after a prorogation: a barrister has a similar privilege while he is on circuit.<sup>7</sup>

Real.

II. Privileges in respect of things. § 5. Some chattels are privileged from distress (*q. v.*), and some from being taken in execution (*q. v.*, and

<sup>1</sup> Stephen's Crim. Dig. 91; Russell on Crimes, 577.

<sup>2</sup> Steph. Comm. iii. 121; Prisons Act, 1865; Prisons Act, 1877.

<sup>3</sup> Manning's Law of Nations, 156.

<sup>4</sup> May, Parl. Pr. 64.

<sup>5</sup> Smith's Action, 105.

<sup>6</sup> Daniell's Ch. Pr. 488.

<sup>7</sup> Smith's Action, 107; Steph. Comm. ii. 341.

see *Goods*). § 6. A document is privileged from production when its production cannot be compelled under the ordinary order for production in an action (see *Production*): the principal instances of privileged documents are documents of title and confidential communications (*q. v.*).<sup>1</sup>

§ 7. A statement is said to be privileged when it is made under such circumstances that it does not render the person making it liable to proceedings for slander or libel, although it would have that effect in the absence of those circumstances. The principal instances of privileged statements are those made between a solicitor or counsel and the client; by a witness in the course of his examination,<sup>2</sup> or a counsel in his speech; those made where it is the duty of the person making it to do so, *e. g.*, where a master is giving the character of a servant, or where the matter is of public interest; this last is sometimes called privilege by reason of the occasion: thus, statements made in the course of legal proceedings and parliamentary debates are privileged, as are also fair reports or comments on such proceedings,<sup>3</sup> and fair criticisms on literary publications and works of art.<sup>4</sup> The privilege is said to be absolute where the intention of the speaker or writer is immaterial (as in the case of judges, members of parliament, &c.), or qualified, when it does not excuse malice in fact, as in the case of statements made by persons in the discharge of some public or private duty, or in the conduct of his own affairs.<sup>5</sup> (See *Malice*, § 2.)

Privileged statement.

Absolute.

Qualified.

**PRIVITY—PRIVY.**—I. § 1. Originally "privy" signified a friend or acquaintance, as opposed to a stranger;<sup>6</sup> and hence privy means knowledge: thus, the rule is that "when any deed is altered in a point material by the plaintiff himself, or by any stranger without the privy of the obligee. . . . the deed thereby becomes void."<sup>7</sup> (See *Alteration*.)

II. § 2. In its secondary sense, privy denotes a peculiar relation in which a person stands, either to a transaction or to some other person. The persons standing in such a relation are called privies. Thus, in the law of fines, the heirs and successors of the parties to a fine were said to be privies to it, and were bound by it as if they had been parties, as opposed to strangers, that is, persons who were neither parties nor privies.<sup>8</sup> (See *Fine*, § 9.) The principal kinds of privy of practical interest are as follows:—

§ 3. Privy of contract is the relation which exists between the immediate parties to a contract, as where A. agrees with B. to pay him

<sup>1</sup> *Bustros v. White*, 1 Q. B. D. 423; *Webb v. East*, 5 Ex. D. 108.

<sup>2</sup> *Seaman v. Netherclift*, 1 C. P. D. 540.

<sup>3</sup> *Purcell v. Towler*, 2 C. P. D. 215; *Milissich v. Lloyd's*, Week. N. (1877), 36; *Webb v. East*, 5 Ex. D. 108.

<sup>4</sup> *Underhill on Torts*, 97.

<sup>5</sup> *Shortt on Copyright and Libel*, 427 *et seq.*; *Clark v. Molyneux*, 3 Q. B. D. 237; *Stevens v. Sampson*, 5 Exch. D. 53; *Capital and Counties Bank v. Henty*, 5 C. P.

D. 514.

<sup>6</sup> Thus in the Grand Coutumier the form of oath for bailiffs is, "qu'ils feront et rendront droit à toutes personnes grans et petits, *privés ou estrangiers*, sans acception de personne" (p. 160).

<sup>7</sup> *Pigot's Case*, 11 Co. 27. In the special verdict in this case it is said that the alteration was made "*sine notitia, Anglice* the privy," of the plaintiff.

<sup>8</sup> *Watkins' Conv.* 316; 2 Inst. 516; *Shepp. Touch.* 21. See Co. Litt. 219 b.

100*l.* Privy of contract is necessary to enable one person to sue another on a contract. Thus, if A. agrees with B. that he will pay C. 100*l.*, C. cannot bring an action against A. on the contract for want of privy between them.<sup>1</sup>

**Estate.** § 4. Privy of estate is that which exists between lessor and lessee, tenant for life and remainderman or reversioner, &c., and their respective assignees, and between joint-tenants and co-parceners. Privy of estate is required for a release by enlargement. Thus, if A. grants land to B. for life, and B. grants a lease to C., and then A. executes a release to C., this is void as a release, because there is no privy between A. and C.<sup>2</sup> Its more important consequence is to make the assignee of a lease liable to the rent and covenants contained in it, although there is no privy of contract between him and the lessor.<sup>3</sup>

**Blood.** § 5. Privy of blood exists between an heir and his ancestor (privy in blood inheritable), and between coparceners. This privy was formerly of importance in the law of descent cast (*q. v.*).<sup>4</sup>

**Representation and succession.** § 6. Privy in representation exists between a testator and his executors, and privy in succession between a predecessor and a successor, in the case of a corporation sole. Either kind is also called privy in right.<sup>5</sup>

**Tenure.** § 7. Privy in tenure is that which exists between a lord and a tenant who holds of him by a service.<sup>6</sup> (See *Tenure*.)

**Person.** § 8. In the old books, privy of person is said to exist (i) between trustee and cestui que trust;<sup>7</sup> (ii) between husband and wife;<sup>8</sup> (iii) between coparceners.<sup>9</sup>

**Possession.** § 9. Privy of possession exists between joint-tenants, tenants in common and coparceners. The last, therefore, have a three-fold privy, and the first a two-fold privy<sup>10</sup> (*supra*, §§ 4, 8).

**In deed, in law.** § 10. Privy in deed is a privy created by the act or consent of the party, as opposed to privy in law, which is one created by the law.<sup>11</sup>

**PRIVY COUNCIL** is the principal council of the crown, consisting of such persons as are nominated by the crown to the office. Nominally the council is supposed to advise the crown on affairs of state, but practically that duty is fulfilled by a select body called the cabinet, who are members of either House of Parliament and hold the principal offices of state. Those members of the Privy Council (other than the cabinet) who perform active duties are subdivided into committees, of which the principal are the Board of Trade (*q. v.*), the Education Committee and the Judicial Committee (*q. v.*).<sup>12</sup> In the case of a large number of Privy

<sup>1</sup> *Moore v. Bushell*, 27 L. J., Ex. 3.

<sup>2</sup> Co. Litt. 272 b. But (semble) such a release might operate as a grant by A. to C. if the intention were clear. See *Grant*, § 2.

<sup>3</sup> Williams, R. P. 398; *Webb v. Russell*, 3 T. R. 394.

<sup>4</sup> Co. Litt. 271 a, 242 a; 2 Inst. 510; 8 Co. 42 b.

<sup>5</sup> *Termes de la Ley*; Perkins, Prof. Book, § 833 *et seq.*; Co. Litt. 271 a; 214 b.

<sup>6</sup> *Termes de la Ley*; Co. Litt. 271 a.

<sup>7</sup> *Fearne*, C. R. 291, n. (h); Watkins, Conv. 214. See also the case discussed by Littleton, §§ 462 *et seq.*

<sup>8</sup> Co. Litt. 354 b.

<sup>9</sup> *Ibid.* 169 a.

<sup>10</sup> *Ibid.*

<sup>11</sup> Co. Litt. 90 b, 172 a, 209 a; Perkins, §§ 831, 832. For other points connected with privy, see *Termes de la Ley*; Co. Litt. 46 b; 3 Co. 1, 23; 8 Co. 42 b; Staunf. 25 a.

<sup>12</sup> Hom. Cox, Inst. 258; Steph. Comm. ii. 457.



Councillors the office is purely nominal: it confers the title of "Right Honourable."

**PRIVY SEAL** is a seal employed by the crown, chiefly as an authority to the Lord Chancellor to affix the Great Seal to certain documents, *e. g.*, letters-patent. The Privy Seal is affixed either to the bill or draft of the letters-patent (see *Bill*, § 5), or to a warrant which sets them forth and directs the Lord Chancellor to have them passed under the Great Seal (*q. v.*).<sup>1</sup>

**PRIZE—PRIZE COURTS.**—"Prize" is property captured from an enemy at sea. (See *Capture*, § 4.) Prize Courts are Courts specially constituted for the purpose of deciding questions of maritime capture in time of war according to international law. In this country the jurisdiction in such questions formerly belonged to the Court of Admiralty sitting as a Prize Court,<sup>2</sup> and is now vested in the High Court of Justice.<sup>3</sup> (See *In Rem*, § 3.)

**PRO CONFESSO.**—Under the old practice in Chancery, when it appeared that a defendant in a suit had absconded to avoid being served with the bill, or absconded after being served and without putting in an answer, the Court might order the bill to be taken *pro confesso* (as if the defendant had confessed or admitted the truth of it), either immediately or at some future time. The cause was accordingly set down for hearing and such decree made as the Court thought just.<sup>4</sup>

**PRO INTERESSE SUO.**—Where sequestrators acting under a writ of sequestration have seized property apparently belonging to the party in default, any person claiming that it belongs to him must make an application to the Court for an inquiry as to the nature of his interest therein. This is called an inquiry *pro interesse suo*. In the Chancery Division the inquiry is conducted in the usual way before the Chief Clerk, and he makes his certificate of the result. If it is in favour of the claimant, the Court directs the sequestrators to deliver up the property to him.<sup>5</sup> The same rule applies where property is taken possession of by a receiver.<sup>6</sup> (See *Certificate*, § 4; *Inquiry*, § 2.)

**PRO RATA** = in proportion: see *Freight*, § 1.

**PROBATE** is a certificate granted by the Probate Division of the High Court of Justice to the effect that the will of a certain person has been proved and registered in the Court and that administration of his effects has been granted to the executor proving the will, he having first sworn faithfully to administer them and to exhibit a true inventory and render a just account when called on. This certificate is on a piece of parchment annexed to a copy of the will and codicils or other tes-

<sup>1</sup> Steph. Comm. i. 619.

<sup>2</sup> Manning's Law of Nations, 472; Naval Prize Act, 1864. As to the practice in prize cases, see *ibid.* and Phillimore's International Law, vol. iii.

<sup>3</sup> Judicature Act, 1873, s. 16.

<sup>4</sup> Stat. 11 Geo. 4 & 1 Will. 4, c. 36, s. 3; Daniell, Ch. Pr. 381, 449.

<sup>5</sup> Daniell, Ch. Pr. 1057.

<sup>6</sup> *Ibid.* 1744.

Probate copy. tamentary papers, if any, engrossed on parchment.<sup>1</sup> The whole is commonly referred to as the probate, but inaccurately, the certificate being the probate, and the copy of the will being the "probate copy."

Probate act. § 2. When a grant of probate has been made, the Clerk of the Seat (*q. v.*) makes an entry or memorandum of the fact; this (or a copy of it) is called the probate act.<sup>2</sup>

Probate duty. § 3. A probate granted in respect of an estate above the value of 100*l.* is liable to a stamp duty varying with the value of the estate.<sup>3</sup> As to these duties, see *Addenda*.

Probate may be granted either in solemn form or in common form.

In solemn form. § 4. Probate in solemn form is only employed when there is or is likely to be a dispute as to the validity of the will, and in such a case the person who wishes its validity to be established commences an action against the person who disputes it. The action proceeds as to pleadings, trial, &c. in the same way as an ordinary action;<sup>4</sup> if the plaintiff makes out his case, the Court pronounces for the validity of the will and the executor may then take probate of it as if it had not been disputed.<sup>5</sup> As a general rule probate in solemn form is conclusive on all who are parties to the proceedings or cognizant of them.<sup>6</sup> (See *Establishment of Wills*.)

In common form. § 5. Probate in common form is that "form which is slight and summary for ordinary and undisputed cases."<sup>7</sup> It is granted in ordinary cases as a matter of course on the executor swearing and filing (1) an affidavit called the oath of executor or oath of office, by which he swears that the will annexed to the affidavit is "the true and original last will and testament" of the testator,<sup>8</sup> and that he will faithfully administer the estate; and (2) an affidavit for Inland Revenue; before the new Probate Duty Act came into operation, this affidavit was to the effect that the gross value of the testator's property did not exceed a certain sum, the stamp on the probate being regulated by this.<sup>9</sup> As to the practice introduced by the new act, see *Addenda*.

Probate with power reserved. Double probate. § 6. Where several persons are named as executors it is not necessary for all to prove together; one may prove, power being reserved to the others to prove subsequently. If they do, another probate, called a double probate, must issue.<sup>10</sup>

As to limited grants of probate, see *Grant*, §§ 5 *et seq.*

Probate business. § 7. "Probate business" is used as a general term to include all business relating to the granting and revoking of probates and letters of administration both in contested and uncontested cases (see *Action*, § 10). The non-contentious business is transacted in the registries of the

<sup>1</sup> Browne's Probate Pr. 142; Williams on Executors, 277 *et seq.*

<sup>2</sup> Coote's Probate Pr. (6th edit.), 219.

<sup>3</sup> Stats. 44 Vict. c. 12; 43 Vict. c. 14, repealing 27 & 28 Vict. c. 56; Williams, P. P. 389.

<sup>4</sup> See the forms Jud. Act, 1875, schedule, App. A, Part II. sect. v. App. C. form 23.

<sup>5</sup> Coote's Probate Pr. 250, 308.

<sup>6</sup> Browne's Probate Practice, 101.

<sup>7</sup> Sir W. Scott in *Duke of Portland v. Bingham*, 1 Hag. Con. R. 158, cited Browne, 101.

<sup>8</sup> As to granting probate of a lost will of which no copy or draft is in existence, see *Sugden v. Lord St. Leonards*, 1 P. D. 154. As to fac-simile probates, see Browne, 126.

<sup>9</sup> Browne, 143; Coote, 31 *et seq.*

<sup>10</sup> Browne, 148.

Probate, Divorce and Admiralty Division of the High Court (*q. v.*): the contentious business is, as a rule, transacted in the same Division,<sup>1</sup> or, where the estate is below a certain value, in the County Court of the district where the deceased had his fixed place of abode.<sup>2</sup>

ETYMOLOGY.]—Latin, *probare*, to prove.

**PROBATE, DIVORCE AND ADMIRALTY DIVISION** is that Division of the High Court of Justice which exercises jurisdiction in matters formerly within the exclusive cognizance of the Court of Probate, the Court for Divorce and Matrimonial Causes, and the High Court of Admiralty<sup>3</sup> (see those titles). It consists of two judges, one of whom is called the President,<sup>4</sup> and of a number of registrars (*q. v.*).

§ 2. The jurisdiction in probate matters is of two kinds, contentious Probate. and non-contentious. As to the contentious business, see *Action*, § 10. The non-contentious business comprises all “common form business,” that is, the business of obtaining probate and administration (*q. v.*) where there is no contention as to the right thereto, including the passing of probates and administrations in contentious cases when the contest is terminated, and also the business of lodging caveats.<sup>5</sup> (See *Caveat*, § 2 ; *Warning*.)

§ 3. The jurisdiction in divorce and matrimonial matters is exercised Divorce. in pronouncing decrees of nullity or dissolution of marriage, judicial separation, restitution of conjugal rights and jactitation of marriage (*q. v.*), and in dealing with subsidiary matters arising in suits for the above purposes<sup>6</sup> (see *Alimony*; *Settlement*). In these matters the former practice of the Divorce Court is retained, so that the President still hears most matters in the first instance, and an appeal from him has in many cases still to be brought to the “full Court” and not to the Court of Appeal.<sup>7</sup>

§ 4. The jurisdiction in Admiralty matters is exercised in questions as Admiralty. to the possession, mortgage, damage, salvage and towage of ships and claims in respect of necessities and wages (see those titles, and *Action*, §§ 11—18).

**PROCEDENDO** is a prerogative writ which issues (1) when the judge of an inferior Court delays the parties to a proceeding before him, by not giving judgment for one side or the other, when he ought to do so; or (2) when a cause has been removed from an inferior Court to a superior Court improperly or on insufficient grounds, and the superior Court thinks fit to remit or remove it back to the inferior Court. In the former class of cases the writ of mandamus (*q. v.*) is more frequently used.<sup>8</sup> (See *Writ*.)

**PROCEDURE.** See *Practice*.

<sup>1</sup> See *Pinner v. Hunt*, Week. N. (1877), 150.

<sup>2</sup> Pollock's County Court Pr. 331; Browne's Probate Pr. 321.

<sup>3</sup> Judicature Act, 1873, s. 34.

<sup>4</sup> *Ibid.* s. 31. The existing judges are the judge of the old Probate and Divorce Courts, who is president of the division,

and the judge of the old Admiralty Court.

<sup>5</sup> Court of Probate Act, 1857, s. 2.

<sup>6</sup> Browne's Divorce Practice, 1.

<sup>7</sup> *Ibid.* 316; *Westhead v. Westhead*,

2 P. D. 1; *Wallis v. Wallis*, 2 P. D. 141.

<sup>8</sup> Steph. Comm. iii. 629; Fisher's Digest, 4670.

**PROCESS** is a form of proceeding taken in a Court of justice for the purpose of giving compulsory effect to its jurisdiction.<sup>1</sup> The process of the Supreme Court of Judicature consists of writs (*q. v.*), and hence the terms "process" and "writ" are used synonymously, as when we speak of service of process.

Civil actions. § 2. In civil actions process is of two kinds: (i) Against a defendant, and this again is of two kinds, viz., (a) process to compel him to appear, now consisting of a writ of summons (*q. v.*); and (b) process of execution, by which the judgment, decree, &c. is executed or carried into effect<sup>2</sup> (see *Execution*, § 3). (ii) Process against persons not parties to the action, *e. g.*, process to summon jurors, witnesses, &c.<sup>3</sup>

Foreign attachment. § 3. Process in a proceeding in foreign attachment (*q. v.*) denotes the attachment paper served upon the garnishee.<sup>4</sup>

Privy Council. § 4. In the practice of the Privy Council in ecclesiastical appeals, "process" means an official copy of the whole proceedings and proofs of the Court below, which is transmitted to the registry of the Court of Appeal by the registrar of the Court below in obedience to an order or requisition requiring him so to do, called a monition for process, issued by the Court of Appeal.<sup>5</sup>

Criminal proceedings. § 5. In criminal proceedings, process means those writs which are issued to bring in a person to answer an indictment which has been found against him. Summary process consists of the writs of venire facias, distringas and capias ad respondendum (*q. v.*), though a justice's warrant is now more commonly used (see *Warrant*). If summary process is ineffectual, process of outlawry (*q. v.*) may be issued.<sup>6</sup>

Old practice. § 6. Formerly process in common law actions was much more complicated and important than now. It was either original or judicial. The former (which was so called because at one time it commenced with the original writ issued out of Chancery) had for its object to compel the defendant to appear (see *Writ*). Original process against either the person or property of the defendant was called single process; when it was against both it was called mixed. § 7. Judicial process was that which issued out of the common law Court, either when the original writ was returned or without an original being issued at all. When original writs fell into disuse, an action was commenced by process issued out of the common law Court to compel the defendant's appearance, to compel him to give bail, &c., and this was called mesne process; the term also included other kinds of process, *e. g.*, jury process, or writs to compel the attendance of jurors. § 8. Writs used to revive an action or remove it into another Court, or the like, were called "judicial process in the nature of new originals."<sup>7</sup> § 9. Process of execution or final process was much the same as at present, except that imprisonment for debt has been abolished in most cases (see *Arrest*, § 4).

**PROCHEIN AMY.** See *Next Friend*.

**PROCLAMATION.**—§ 1. The power of issuing proclamations is part of the royal prerogative. Such proclamations have a binding force

<sup>1</sup> Smith's Action, 43.

<sup>2</sup> Co. Litt. 289 a.

<sup>3</sup> Finch, Law, 436.

<sup>4</sup> Brandon, For. Att. 78.

<sup>5</sup> Macpherson, Privy C. Pr. 173.

<sup>6</sup> Steph. Comm. iv. 381; Archbold, Crim. Pl. 81 *et seq.*

<sup>7</sup> Finch, Law, 343 *et seq.*

when they are grounded upon and enforce the laws of the realm.<sup>1</sup> (See *Order*, § 4.)

§ 2. A proclamation is valid in law if published in the London Gazette,<sup>2</sup> and a copy of the Gazette is *prima facie* evidence of the proclamation; it may also be proved by a certified or Queen's printer's copy.<sup>3</sup>

As to fines with proclamations, see *Fine*, § 10.

**PROCTORS** in the Ecclesiastical and Admiralty Courts discharge duties similar to those of solicitors and attorneys in other Courts.<sup>4</sup> They are, or used to be, empowered to institute or withdraw proceedings by an instrument called a proxy, signed by the litigant, attested, and deposited in the registry of the Court.<sup>5</sup>

By stat. 33 & 34 Vict. c. 28, s. 20, attorneys and solicitors were empowered to practise in the Ecclesiastical Courts.

By the Judicature Act, 1873, s. 87, proctors of the then existing Admiralty Court are to be called solicitors of the Supreme Court.

**PRODUCTION.**—§ 1. The High Court of Justice has a general power to order a party to an action or other proceeding to produce to the Court any documents in his possession or power relating to the matters in question in the action, and the Court may deal with the documents so produced as it thinks right.<sup>6</sup> It also has power to order a party to produce any documents in his possession for the inspection of any other party, unless they are privileged from production.<sup>7</sup> (See *Affidavit*, § 3; *Discovery*; *Inspection*; *Notice to produce*, § 2; *Privilege*, § 6.)

Production of documents.

§ 2. Where a person is entitled to property in reversion or remainder expectant on the death of another person, and has reason to believe that that person (called the *cestui que vie*) is dead, and that his death is concealed, he may apply to the Chancery Division of the High Court for an order directing the person in possession of the property to produce the *cestui que vie* to persons named by himself, or in case of non-production to them, the *cestui que vie* is ordered to be produced in open Court or to commissioners appointed by the Court, and on failure of production the applicant may take possession of the property as if the *cestui que vie* were actually dead.<sup>8</sup> (See *Cestui que vie*.)

Production of *cestui que vie*.

**PROFERT.**—Formerly the general rule was that where a party to an action relied in his pleading on a deed under seal, to which he was party or privy, the deed had to be "shown forth" or produced to the Court.<sup>9</sup> Hence the party in his pleading used to allege that he brought the deed into Court, although it was not actually done. This was called "profert in curiâ," and entitled the opposite party to "oyer" of the deed<sup>10</sup> (see *Oyer*). Profert and oyer were abolished by the Common Law Procedure Act, 1852, s. 55.

<sup>1</sup> Steph. Comm. ii. 507.

<sup>2</sup> Crown Office Act, 1877, s. 3.

<sup>3</sup> Documentary Evidence Act, 1868.

<sup>4</sup> Phillimore, Eccl. Law, 1219. "Procurator est qui aliena negotia mandatu domini administrat." Dig. iii. 1. "Item et ad litem futuram . . . dari potest:" *ibid.* 3.

<sup>5</sup> Phill. 1220.

<sup>6</sup> Rules of Court, xxxi. 11.

<sup>7</sup> *Ibid.* 18; *Bustros v. White*, 1 Q. B. D. 423.

<sup>8</sup> Stat. 6 Anne, c. 18; Daniell, Ch. Pr. 1909.

<sup>9</sup> Co. Litt. 35 b, 225 a; Shepp. Touch.

<sup>10</sup> Bl. Comm. iii. App.

**PROFESSED—PROFESSION.**—§ 1. Formerly a man was said to be professed or “entered and professed in religion” when he had entered a religious order, taken the habit of religion and vowed three things, “obedience, willfull poverty, and perpetual chastity.”<sup>1</sup> A nun was also said to be professed. Profession operated as a civil death<sup>2</sup> (see *Death*). Since the Reformation, however, religious profession is not recognized by the law.<sup>3</sup>

§ 2. “Professional privilege” is the privilege which exempts barristers and solicitors from disclosing matters confided to them in their professional capacity by clients. (See *Confidential Communications* ; *Privilege*.)

**PROFIT.**—I. § 1. In its primary sense, profit signifies advantage or gain in money or in money’s worth. Thus, in an action in the Chancery Division for infringement of a patent or copyright, the plaintiff generally has his election whether the defendant shall be ordered to pay him the damages caused to him by the infringement, or the profits which the defendant has made by the wrongful use of the patent or copyright<sup>4</sup> (see *Account*, § 6 ; *Inquiry*, § 2 ; *Partnership*).

II. § 2. In the law of real property “profit” is used in a special sense to denote a produce or part of the soil of land. Therefore, “if a man seised of lands in fee by his deed granteth to another the profit of those lands, to have and to hold to him and his heires, and maketh livery *secundum formam chartæ*, the whole land itselfe doth passe : for what is the land but the profits thereof ; for thereby vesture, herbage, trees, mines and all whatsoever parcell of that land doth passe.”<sup>5</sup> So, in the old books, an easement is defined to be a privilege, without profit, which one neighbour hath of another.<sup>6</sup>

§ 3. Profits in this sense are of three classes. (i) Profits lying in render consist of rents, dues and services rendered to a lord by his tenant. They are so called because it is the duty of the tenant to pay or tender them to the lord, as opposed to (ii) profits à prendre, which are rights of taking the produce or part of the soil from the land of another person, and (iii) the casual profits which accrue to a lord from his tenants “by chance and unlooked for,” such as escheats.<sup>7</sup>

§ 4. Profits à prendre consist of rights of common (see *Common*), and rights of sole or several pasture, vesture and herbage<sup>8</sup> (see *Pasture* ; *Vesture*). The custom of tin-bounding (*q. v.*) is also sometimes treated as a profit à prendre.<sup>9</sup> The right of taking water from a well or stream on another’s land is not a profit à prendre, but an easement.<sup>10</sup> A profit à prendre may be claimed by grant or prescription, or, in the case of copyholders, by custom. (See *Prescription* ; *Prescription Act*.)

<sup>1</sup> Co. Litt. 132 a.

<sup>2</sup> *Ibid.* ; Litt. § 200.

<sup>3</sup> Bl. Comm. i. 133.

<sup>4</sup> *Neilson v. Betts*, L. R., 5 H. L. 1.

<sup>5</sup> Co. Litt. 4 b.

<sup>6</sup> *Termes de la Ley*.

<sup>7</sup> Co. Litt. 92 b ; Elton, Commons, 2.  
“Rent” is sometimes opposed to profit,

as when it is said that rent issues out of the profits of the land, and that a man cannot reserve as rent part of the annual profits of the land, such as the vesture or herbage ; Co. Litt. 141 b, 142 a.

<sup>8</sup> *Williams on Commons*, 18.

<sup>9</sup> Hall on Profits à Prendre, 223.

<sup>10</sup> *Ibid.* ; *Race v. Ward*, 4 E. & B. 702.

**PROHIBITION.**—§ 1. The writ of prohibition is a writ issuing out of the High Court to restrain an inferior Court within the limits of its jurisdiction. It is granted in all cases where an inferior Court exceeds its powers, either by acting where it has no jurisdiction, or where, having a primary jurisdiction, it takes upon itself the decision of something not included within its jurisdiction.<sup>1</sup>

§ 2. Prohibitions are of three kinds. (1) An absolute prohibition is Absolute, peremptory, and wholly ties up the inferior jurisdiction, but if the superior Court afterwards comes to the conclusion that the matter relied on is not a sufficient ground for prohibition, a writ of consultation may be awarded, by which the cause is remanded to the inferior Court;<sup>2</sup> this latter writ seems in practice to be only awarded in ecclesiastical cases (see *Consultation*). (2) A temporary prohibition (sometimes called a prohibition quousque) temporary, is operative only until a particular act is done, and is ipso facto discharged on the act being done.<sup>3</sup> (3) A limited or partial prohibition limited. (sometimes called a prohibition quoad) extends only to that part of the proceeding which exceeds the jurisdiction of the inferior Court, allowing it to proceed as to the residue.<sup>4</sup>

§ 3. The writ is applied for by motion:<sup>5</sup> if the defendant appears and Practice. contests the matter, the Court may, where the question involved is doubtful, order the plaintiff to declare in prohibition, that is, deliver a declaration (*q. v.*), to which the defendant pleads or demurs, and so on; the matter is then argued or tried in the same way as an ordinary action, and judgment given for the successful party.<sup>6</sup>

**PROLIXITY** is the allegation of facts at unnecessary length, either in a pleading or affidavit. The party offending may be ordered to pay the costs thereby occasioned, or, in the case of an affidavit, it may be ordered to be taken off the file.

**PROMISE.**—Promises are of two kinds. § 1. A true promise is the expression of an intention to do or forbear from some act, made by one person (the promisor) to another (the promisee). Expressions in the form of promises, but reserving an option as to their performance, and illusory promises (*e. g.*, a promise by me to pay B. such a sum as I think proper), are not true promises.<sup>7</sup>

§ 2. True promises are either express or implied; thus, if I request A. to lend me 50*l.*, and he does so, a promise by me to repay it is implied. (See *Express*.)

§ 3. To have legal effect a promise must either be under seal, when it Promise under seal. forms a covenant (*q. v.*), or must form part of a contract, that is, be made

<sup>1</sup> Pollock's County Court Practice, 249; *Mayor of London v. Cox*, L. R., 2 H. L. at p. 254.

<sup>2</sup> Bl. Comm. iii. 114.

<sup>3</sup> Pollock, 251.

<sup>4</sup> *Ibid.* 252; Phillimore, Eccl. Law, 1438; Rogers, Eccl. Law, 813.

<sup>5</sup> Pollock, 256.

<sup>6</sup> Steph. Comm. iii. 636; *Worthington v. Jeffries*, L. R., 10 C. P. 379; *South Eastern Rail. Co. v. Railway Comm.*, 5 Q. B. D. 217.

<sup>7</sup> Leake on Contracts, 9; *Taylor v. Brewer*, 1 M. & S. 290; Pollock on Contract, 5, 26.

Contractual  
promise.  
Mutual prom-  
ises.

Independent,

dependent,

concurrent.

Fictitious  
promises.

in consideration of something done or to be done in return by the promisee (see *Consideration*; *Contract*). When that consideration consists of another promise each party is both a promisor and a promisee, and the contract consists of mutual promises; thus, in an ordinary contract of sale, the vendor's promise to deliver the goods is in consideration of the purchaser's promise to pay for them, and vice versa. § 4. Mutual promises are said to be *independent* where either party may sue the other for the breach of his promise and where it is no excuse for the party sued to allege a breach by the plaintiff of his own promise (see *Apportionment*, § 3): *dependent*, when the performance of one promise depends on the performance of the other, and therefore, until the prior condition is performed, the other party is not liable on his promise; as where A. promised B. to keep some buildings in repair on condition of their being first put into repair by B.: *concurrent*, where both promises are mutually dependent; thus, where A. agrees to sell property to B., neither can sue the other without showing that he has performed or is ready to perform his part of the contract.<sup>1</sup>

§ 5. Fictitious promises, sometimes called implied promises, or promises implied in law, occur in the case of those contracts which were invented to enable persons in certain cases to take advantage of the old rules of pleading peculiar to contracts, and which are not now of practical importance. (See *Contract*, §§ 5 *et seq.*)

**PROMISSORY NOTE**, or note of hand, is an absolute promise in writing, signed but not sealed, to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named or designated, or to his order, or to the bearer. The person who signs the note is called the maker. Promissory notes are negotiable or transferable in the same manner as bills of exchange (*q. v.*).<sup>2</sup>

The legal effect of making a note is an absolute contract by the maker to pay the note. As to the effect of an indorsement, see *Bill of Exchange*, § 4. The rules are the same in both cases, the maker of a note being in the same position as the acceptor of a bill.<sup>3</sup>

Of company.

**PROMOTERS.**—§ 1. In the law of joint stock companies, promoters are persons who join together for the purpose of procuring the formation of a company. Who are promoters in a given case depends on the circumstances. The commonest instance of a promoter occurs in the case of a person who causes a company to be formed in order that it may purchase some property, patent, &c., from him.<sup>4</sup> Promoters stand in a fiduciary position towards the company which they form.<sup>5</sup> (See *Fiduciary*.)

Promoters of  
undertaking.

§ 2. In the Lands Clauses Consolidation Acts "promoters" means the company, commissioners or private persons who are empowered to execute

<sup>1</sup> Leake, 344 *et seq.*, citing *Jones v. Barkley*, 2 Dougl. 684.

<sup>2</sup> Byles on Bills, 5; stat. 3 & 4 Anne, c. 9.

<sup>3</sup> Byles, 3.

<sup>4</sup> As to the question of promoter or no promoter, see *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73; 3 App. Ca.

148; *Twyecross v. Grant*, 2 C. P. D. at pp. 503, 541; *Emma Silver Mining Co. v. Lewis*, 4 C. P. D. at p. 407; *Bagnall v. Carlton*, 6 Ch. D. 371. As to the liabilities of promoters, see *Lindley on Partnership*, 33; *Thring on Companies*, 29, 46.

<sup>5</sup> *Ibid.*



the works or undertaking authorized by the special act.<sup>1</sup> (See *Act of Parliament*, § 5; *Statute*.)

§ 3. In the practice of the Privy Council in ecclesiastical appeals, a promoter is a person who brings an appeal from the judgment of an inferior Court.<sup>2</sup> (See *Office of the Judge*.)

Promoter of ecclesiastical cause.

**PROMOVENT** is a plaintiff in a suit of duplex querela (*q. v.*).<sup>3</sup>

**PRICKING FOR SHERIFFS.**—When the yearly list of persons nominated for the office of sheriff is submitted to the Queen, she takes a pin, and to insure impartiality, as it is said, she lets the point of it fall upon one of the three names nominated for each county, &c., and the person upon whose name it chances to fall is sheriff for the ensuing year. This is called pricking for sheriffs.<sup>4</sup>

**PROOF.**—I. § 1. In the law of evidence, an allegation of fact is said to be proved when the tribunal is convinced of its truth, and the evidence by which that result is produced is called the proof.<sup>5</sup> § 2. Where a person who makes an allegation is bound to prove it, the burden or onus of proof (*onus probandi*) is said to rest on him. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. (See *Ei incumbit Probatio*, &c.)

Burden of proof.

§ 3. Where a person on whom the burden of proof lies, adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is taken to be true, unless his opponent adduces evidence to rebut the presumption. (See *Evidence*, § 4; *Presumption*.)

Shifting burden of proof.

II. § 4. When evidence is to be given *vivâ voce*, *e. g.*, at the trial of an action, the solicitor of the party on whose behalf a witness is to be called usually sees the witness beforehand, and takes down a statement of the facts on which he is able to give evidence. This statement is called the “proof” of the witness. A copy of it is furnished to the counsel of the party for his guidance in examining the witness.

Proof of witness.

III. § 5. In admiralty practice, “proof” was equivalent to “evidence,” and was divided into three kinds,—proofs by affidavit, by written depositions and by oral examination of witnesses in open Court.<sup>6</sup> The rules as to evidence in admiralty actions are now the same as in other actions.<sup>7</sup>

Admiralty proofs.

IV. § 6. In bankruptcy, “proof” denotes not only the operation of proving the existence of a debt owing from the bankrupt’s estate, but also the affidavit, declaration, &c., by which debts are usually proved: and hence to “prove against the estate” means to bring forward a claim in that way. An ordinary proof is an affidavit by the creditor to the effect that the bankrupt was at the date of the order of adjudication, and still is, justly and truly indebted to the creditor, stating the amount and the

Bankruptcy.

<sup>1</sup> Stat. 8 & 9 Vict. c. 18, s. 2.

<sup>2</sup> Macpherson, Privy C. Pr. 238.

<sup>3</sup> *Willis v. Bishop of Oxford*, 2 P. D.

192.

<sup>4</sup> Atkinson on Sheriffs, 18.

<sup>5</sup> See Best on Evidence, 9.

<sup>6</sup> Admiralty Rules, 78; Williams & Bruce’s Admiralty, 260.

<sup>7</sup> Rules of Court, xxxvii.

consideration for the debt, and whether the creditor holds any security for it.<sup>1</sup> (See *Creditor*, § 3; *Debt*, § 11; *Security*.)

**Double proof.** § 7. Formerly there was a rule that if a person was liable in respect of distinct contracts,—either as member of two or more distinct firms, composed in whole or in part of the same individuals; or as a sole contractor and also as member of a firm,—then the creditors under those contracts could not prove against the estates of the two firms in the one case, or against the several estate of the sole contractor and the joint estate of his firm in the other case, but could only prove against one estate. This rule against double proof was abolished by the Bankruptcy Act, 1869.<sup>2</sup> But if a firm is carrying on business in England and abroad, and its property abroad is divided among its creditors, those of them who prove against the estate in England must give credit for what they have received abroad.<sup>3</sup>

**Expunging  
and reducing  
proofs.**

§ 8. When a proof has been admitted by the trustee, it may afterwards happen that circumstances are disclosed which, if known at the time of proof, would have excluded the creditor from the right to prove, wholly or in part; or circumstances may arise after proof so as materially to change the state of the debt: and in these cases it becomes necessary either to expunge the proof,—that is, to reject it retrospectively, as if it had never been made; or to reduce it,—that is, reduce the amount on which the creditor is to receive dividends, as if he had originally proved for the smaller amount.<sup>4</sup>

**Proof of will.** V. § 9. An executor is said to prove a will when he obtains probate of it, either in common or in solemn form. (See *Probate*.)

**PROPERTY.**—I. § 1. In its largest sense “property” signifies things and rights considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured. Property includes not only ownership, estates, and interests in corporeal things, but also rights such as trade-marks, copyrights, patents, and rights in personam capable of transfer or transmission, such as debts.<sup>5</sup>

§ 2. Property is of two kinds, real and personal; as to which see those titles.

II. § 3. “Property” also signifies a beneficial right in or to a thing. Sometimes the term is used as equivalent to “ownership;” as where we speak of the right of property as opposed to the right of possession (*q. v.*),<sup>6</sup> or where we speak of the property in the goods of a deceased person being vested in his executor.<sup>7</sup> The term is chiefly used in this sense with reference to chattels: “the ownership of a chattel personal is termed a *propertie*.”<sup>8</sup>

<sup>1</sup> Bankr. Rules (1870), Form 32.

<sup>2</sup> Sect. 37; Robson's Bankr. 619; *Ex parte Honey*, L. R., 7 Ch. 178.

<sup>3</sup> *Ex parte Banco de Portugal*, 11 Ch. D. 317; 5 App. Ca. 161.

<sup>4</sup> Robson's Bankr. 178, 328.

<sup>5</sup> See *Birchall v. Pugin*, L. R., 10 C. P. 397; Austin, ii. 817 *et seq.*

<sup>6</sup> Co. Litt. 266 a; Britton, 91 a.

<sup>7</sup> Comyns' Dig. *Administration*, B. 9.

<sup>8</sup> Finch, Law, 176; *Termes de la Ley*, s. v.

Property in this sense is divided into general and special or qualified.

§ 4. General property is that "which every absolute owner hath."<sup>1</sup> General.  
(See *Ownership*.)

§ 5. "Special property" has two meanings. First, it may mean that Special.  
the subject-matter is incapable of being in the absolute ownership of any person. Thus a man may have a property in deer in a park, hares or rabbits in a warren, fish in a trunk, &c.; but it is only a special or qualified property, for if at any time they regain their natural liberty his property instantly ceases, unless they have *animus revertendi*.<sup>2</sup> (See *Animals Ferae Naturæ*.) § 6. Secondly, a person may have a special property in a thing in the sense that he can only put it to a particular use. Thus, in the case of a bailment (*q. v.*), the bailee has a special property in the thing bailed, for he is only entitled to deal with it in accordance with the contract of bailment; but he can maintain an action in respect of it against a wrongdoer.<sup>3</sup> So possession is said to confer a special property, by which is meant that the possessor of a thing is deemed to be owner as against every one who cannot show a better title.<sup>4</sup>

[ETYMOLOGY].—Norman-French, *propreté*; Latin, *proprietas*, from *proprius*, one's own. (See *Ownership*.) For the history of property or ownership, see Lavaleye de la Propriété; Maine, *Anc. Law*, ch. viii.; Block, *Dict. de la Politique*, s. v.; Markby's *Elements of Law*, §§ 464 *et seq.*

**PROPERTY TAX** is income tax payable in respect of landed property. (See *Income Tax*.)

**PROPOUND**.—An executor or other person is said to propound a will or other testamentary paper when he institutes an action for obtaining probate in solemn form. (See *Action*, § 10; *Probate*.) The term is also technically used to denote the allegations in the statement of claim, by which the plaintiff alleges that the testator executed the will with proper formalities, and that he was of sound mind at the time.<sup>5</sup>

**PROPRIETARY CHAPELS** are chapels erected by and belonging to private persons, and not consecrated for divine service. Such a chapel has no parochial rights, unless acquired by a composition with the patron, incumbent and ordinary of the parish church, nor can public divine service be celebrated in it except with the consent of the incumbent and the licence of the bishop.<sup>6</sup>

**PROPRIETARY RIGHTS** are those rights which an owner of property has by virtue of his ownership. When proprietary rights are

<sup>1</sup> Co. Litt. 89 a, 145 b; *Donald v. Suckling*, L. R., 1 Q. B. at pp. 606, 614; *Coggs v. Bernard*, Smith's L. C. i. 188; Markby's *Elements of Law*, §§ 529 *et seq.*

<sup>2</sup> Bl. Comm. ii. 391.

<sup>3</sup> *Ibid.* 395; Steph. *Crim. Dig.* 198; *Babcock v. Lawson*, 4 Q. B. D. 394; see also *Lewis Bowles' Case*, 11 Rep. 79 b; Steph. *Comm.* ii. 10.

<sup>4</sup> *Armory v. Delamirie*, Smith, L. C. i. 357.

<sup>5</sup> See the forms numbered 23 in the Appendix (C) to the Rules of Court, Jud. Act, 1875.

<sup>6</sup> Phill. *Eccl. Law*, 1183, 1834; Steph. *Comm.* ii. 746; *Moysey v. Hillcoat*, 2 Hagg. *Eccl.* 30.

opposed to acquired rights, such as easements, franchises, &c., they are more often called natural rights (*q. v.*).<sup>1</sup> (See *Ownership*.)

**PROPRIETOR** is almost synonymous with "owner" (*q. v.*), as in the phrase "riparian proprietor." (See *Riparian*.) A person entitled to a trade-mark or a design under the acts for the registration of trade-marks and designs (*q. v.*), is called proprietor of the trade-mark or design.

Criminal.

**PROSECUTION—PROSECUTOR.**—§ 1. A prosecutor is a person who takes proceedings against another in the name of the crown. § 2. The commonest instance of a prosecutor is in criminal matters, where the suit is said to be by "Her Majesty the Queen on the prosecution of A. B. against C. D. (the prisoner)." The prosecutor may be a private person, in which case he is generally the person specially injured by the crime. When the crime is of a heinous nature or likely to go unpunished for want of a prosecutor, the proceedings are conducted by the Director of Public Prosecutions (*q. v.*), in the name of the Attorney-General.

Scire facias,  
&c.

§ 3. A person who sets in motion proceedings by *scire facias* to repeal a crown grant (see *Scire Facias*), by the prerogative process of information (*q. v.*), by mandamus, or similar proceedings, is called the prosecutor, as is also a person who institutes proceedings for attachment (*q. v.*, § 4).

**PROSPECTUS** is a document published by a company or municipal corporation, or by persons acting as its agents or assignees, setting forth the nature and objects of an issue of shares, debentures or other securities created by the company or corporation, and inviting the public to subscribe to the issue.<sup>2</sup> A prospectus is also usually published on the issue, in England, of bonds or other securities by a foreign state or corporation.

§ 2. Prospectuses are of importance from a legal point of view, chiefly because they are not unfrequently made the vehicle of misrepresentations, so that persons induced to subscribe on the faith of the statements contained in them acquire a right of action for damages or rescission of the contract. This right, however, is limited to those who subscribed to the issue, and does not extend to persons who may have bought shares or bonds on the market, after seeing a prospectus inviting subscriptions.<sup>3</sup>

§ 3. The Companies Act, 1867, s. 38, enacts that every prospectus inviting persons to subscribe for shares in any joint-stock company shall specify the dates of and parties to any contract entered into by the company, or its promoters, directors or trustees, before the issue of the prospectus; and that any prospectus not specifying these particulars shall be deemed fraudulent on the part of the promoters, directors and officers of the company knowingly issuing the same, as regards any person taking shares on the faith of the prospectus without notice of the contract.<sup>4</sup>

<sup>1</sup> See *Orr Ewing v. Colquhoun*, 2 App. Ca. at p. 854.

<sup>2</sup> See Lindley on Partn. 103. Thring on Companies, 28, where, however, only prospectuses issued on the formation of a

new company are mentioned.

<sup>3</sup> *Peek v. Gurney*, L. R., 6 H. L. 377.

<sup>4</sup> The cases on this section are referred to in *Twycross v. Grant*, 2 C. P. D. 469; *Sullivan v. Metcalfe*, 5 C. P. D. 455.

**PROTECTED TRANSACTIONS.**—As a general rule, every bankruptcy, by the doctrine of relation, is deemed to commence from the first act of bankruptcy committed by the bankrupt within twelve months before the adjudication. The effect of this rule is to invalidate alienations and dispositions of property by the debtor, and judgments against him made or obtained since the act of bankruptcy, and its object is to protect the general creditors against fraudulent and collusive arrangements for the benefit of particular creditors.<sup>1</sup> But to prevent the rule from bearing hardly on honest creditors, the bankruptcy law excludes from its operation payments, transfers, contracts, dealings and executions, when made or obtained *bonâ fide* by persons not having notice of an act of bankruptcy. These are known as protected transactions.<sup>2</sup>

**PROTECTION ORDER.**—By stat. 20 & 21 Vict. c. 85, s. 21, a wife who has been deserted by her husband may apply to a magistrate or justices, or the judge ordinary of the Divorce Court (now a judge of the Probate, Divorce and Admiralty Division of the High Court), for an order protecting her earnings and property acquired since the commencement of such desertion from her husband, and those claiming under him. On the order being made the earnings and property belong to her as if she were a *feme sole*; and as to her property and contracts generally, the order has the effect of a decree of judicial separation (*q. v.*).<sup>3</sup>

See *Writ of Protection*.

**PROTECTOR.**—§ 1. The protector of a settlement<sup>4</sup> is a person without whose consent a tenant in tail cannot bar the entail except as against his own issue, nor a tenant in base fee enlarge his estate into a fee simple. § 2. In the absence of a protector specially appointed by the settlor, the original owner of the first estate for years determinable on the dropping of a life or lives, or any greater estate, prior to the estate tail, is the protector.<sup>5</sup> Thus, if land is limited to B. for life, with remainder to C. in tail, B. is the protector. The act contains special provisions for cases in which co-owners, married women, lunatics, &c. have the first prior estate.<sup>6</sup> The person to whom the prior estate was originally given remains protector, although he may have encumbered or alienated it.<sup>7</sup> § 3. Every settlor is empowered to appoint by the settlement any number of persons in esse not exceeding three to be protector of the settlement in lieu of the person who would otherwise have been protector, and to insert in the settlement a power of appointing a protector in the place of any protector dying or relinquishing his office.<sup>8</sup>

Owner of prior estate, when protector.

Protector by appointment.

§ 4. Although the protector fills an office somewhat similar to that of the donee of an ordinary power, he is exempt from the rules applying to dealings between the donee and the object of a power (see *Fraud*,

<sup>1</sup> Robson's Bankr. 462.

<sup>2</sup> *Ibid.* 463.

<sup>3</sup> Watson's Comp. Eq. 388; Browne on Divorce, 193; Macqueen's Husb. & Wife, 222.

<sup>4</sup> As to the special meaning of "settle-

ment," "settlor," &c. under the Fines and Recoveries Act, see *Settlement*.

<sup>5</sup> Fines and Recoveries Act, s. 22.

<sup>6</sup> Sect. 23 *et seq.*

<sup>7</sup> Sect. 21.

<sup>8</sup> Sect. 32.

§ 13). Thus the consent given by a protector is not invalidated by his obtaining a pecuniary benefit in consideration of his giving it.<sup>1</sup>

See *Estate Tail; Disentailing Deed; Tenant to the Præcipe*.

**PROTEST.**—§ 1. In its most general sense, a protest is an express declaration by a person doing an act that the act is not to give rise to an implication which it might otherwise cause.<sup>2</sup> Thus, the payment of a sum of money by A. in answer to a demand by B. would in general give rise to the presumption that the money was owing by him to B., and if A. wishes to prevent it from doing so, he pays the money under protest.<sup>3</sup> As a general rule, a protest is not effectual unless the payment or other act takes place under compulsion: thus, if A. wrongfully distrains goods belonging to B., and B. pays the sum claimed for rent under protest in order to regain his goods, he may afterwards sue A. to recover the amount. (See *Duress*.)

Bills of exchange.

§ 2. In the law of bills of exchange, a protest is a solemn declaration by a notary stating that he has demanded acceptance or payment of a bill, and that it has been refused, with the reasons, if any, given by the drawee or acceptor for the dishonour.<sup>4</sup> The object of a protest is to give satisfactory evidence of the dishonour to the drawer or other antecedent party; but it is not necessary except in the case of a foreign bill<sup>5</sup> (see *Bill of Exchange*, § 10; *Noting*). § 3. Protest for better security is where the acceptor becomes insolvent, or his credit is publicly impeached before the bill falls due. In such a case the holder may cause a notary to demand better security, and on its being refused the bill may be protested, and notice sent to an antecedent party. The only advantage of such a protest seems to be that there may be a second acceptance for honour: for in other cases the rule is that there cannot be two acceptances on the same bill.<sup>6</sup>

For better security.

Appearance under protest.

§ 4. In the Admiralty Division, a defendant desiring to object to the jurisdiction must enter an appearance under protest, and then make an application by summons or motion to have the action dismissed on the ground of want of jurisdiction.<sup>7</sup> Formerly a question of this kind was raised by "pleadings on protest," commenced by the defendant filing a "petition on protest," to which the plaintiff filed a reply, and so on.<sup>8</sup>

**PROTESTATION** was a formula once used in pleadings at common law when a party wished to prevent an admission of a fact by him in one action from being afterwards used against him in another action as an estoppel or conclusion of the truth of the fact.<sup>9</sup> The necessity of protestation was abolished in 1834.<sup>10</sup>

<sup>1</sup> Sect. 37; Shelford, R. P. Stat. 331.

<sup>2</sup> Savigny, Syst. iii. 246.

<sup>3</sup> See an instance, *Hilliard v. Eiffe*, L. R., 7 H. L. at p. 40.

<sup>4</sup> Byles on Bills, 257.

<sup>5</sup> *Ibid.* 255.

<sup>6</sup> *Ibid.* 257.

<sup>7</sup> *The Catterina Chiazzare*, 1 P. D. 368; *The Vivar*, 2 P. D. 29.

<sup>8</sup> Williams & Bruce's Admiralty, 202; *The Pieve Superiore*, L. R., 5 P. C. 482.

For an instance of a protest filed by the Attorney-General, see *The Parlement Belge*, 4 P. D. at p. 130. As to appearance under protest in the Ecclesiastical Courts, see Phillimore, 1258; and in divorce practice, see Browne on Divorce, 21.

<sup>9</sup> Co. Litt. 124 b.

<sup>10</sup> Stephen, Pl. (5), 249, n. (7.)

**PROTOCOLS** are the original acts and proceedings in an ecclesiastical cause taken down by a notary (*πρωτος κολλη*, the things first glued together, *i. e.*, the original drafts).<sup>1</sup>

**PROVE.** See *Proof*; *Probate*.

**PROVINCE** is a district subject to an archbishop's jurisdiction. England is divided into two provinces, those of Canterbury and York, and each province contains divers dioceses.<sup>2</sup> (See *Archbishop*; *Diocese*; *Provincial Courts*.)

**PROVINCIAL COURTS** are Ecclesiastical Courts within the provinces of the two primates, and are hence also called the Courts of the Primates. They are (1) in the province of Canterbury—(a) the Court of Arches (*q. v.*); (b) the Court of the Vicar-General, wherein bishops of the province are confirmed; (c) the Court of the Master of the Faculties, wherein cases relating to notaries public are heard (see *Faculty*); (d) the Court of Audience (*q. v.*); and (e) the Court of the Commissary of the Archbishop: (2) in the province of York—(a) the Supreme Court or Chancery Court (see *Chancery*, § 7); (b) the Consistory Court; and (c) the Court of Audience (*q. v.*).<sup>3</sup> (See *Diocesan Courts*.)

**PROVISION—PROVISORS.**—In the law of *præmunire* (*q. v.*) a provision was a nomination by the pope to an English benefice before it became void, though the term was afterwards indiscriminately applied to any right of patronage exerted or usurped by the pope. The stat. 35 Edw. I was the first statute against provisions. Persons who attempted to take the benefit of provisions were called provisors.<sup>4</sup>

**PROVISIONAL ORDER.**—Under various acts of parliament, certain public bodies and departments of the government are authorized to inquire into matters which, in the ordinary course, could only be dealt with by a private act of parliament, and to make orders for their regulation. These orders have no effect unless they are confirmed by an act of parliament, and are hence called provisional orders. Several orders may be confirmed by one act. The object of this mode of proceeding is to save the trouble and expense of promoting a number of private bills.

As to provisional orders by the Inclosure Commissioners, see *Inclosure*, § 3. Provisional orders are also made by the Local Government Board under the Public Health Act.

**PROVISIONAL SPECIFICATION.** See *Specification*.

**PROVISO** is a clause in a deed or other instrument beginning "provided always that, &c.;" in Latin, *proviso semper*.<sup>5</sup> It operates as a condition, limitation, qualification or covenant, according to its tenor.<sup>6</sup>

<sup>1</sup> Phill. Eccl. Law, 1243; Just. Nov. 45, de Tabell.

<sup>2</sup> Bl. Comm. i. 111.

<sup>3</sup> Phillimore, Eccl. Law, 1201.

<sup>4</sup> Steph. Comm. iv. 189.

<sup>5</sup> Litt. § 329.

<sup>6</sup> Co. Litt. 203 b.

A common instance of a proviso is that for re-entry contained in almost every lease (see *Right of Entry*), and the proviso for redemption contained in an ordinary mortgage (*q. v.*, § 6).

**PROXY** denotes (i) a person appointed to represent another at a meeting or number of meetings; (ii) the instrument containing the appointment. It requires a stamp of *1d.* In most companies a shareholder has the power of appointing any other shareholder as his proxy to vote at meetings.

§ 2. In bankruptcy, any creditor may, by a memorandum subscribed to his proof or by a separate instrument in writing, appoint a person to represent him as a proxy in the matter of the bankruptcy; if in general terms, the proxy operates as an authority for the appointee to vote at all meetings, receive dividends, and generally to act in all matters in the bankruptcy as fully as the creditor himself could act.<sup>1</sup>

**PUBLIC.** See *Act of Parliament*, § 2; *Company*, § 10; *Director of Public Prosecutions*; *Highway*; *Navigable*; *Policy*; *River*.

**PUBLIC HEALTH.**—The law relating to public health is contained (as to England generally) in the Public Health Acts, 1875-9, and (as to London) in the Metropolis Local Management Act, 1855, and other acts.<sup>2</sup> (See *Sanitary Authorities*; *Local Government Board*; *Nuisance*.)

**PUBLIC OFFICER** sometimes means the holder of a public office (see *Fraud*, § 18), but it is more generally used to denote an officer of a joint-stock company or corporation. Fraudulent appropriation of money, alteration of accounts, destruction of books and papers, &c. by such a public officer are misdemeanors.<sup>3</sup>

§ 2. The term "public officer" in the latter sense seems to be derived from the stat. 7 Geo. 4, c. 46, which provided for the appointment of public officers of banking companies, and empowered such companies to sue and be sued in the name of any such officer, although the companies themselves were not incorporated. A similar provision was frequently contained in private acts authorizing the formation of unincorporated companies. Companies formed under the modern acts are always incorporated.

See *Companies Acts*.

**PUBLIC WORSHIP REGULATION ACT, 1874**, contains provisions designed to prevent unlawful alterations in or additions to the fabric, ornaments or furniture of any church belonging to the Church of England, to prevent the use of unlawful ornaments, and to enforce the use of prescribed ornaments and vestures, and the observance of the rites ordered by the Book of Common Prayer.<sup>4</sup> (See *Ecclesiastical Courts*.)

<sup>1</sup> Robson's Bankr. 181 *et seq.*; Bankr. Act, 1869, s. 80, § 8.

<sup>2</sup> The principal ones are enumerated in part i. of sched. v. to the Public Health

Act, 1875; Steph. Comm. iii. 168 *et seq.*

<sup>3</sup> Stat. 24 & 25 Vict. c. 96, ss. 81 *et seq.*

<sup>4</sup> Phill. Eccl. Law, supp. 38; *Regulæ Generales*, February, 1879 (4 P. D. 250).



**PUBLICATION—PUBLISH.**—§ 1. To publish a libel is to deliver Libel. it, exhibit it, read it or otherwise communicate its purport to any person other than the person libelled.<sup>1</sup>

§ 2. A patent for an invention may be invalidated by prior publication Patent. in this country. Thus, if the invention was described in a book accessible and known to the general public in this country, or at least to that portion of the public whose attention is turned to such matters, before being patented, that would invalidate the patent.<sup>2</sup>

§ 3. In the old law of wills, publication signified that a will had been Will. recognized by the testator as his operative will; express publication in the presence of witnesses was recommended, but the fact of a will being in the custody of the testator was a sufficient publication of a will of personalty.<sup>3</sup> Now, by the Wills Act, no publication of a will is required.<sup>4</sup>

**PUBLICI JURIS** ("of public right"), as applied to a thing or right, means that it is open to or exercisable by all persons.

§ 2. When a thing is common property, so that any one can make use of it who likes, it is said to be *publici juris*, as in the case of light, air and public water. (See *Air; Light; Water; Natural Rights*.) § 3. So when a copyright or patent has expired, or a trade-mark or trade-name becomes common property, the book, process, trade-mark, or trade-name is said to be *publici juris*, that is, any person can print or use it.<sup>5</sup>

§ 4. As applied to the case of water flowing through private land, *publici juris* means that the water flows in such a defined channel as to give the owner of each piece of land through which it passes what are called rights of water in respect of it, as opposed to water which is either confined to one piece of land, as in a pond, or percolates or flows in no defined course.<sup>6</sup>

**PUCHTA.**—Georg Friedrich Puchta was born 31st August, 1798, became professor at Erlangen, Munich, Marburg, Leipzig and Berlin, and died 8th January, 1846. He wrote numerous works on modern Roman law, especially the *Cursus der Institutionen* and the *Lehrbuch der Pandecten*.<sup>7</sup>

**PUFENDORF.**—Samuel (Freiherr) von Pufendorf was born 8th January, 1632, became professor in Heidelberg, and died 16th October, 1694. He wrote *De jure naturæ et gentium* and other works.<sup>8</sup>

<sup>1</sup> Stephen's Crim. Dig. 186.

<sup>2</sup> *Stead v. Williams*, 2 Webst. P. R. 126; *Stead v. Anderson*, *ibid.* 147; *Plimpton v. Spiller*, 6 Ch. D. 412.

<sup>3</sup> Williams on Executors, 81. Whether the Statute of Frauds required publication of a will of land is doubtful; *ibid.* 86, n. (g).

<sup>4</sup> 1 Vict. c. 26, s. 13.

<sup>5</sup> *Ford v. Foster*, L. R., 7 Ch. 611.

S.

<sup>6</sup> "Flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right; but it is public and common in this sense only, that all may reasonably use it who have a right of access to it." *Embrey v. Owen*, 6 Exch. 369, quoted in Phear on Water, 22, 33.

<sup>7</sup> Holtzen. Encycl.

<sup>8</sup> *Ibid.*

**PUIS DARREIN CONTINUANCE.**—Under the old common law system, a plea puis darrein continuance was one in which the defendant pleaded some matter of defence which had arisen “since the last continuance” or adjournment. (See *Continuance*.) After the abolition of continuances, the same name was given to pleas of defences which arose after the defendant has put in his plea. (See *Plea*, § 8.) Under the new practice, where a ground of defence arises after the delivery of the statement of defence, the defendant may by leave of the Court deliver a further defence setting forth the same.<sup>1</sup>

**PUISNÉ** literally means “later born,” as in the phrase *mulier puisné* (see *Mulier*). As applied to incumbances, puisné denotes subsequent in point of date. (See *Priority*, § 2.)

While the old Common Law Courts existed all the judges of each court, except the chiefs, were called puisné justices or puisné barons, according to the court. The justices of the Queen’s Bench Division, other than the Lord Chief Justice, are similarly called puisné justices.

**PUNISHMENT.** See *Crime*; *Death*; *Imprisonment*; *Penal Servitude*; *Penalty*; *Police Supervision*; *Whipping*.

**PUR AUTER VIE.** See *Tenant for Life*.

**PUR CAUSE DE VICINAGE.** See *Common*, § 8.

**PURCHASE** is used, in law not only in the popular sense of buying (see *Vendors and Purchasers*), but also in a technical sense to denote that a person has acquired land by the lawful act of himself or another, *e. g.*, by conveyance, gift or devise, as opposed to title by act of the law, such as descent, dower, curtesy, &c., and to title by wrong, as in the case of disseisin.<sup>2</sup> As to escheat, see that title, § 3. (See *Purchaser*; *Title*.)

**ETYMOLOGY.**—Norman-French, *purchaz*, *purchacer*, more modern *pourchas*, *pourchasser*, from *pur* (intensive), and *chasser*, to seek after, acquire<sup>3</sup> (see *Chase*). Hence the old writers speak of “purchasing” land by accretion,<sup>4</sup> and of purchasing writs, charters of pardon, &c.<sup>5</sup>

**PURCHASER** means, I. a person who buys property (see *Vendor and Purchaser*); II. a person who acquires land by purchase in the technical sense of the word (see *Purchase*); III. a person who acquires land otherwise than by descent. It is in the last sense that the term is used in the Inheritance Act. (See *Descent*, § 3.)

**PURGE.** See *Contempt*, § 4.

**PURLIEU** is a certain territory of ground adjoining a forest, bounded with immoveable boundaries known by matter of record only, which

<sup>1</sup> Rules of Court, xx. 1; Archbold, Pr.

737.

<sup>2</sup> Litt. § 12; Co. Litt. 3 b, 18 b.

<sup>3</sup> Littré, s. v. *Pourchasser*.

<sup>4</sup> See Britton, 86 b.

<sup>5</sup> Co. Litt. 128 b.

territory was once forest and afterwards disafforested again by the perambulations made for the severing of the new forests from the old, in accordance with the Charta de Foresta (18 John).<sup>1</sup>

See *Forest*.

ETYMOLOGY.]—Norman-French, *purale*,<sup>2</sup> *pourallee*, a perambulation; from Latin *perambulatio*.

**PURPARTY** is an old word for share or portion,<sup>3</sup> so that to hold land in purparty with a person is to hold it jointly with him.<sup>4</sup>

**PURPRESTURE** is where an erection or enclosure is made on any part of the king's demesnes, or on a highway, or a common street or public water, or the like. The term is derived from the Norman-French *purprendre*, to encroach or enclose,<sup>5</sup> and is not now much used, the offence being more commonly called a common nuisance (*q. v.*). (See *Usurpation*.)

**PURSUE**.—To pursue a warrant or authority, in the old books, is to execute it or carry it out.<sup>6</sup> (See *Execute*.)

**PURVIEW** is that part of a statute which provides or enacts, as opposed to the preamble, which recites the reason or occasion for the statute.<sup>7</sup> Hence a case is said to be within the purview of an act when it falls within its provisions.

ETYMOLOGY.]—Norman-French, *purveu est*; Latin, *provisum est*, used in the enacting part of old statutes.<sup>8</sup>

## Q.

**QUALIFICATION** is a quality which makes a person eligible for an office. As a general rule, the term denotes the possession of property of a certain value. Thus every juryman for the trial of actions in the High Court must either (i) be assessed to the poor-rate or inhabited house duty on a value of not less than 30*l.* in Middlesex, or 20*l.* in any other county; or (ii) occupy a house containing not less than fifteen windows; or (iii) possess freehold or leasehold property of a certain yearly value. In the city of London the qualification is different. A special juror must either be a banker, merchant, or esquire, or occupy a private dwelling-house of a certain value.<sup>9</sup> So a director of a company is generally required to be the holder of a certain number of shares.<sup>10</sup>

<sup>1</sup> Manwood, *Forest*, 127; 4 Inst. 303.

<sup>2</sup> Britton, 129 a.

<sup>3</sup> *Ibid.* 184 a, 187 a; Litt. § 262.

<sup>4</sup> Litt. § 260.

<sup>5</sup> Co. Litt. 277 b; Britton, 30 b.

<sup>6</sup> Co. Litt. 52 a.

<sup>7</sup> 12 Co. Rep. 20.

<sup>8</sup> See for example stat. 3 Edw. 1, in the Revised Statutes.

<sup>9</sup> Archbold's Pr. 385; stat. 6 Geo. 4, c. 50; Juries Act, 1870.

<sup>10</sup> Thring on Companies, 43.

**QUALIFIED FEE.** See *Fee*, § 4.

**QUALITY.** See *Estate*, § 6.

**QUANDO ACCIDERINT.** See *Judgment*, § 12.

**QUANTITY.** See *Estate*, § 4.

**QUANTUM MERUIT** = "as much as he has earned." If a person enters into a contract to do services for another, and either the contract is put an end to before they are completed, or they are not rendered in the manner provided by the contract, the contractor is obviously not entitled to be paid his contract price, but in some cases he is entitled to be paid the actual value of his services; and if he brings an action to recover it, he is said (in the language of common law) to sue on a quantum meruit. Thus, where a party to a contract refuses to perform his part of it, the other has the right to rescind it, and to sue on a quantum meruit for the services which he had done under it previous to the rescission.<sup>1</sup> (See *Quantum valebant*.)

**QUANTUM VALEBANT** = "as much as they were worth." If a person contracts to supply goods of a certain kind, and supplies goods of a different kind, and the other party does not avail himself of the right of rejecting them, the former, although he cannot claim the price payable under the contract (for it has not been performed), can claim the actual value of the goods supplied; and if he brings an action for it, he is said, in the language of common law, to sue on a quantum valebant.<sup>2</sup>

**QUARANTINE** is literally a period of forty days. The expression is now chiefly used to denote the period (whether forty days or not) which persons coming from a country or ship in which an infectious disease is prevalent are obliged to wait before they are permitted to land in England.<sup>3</sup> § 2. It also signifies the forty days during which a widow is entitled to remain in her husband's dwelling-house after his death.<sup>4</sup>

**QUARE CLAUSUM FREGIT.** See *Trespass*.

**QUARE IMPEDIT.**—An action of quare impedit lies to enforce the right to present to a benefice. If, on a vacancy of a living taking place, two persons present clerks to the bishop, the person rightfully entitled to present should commence an action of quare impedit in the High Court against the bishop, the pretended patron, and his clerk, in order to determine the question of right and prevent his opponent's clerk from obtaining (or retaining) the benefice. An action of quare

<sup>1</sup> *Cutter v. Powell*, 6 T. R. 320; Smith, L. C. ii. 1; Chitty on Contracts, 527. As to an equitable quantum meruit, see *In re Empress Engineering Co.*, 16 Ch. D. 125.

<sup>2</sup> Chitty on Contracts, 421; Smith, L.

C. ii. 20 *et seq.*

<sup>3</sup> Stat. 6 Geo. 4, c. 78; Steph. Comm. iii. 171; Bl. Comm. ii. 135, n. (a).

<sup>4</sup> Magna Charta, c. vii.; Digby's Hist. R. P. 95, and 2 Inst. 16; Co. Litt. 32 b.

impedit also lies against the bishop if he refuses to admit a clerk on the ground of incapacity or the like.<sup>1</sup> The trial is generally by jury, but in some instances (it is said) by certificate.<sup>3</sup> “Quare impedit” = “Why he obstructs.” (See *Jus Patronatus*.)

**QUARTER SESSIONS** is a Court of Record holden before two or more justices of the peace once in every quarter of the year for execution of the authority given them by the commission of the peace and certain statutes. Formerly their jurisdiction, in theory, extended to trying all misdemeanors and felonies, though in practice they sent the more serious cases to the assizes. Now, however, their jurisdiction to try cases of treason, murder, manslaughter, rape, perjury, forgery, frauds by agents, and numerous other serious offences, has been taken away altogether, so that in those cases their jurisdiction ceases as soon as the indictment has been found.<sup>3</sup>

§ 2. A separate Court of Quarter Sessions may be granted to a borough, Boroughs. thus excluding the county justices from exercising jurisdiction within it. The Court consists of the Recorder (*q. v.*) alone.<sup>4</sup>

§ 3. Proceedings at quarter sessions consist (1) of the finding of bills or indictments by the grand jury (see *Bill*, § 4); (2) of the removal to the assizes of those indictments which the Court of Quarter Sessions has no jurisdiction to try; (3) of the trial of those indictments which it has jurisdiction to try (see *Trial*); (4) of business falling within the original jurisdiction of the sessions, chiefly in matters relating to the preservation of the peace and the punishment of rogues and vagabonds; (5) of business within the appellate jurisdiction, which includes appeals from petty and special sessions in bastardy, highway, rating, removal of paupers, and licensing cases.<sup>5</sup>

See *Justices of the Peace*.

**QUASH** is to discharge or set aside. Thus an indictment may be quashed when it is so defective that no judgment can be given on it.<sup>6</sup>

**QUASI-CONTRACT.**—§ 1. A quasi-contract is an obligation similar to that created by contract, but not really arising by the consent of the person bound. Thus, in Roman law, if a person left his property without anyone to look after it, a stranger might undertake the care of it, and had a right of action against the owner for his expenses (*actio negotiorum gestorum*); “and this is for the sake of utility, lest the affairs of persons suddenly called away without being able to arrange for their management should be neglected, for no one would look after them if he had not a right of action for his expenses.”<sup>7</sup> § 2. The term quasi-

<sup>1</sup> Phill. Eccl. Law, 451; Steph. Comm. iii. 416; Jud. Act, 1875, App. A., part ii. sect. iv.

<sup>2</sup> Steph. 611; see Rules of Court, xxxvi. 26. See *Trial*.

<sup>3</sup> Pritchard's Q. S. 7, 364 *et seq.*; stats. 5 & 6 Vict. c. 38; 24 & 25 Vict. c. 96, s. 87. The sessions in London and Middlesex are subject to special regulations: Prit-

chard, 29; stat. 7 & 8 Vict. c. 71. See *Assistant Judge*.

<sup>4</sup> Stat. 5 & 6 Will. 4, c. 76, ss. 103 *et seq.*; Pritchard, 15 *et seq.*

<sup>5</sup> See Pritchard, *passim*.

<sup>6</sup> Archbold, Crim. Pl. 93. As to quashing an inquisition in lunacy, see Pope on Lunacy, 69.

<sup>7</sup> Just. Inst. iii. 27, § 1,

contract is unknown to the English law, although the thing itself exists. Thus if, in the absence of a husband, I incur expense in burying the wife in a manner suitable to the husband's condition, though without his knowledge, I may sue him for my expenses, or, as it is said, the law will imply a promise by him to reimburse me.<sup>1</sup> § 3. Again, every one exercising an office or employment who undertakes a duty comprised in it is bound to perform it with integrity, diligence and skill, independently of any special stipulation to that effect with his contractee. Thus a common carrier is bound to carry his goods or passengers safely, and a solicitor, surgeon, engineer, &c., who undertakes a professional duty is bound to discharge it with integrity and skill, and if he does not he is liable for any damages caused by his default or negligence. "But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such *general* undertaking, but, in order to charge him with damages, a *special* agreement is required."<sup>2</sup> The best example of a quasi-contract in English law is salvage (*q. v.*).

See *Quasi-Tort*.

ETYMOLOGY.]—The term "quasi-contract" is a modern abbreviation of the *obligatio quasi ex contractu* of the Romans.

**QUASI-EASEMENT.**—An easement, in the proper sense of the word, can only exist in respect of two adjoining pieces of land occupied by different persons, and can only impose a negative duty on the owner of the servient tenement. Hence an obligation on the owner of land to repair the fence between his and his neighbour's land is not a true easement, but is sometimes called a quasi-easement.<sup>3</sup>

**QUASI-ENTAIL.**—A quasi-entail or quasi-estate-tail exists when an estate pur autre vie is limited to a person and the heirs of his body. Thus, if land is given to A. and the heirs of his body during the life of B., A. has a quasi-entail. A quasi-entail in possession may be barred by an ordinary deed of conveyance: if it is in remainder, the concurrence of the tenant for life is required.<sup>4</sup>

**QUASI-POSSESSION** is to a right what possession is to a thing—it is the exercise or enjoyment of the right, not necessarily the continuous exercise, but such an exercise as shows an intention to exercise it at any time when desired. When the right itself is exercised by means of possession of the thing which is the subject of the right, as in the case of ownership, the idea of quasi-possession does not arise, and hence the term is confined to those rights which merely give a limited power of using the thing, as in the case of easements and profits à prendre; it is,

<sup>1</sup> *Jenkins v. Tucker*, 1 H. Bl. 90: see also *Foster v. Ley*, 2 Bing. N. C. 269, cited Leake on Contracts, 41.

<sup>2</sup> Bl. Comm. iii. 166; Broom, C. C. L. 672.

<sup>3</sup> Gale on Easements, 516.

<sup>4</sup> Co. Litt. 20 a, n. (5); Fearne, C. R. 495; Williams' R. P. 60. As to the effect of attempting to limit estate tail in chattels, see Williams' P. P. 315 *et seq.*; White & Tudor, L. C. i. 1.

however, not much used in English law, the word "enjoyment" (*q. v.*) being more frequently employed.<sup>1</sup>

**QUASI-TORT**, though not a recognized term of English law, may be conveniently used in those cases where a man who has not committed a tort is liable as if he had. Thus, a master is liable for wrongful acts done by his servant in the course of his employment.<sup>2</sup> The ground of the liability is sometimes expressed by the rule "qui facit per alium facit per se;"<sup>3</sup> but this is erroneous, that rule only applying to *authorized* acts: the true rule is "respondeat superior."<sup>4</sup> (See *Quasi-Contract*.)

**QUE ESTATE.** See *Prescription*, § 5.

**QUEEN ANNE'S BOUNTY.**—By the statute 26 Hen. 8, c. 3, certain duties called first fruits and tenths which had up to that time been paid by the incumbents of ecclesiastical benefices to the Pope, were made part of the revenues of the crown. Queen Anne determined to apply them to the augmentation of the livings of the poorer clergy, and under the provisions of the stat. 2 & 3 Anne, c. 20, she appointed certain persons to be a corporation to receive and apply for this purpose the first fruits and tenths, and also any gifts and benevolences given to them for the same purpose; they are called the Governors of the Bounty of Queen Anne for the Augmentation of the Maintenance of the Poor Clergy.<sup>5</sup> (See *First Fruits*.)

**QUEEN'S ADVOCATE** is an advocate (*q. v.*) who holds, in the Courts in which the rules of the canon and civil law prevail, a similar position to that which the Attorney-General holds in the ordinary Courts: that is, he acts as counsel for the crown in ecclesiastical, admiralty and probate cases, and advises the crown on questions of international law. In order of precedence it seems that he ranks after the Attorney-General.<sup>6</sup>

**QUEEN'S BENCH.**—§ 1. The Court of Queen's Bench was one of the superior Courts of common law, having in ordinary civil actions concurrent jurisdiction with the Courts of Common Pleas and Exchequer; it was, however, considered superior to them in dignity and power, its principal judge being styled the Lord Chief Justice of England, and taking precedence over the other common law judges.<sup>7</sup> It also had special jurisdiction over inferior Courts, magistrates and civil corporations by the prerogative writ of mandamus, and (concurrently with the two

<sup>1</sup> Gale on Easements, 207. As to quasi-possession in Roman law, see Hunter's Roman Law; Bruns, Recht des Besitzes.

<sup>2</sup> Broom, C. C. L. 690; Underhill on Torts, 29. As to the use of the term "quasi-tort" to signify the breach of a quasi-contract, see *Tort*. Austin rejects "quasi-tort" or "quasi-delict" altogether (*Jurisp.* 959).

<sup>3</sup> Underhill, 29.

<sup>4</sup> See *Reg. v. Holbrook*, 4 Q. B. D. at pp. 46, 51.

<sup>5</sup> Phillimore, Eccl. Law, 2069, where the modern statutes relating to the bounty are given.

<sup>6</sup> Steph. Comm. iii. 275, n.; Manning's *Serviens ad Legem*, 19, app. iv.

<sup>7</sup> Formerly an appeal lay from the Common Pleas and Exchequer to the Queen's Bench.

other Courts) by prohibition and certiorari (*q. v.*), and in proceedings by quo warranto and habeas corpus. The Queen's Bench was also the principal Court of criminal jurisdiction in England: informations might be filed and indictments preferred in it in the first instance, and indictments from all inferior Courts might be removed into it by certiorari, subject to certain limitations.<sup>1</sup> (See *Certiorari*; *Indictment*; *Information*.)

Plea and  
crown sides.

§ 2. The Queen's Bench accordingly had two "sides" or sets of offices, namely, the "plea side," in which civil business was transacted; and the "crown side," or "Crown Office," in which matters within the criminal and extraordinary jurisdiction of the Court were transacted. (See *Crown Office*.)

§ 3. It is said to have been called the Queen's Bench or King's Bench, both because its records ran in the name of the king (*coram rege*), and because kings in former times have often personally sat there.<sup>2</sup>

Queen's  
Bench Divi-  
sion.

§ 4. By the Judicature Act, 1873, the jurisdiction of the Court of Queen's Bench was transferred to the High Court of Justice. Its judges (namely, the Lord Chief Justice and the five puisné justices) originally formed a separate division of the High Court, called the Queen's Bench Division, and to it was assigned all business, civil and criminal, which was formerly within the exclusive cognizance of the Court of Queen's Bench.<sup>3</sup> Now, however, the Common Pleas and Exchequer Divisions have been consolidated with it into one division called the Queen's Bench Division.

See *High Court of Justice*.

**QUEEN'S CORONER AND ATTORNEY** is an officer of the Central Office of the Supreme Court (*q. v.*). He was an officer in the Crown Office of the Queen's Bench Division before that office was transferred to the Central Office. His duties are similar in kind to those discharged by the other common law masters.<sup>4</sup> (See *Masters*, § 1.)

**QUEEN'S COUNSEL** are barristers who by reason of their superior learning and talent have obtained the appointment of counsel to her Majesty. They wear silk gowns, sit within the bar, and take precedence in Court over ordinary barristers.<sup>5</sup> They have no active duties to perform to the crown, but they must not be employed in any cause against the crown (*e. g.*, in defending a prisoner) without special licence.<sup>6</sup> § 2. There are also queen's counsel in the County Palatine of Lancaster, who take precedence of other barristers in the palatine Courts.<sup>7</sup> (See *Bar*; *Barrister*; *Serjeant-at-Law*; *Inns of Court*.)

**QUEEN'S EVIDENCE.**—When several persons are charged with a crime, and one of them gives evidence against his accomplices, on the

<sup>1</sup> Steph. Comm. iii. 331, iv. 307; stat. 35 & 36 Vict. c. 52.

<sup>2</sup> Co. Litt. 71 b.

<sup>3</sup> Jud. Act, 1873, ss. 16, 31 *et seq.*

<sup>4</sup> Second Rep., Legal Dep. Comm. 15;

Judicature (Officers) Act, 1879, ss. 4 *et seq.*

<sup>5</sup> Manning's *Serviens ad Legem*, 25,

209.

<sup>6</sup> Steph. Comm. iii. 273.

<sup>7</sup> Judicature Act, 1873, s. 78.



promise of being granted a pardon, he is said to be admitted Queen's evidence.<sup>1</sup> (See *Approve*, § 2.)

**QUEEN'S REMEMBRANCER** is an officer of the Central Office of the Supreme Court.<sup>2</sup> Formerly he was an officer of the Exchequer, and had important duties to perform in protecting the rights of the crown, *e. g.*, by instituting proceedings for the recovery of land by writs of intrusion (*q. v.*), and for the recovery of legacy and succession duties; but of late years administrative changes have lessened the duties of the office,<sup>3</sup> and on the next vacancy they will be consolidated with those of the Senior Master of the Central Office.<sup>4</sup>

**QUEM REDDITUM REDDIT** was a real action by which the grantee of a rent could compel the tenants of the land out of which the rent issued to attorn to him.<sup>5</sup> It was abolished by stat. 3 & 4 Will. 4, c. 27, s. 36. (See *Attornment*.)

**QUESTIONS OF LAW** arising in an action may be stated in the form of a special case (*q. v.*) for the opinion of the Court, or in such other manner as the Court may deem expedient.<sup>6</sup> See further as to questions of law, *Fact*, § 3.

**QUI FACIT PER ALIUM FACIT PER SE** means that a principal is liable for the acts of his agent within the scope of his authority. (See *Agent*, § 2; *Master and Servant*, § 3; *Respondeat Superior*.)

**QUI TAM.** See *Action*, § 8.

**QUIA EMPTORES** is the name usually given to the Statute 18 Edw. 1, passed in the third "notable" parliament holden at Westminster, and therefore also called the Statute of Westminster III. After reciting that purchasers of lands ("quia emptores terrarum") from freeholders of great men and other lords hold their lands of the freeholders and not of the superior lords, whereby the latter lose the feudal fruits of tenure, it enacts that every freeman shall be at liberty to sell his lands, but that the purchaser shall hold them of the chief lord, so as to take the place of the vendor. The statute, therefore, abolished subinfeudation (*q. v.*), and thus made the future creation of seignories, manors, honours, &c. impossible. In the opinion of many writers it also first authorized conveyances of feudal lands, which had hitherto been considered inoperative as against the lord.<sup>7</sup>

**QUIA TIMET.** See *Bill of Complaint*, § 5.

<sup>1</sup> Steph. Comm. iv. 395.

<sup>2</sup> Judicature (Officers) Act, 1879, ss. 4 *et seq.*

<sup>3</sup> Second Rep. Legal Dep. Comm. 17; stat. 22 & 23 Vict. c. 21.

<sup>4</sup> Jud. Act, 1879, s. 14.

<sup>5</sup> Shepp. Touch. 254.

<sup>6</sup> Rules of Court, xxxiv.

<sup>7</sup> Bl. Comm. ii. 91; 2 Inst. 500; Williams on Seisin, 22.

**QUID JURIS CLAMAT** was a real action by which the grantee of a reversion or remainder expectant on an estate for life could compel the tenant for life to attorn to him.<sup>1</sup> It was abolished by stat. 3 & 4 Will. 4, c. 27, s. 36. (See *Attornment*.)

**QUID PRO QUO** ("something for something") is the old term for consideration (*q. v.*). "In every contract there must be *quid pro quo*."<sup>2</sup>

**QUIET ENJOYMENT.** See *Covenant*, § 8; *Lease*, § 8.

**QUIETUS** is a discharge granted by the crown or its officer to a person indebted to the crown, *e. g.*, an accountant. It is a defence to a writ of extent, and may be entered on the register of judgments in discharge of an execution already issued.<sup>3</sup> It seems to have been originally a writ addressed to the barons of the Exchequer, directing that the debtor should be discharged (*quietus sit*) of all claims.<sup>4</sup>

**QUIT CLAIM** "is a release or acquitting of a man for any action that he [the releasor] hath or might have against him."<sup>5</sup> "*Fleta calleth it charta de quietâ clamantiâ.*"<sup>6</sup> The expression "quit claim" is used in old-fashioned releases as an operative word equivalent to "release."

**QUIT RENT.** See *Rent*.

Writ.

Information.

**QUO WARRANTO.**—§ 1. The writ of quo warranto is a high prerogative writ by the crown against one who claims or usurps any office, franchise or liberty, to inquire "by what authority" he supports his claim. It lies also in case of non-user, or mis-user, of a franchise, or where any public trust is executed without authority, though it may be no usurpation on a franchise of the crown.<sup>7</sup> § 2. The prerogative writ of quo warranto, however, has long fallen into disuse, having been supplanted by what is called an *information in the nature of a writ of quo warranto*, wherein the process is speedier, and the judgment not so inconveniently decisive, as on the ancient writ: it is now the usual remedy in the case of corporation disputes between private persons, without the intervention of the prerogative, by virtue of the stat. 9 Ann. c. 20, which permits an information in the nature of a quo warranto to be brought with leave of the Court, at the relation of any person desiring to prosecute the same (who is then styled the *relator*) against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough or town corporate.<sup>8</sup> (See *Ouster*.)

<sup>1</sup> Shepp. Touch. 254.

<sup>2</sup> Co. Litt. 47 b. See Pollock on Contract, 151.

<sup>3</sup> Blount's Law Dict. s. v.

<sup>4</sup> Madox, Exch. ii. 220 *et seq.*; *R. v. Wilkinson*, Bunb. 315; stat. 2 & 3 Vict. c. 11.

<sup>5</sup> Termes de la Ley, s. v.

<sup>6</sup> Co. Litt. 264 b.

<sup>7</sup> Bl. Comm. iii. 262; Steph. Comm. iii. 638; Chitty, Prer. 336.

<sup>8</sup> *Ibid.*; stats. 32 Geo. 3, c. 58; 7 Will. 4 & 1 Vict. c. 78; 6 & 7 Vict. c. 89. See *Ex parte Richards*, 3 Q. B. D. 368.

**QUOD EI DEFORCEAT** was a writ or action which lay for the recovery of land where a tenant for life, in tail, or the like, had lost the right of possession through his default or non-appearance in a possessory action.<sup>1</sup> It was abolished by stat. 3 & 4 Will. 4, c. 27, s. 36.

**QUORUM.**—§ 1. When a committee, board of directors, meeting of shareholders, or other body of persons, cannot act unless a certain number at least of them are present, that number is called a quorum. Thus, a first meeting of creditors in bankruptcy cannot act for any purpose, except the election of a chairman, the proving of debts and the adjournment of the meeting, unless a quorum of three creditors are present.<sup>2</sup>

§ 2. The expression is taken from the form of commission by which justices of the peace are appointed, and which mentions some particular justices of whom one must always be present for the transaction of certain kinds of business (*quorum aliquem vestrum A., B., C., D., &c. unum esse volumus*), whence the persons so named are or were called justices of the quorum: at the present day the quorum clause is of no importance, all the justices being usually named in it.<sup>3</sup>

**QUOUSQUE.** See *Prohibition*, § 2; *Seizure*.

## R.

**RACKRENT.** See *Rent*, § 4.

**RAILWAY.**—Railways in England are generally constructed under private acts of parliament, which confer the power of compulsorily purchasing the lands required for the line. A railway act also almost invariably incorporates the provisions of the Lands Clauses Consolidation Act (see *Act of Parliament*, § 5) and the Railways Clauses Acts, 1845 and 1863. Railways are further subject to numerous acts of parliament, the chief of which are the Railway Regulation Acts, 1840, 1842, 1868, 1871, 1873, and the Railway and Canal Traffic Act, 1854. The provisions of some of these acts are enforced by the Board of Trade, others by the Railway Commissioners.<sup>4</sup>

As to whether a railway company is a carrier, see *Carrier*, § 2.

**RAILWAY COMMISSIONERS** are a body of three commissioners appointed under the Regulation of Railways Act, 1873, principally to enforce the provisions of the Railway and Canal Traffic Act, 1854, by compelling railway and canal companies to give reasonable facilities for

<sup>1</sup> Co. Litt. 331 b. 354 b; Bl. Comm. iii.

193.

<sup>2</sup> Bankr. Rules (1870), 93.

<sup>3</sup> Bl. Comm. i. 351.

<sup>4</sup> See Hodges on Railways, *passim*.

traffic, to abstain from giving unreasonable preference to any company or person, and to forward through traffic at through rates. They also have the supervision of working agreements between companies.<sup>1</sup> The duration of their office has been extended to the 31st December, 1882.<sup>2</sup>

**RANK.**—A claim to a prescriptive payment, such as a modus, is said to be rank when it is excessive, and therefore void. Thus if a modus set up is so large that it exceeds what would have been, in the time of Richard I., the value of the tithes in lieu of which it is claimed, the modus is rank and destroys itself.<sup>3</sup>

**RAPE.**—I. § 1. In civil law, a rape is a division of a county. (See *Lathe*.)

II. § 2. In criminal law, rape is the act of having carnal knowledge of a woman against her will or without her conscious permission, or where her permission has been extorted by force or fear of immediate bodily harm. Rape is a felony, punishable with penal servitude for life.<sup>4</sup>

**RATE—RATEABLE.**—§ 1. A rate is a sum assessed or made payable by a body having local jurisdiction over the district in which the person on whom the rate is assessed dwells or has property. (See *Taxation*.) There are also rates, such as water rates, charged by ordinary water-companies, which are modes of charging for the sale of commodities, and therefore do not fall within the ordinary definition of rates. Rates are almost always, if not invariably, assessed in respect of the enjoyment or occupation of real property<sup>5</sup> in proportion to its value (*pro ratâ*, whence the term “rate”); and when a person has such an occupation of property as to be liable to payment of rates, his occupation is said to be rateable. (See *Occupation*, § 3.) The oldest rate appears to be that imposed for the relief of the poor, and the principles on which it is assessed and levied have been followed (with certain modifications) in the case of other rates. Those principles may be shortly stated as follows:—It is only the beneficial occupation which is rateable, and therefore, in arriving at the value of it, repairs, insurance and other necessary outgoings are allowed to be deducted.<sup>6</sup> For the same reason unoccupied houses (*e.g.*, a house in the

<sup>1</sup> *Hodges on Railways*, 437 *et seq.* See *Warwick Canal Co. v. Birmingham Canal Co.*, 5 Ex. D. 1; *South Eastern Rail. Co. v. R. C.*, 5 Q. B. D. 217; 6 Q. B. D. 586; *Great Western Rail. Co. v. R. C.*, 7 Q. B. D. 182.

<sup>2</sup> Stat. 42 & 43 Vict. c. 56.

<sup>3</sup> Steph. Comm. ii. 731.

<sup>4</sup> Stephen's Crim. Dig. 171; Russell on Crimes, i. 858; stats. 24 & 25 Vict. c. 100, s. 48; 27 & 28 Vict. c. 47. As to the punishment for abuse of children, see the same statutes.

<sup>5</sup> Castle on Rating, 120; stat. 3 & 4 Vict. c. 89. As to the rating of plantations, mines and rights of sporting, see the Rating Act, 1874.

<sup>6</sup> See stat. 5 & 6 Will. 4, c. 96, which directs the rateable value of hereditaments rated for the relief of the poor to be calculated upon an estimate of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes and tithe commutation rent charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent: Castle, 357. Special provisions as to rating the owners instead of the occupiers of property in certain cases, and as to rating unoccupied property, are contained in the Public Health Act, 1875, s. 211.

custody of a care-taker) and unfinished buildings are not rateable. On the other hand, the fact that the occupation of property is in effect unprofitable, because the occupier has a heavy rent or other outgoings to bear, or because the income arising from the occupation is devoted to charitable or public purposes, does not affect his liability to be rated.<sup>1</sup>

§ 2. The principal kinds of rates are:<sup>2</sup> (i) borough rates, as to which see *Borough*, § 4; there are also special rates levied in some boroughs, e. g., watch rates for defraying police expenses;<sup>3</sup> (ii) county rates, assessed by the justices of the peace for the respective counties of England, to defray certain expenses authorized by various acts of parliament from 22 Hen. VIII.; the principal purposes for which the county rate is levied are the repair of bridges and the building and repairing of prisons;<sup>4</sup> (iii) county police rates;<sup>5</sup> (iv) county lunatic asylum rates;<sup>6</sup> (v) poor rates, as to which see *Guardians of the Poor*; *Overseers*; *Poor Laws*; (vi) highway rates, for the repairing and widening of highways (*q. v.*); (vii) rates levied by sanitary authorities, of which the chief are—(a) the general district rate, leviable to defray the ordinary expenses of an urban authority in the execution of the Public Health Acts, which the district fund is insufficient to meet;<sup>7</sup> (b) private improvement rates, levied on the occupiers of particular premises in respect of works executed by an urban authority for the benefit of such premises;<sup>8</sup> (c) highway rates, levied by an urban authority as surveyor of highways within their district;<sup>9</sup> (d) water rates; levied by an urban or rural authority.<sup>10</sup> (viii) The vestries and district boards charged with the execution of the Metropolis Management Act, 1855, and the subsequent acts, are authorized to require the overseers of the poor of the respective parishes within the metropolis to levy rates for defraying their expenses, namely, a sewers rate, a lighting rate, and a general rate.<sup>11</sup> The Metropolitan Board of Works are authorized to levy a consolidated rate for defraying their expenses in the execution of the acts, and for paying interest on and redeeming the moneys borrowed by them. The rate is levied by precept on the vestries and local boards, who add the amount to their own expenses.<sup>12</sup> (ix) The expenses of the metropolitan police are defrayed partly out of a police rate, and partly out of grants by the Treasury.<sup>13</sup> (x) The stat. 3 & 4 Will. 4, c. 90, authorizes the levying of rates for lighting and watching any parish in which the act is adopted; “watching” means the employment of police or constables. (xi) There are also various rates levied under acts of local application, such as improvement rates, sewers and drainage rates, levied

Borough.

County.

Poor.

Highway.

Sanitary.

Metropolitan rates.

Lighting and watching.

Local improvements.

<sup>1</sup> Castle, 27, 44; *Jones v. Mersey Docks*, 11 H. L. 443.

<sup>2</sup> A full list will be found in the Report of the Select Committee on Local Taxation, 1870.

<sup>3</sup> Mun. Corp. Act, 1835, s. 92; 2 & 3 Vict. c. 28; 3 & 4 Vict. c. 28; 8 & 9 Vict. c. 110.

<sup>4</sup> Stats. 12 Geo. 2, c. 29; 15 & 16 Vict. c. 81.

<sup>5</sup> Stats. 3 & 4 Vict. c. 88; 7 & 8 Vict. c. 33.

<sup>6</sup> Stat. 16 & 17 Vict. c. 97, s. 46.

<sup>7</sup> Public Health Act, 1875, ss. 207 *et seq.*

<sup>8</sup> *Ibid.* ss. 213 *et seq.*; compare ss. 23, 150.

<sup>9</sup> *Ibid.* ss. 144, 216.

<sup>10</sup> *Ibid.* s. 56; Public Health (Water) Act, 1878.

<sup>11</sup> M. L. M. Act, 1855, ss. 158 *et seq.*; Act of 1862, s. 5.

<sup>12</sup> Metr. B. of Works (Loans) Act, 1869.

<sup>13</sup> Stat. 10 Geo. 4, c. 44; Police Rate Act, 1868; Police (Expenses) Act, 1875.

by improvement commissioners and other bodies.<sup>1</sup> (See *Towns Improvement*.)

§ 3. Rates are sometimes divided into (a) rates of primary districts, such as those levied in parishes; and (b) rates of aggregate districts, such as counties, boroughs, &c.; also into (c) rates which are levied and expended by the same authority, such as poor rates; and (d) rates levied by one authority and expended by another, such as the metropolitan rates mentioned above; the latter are sometimes called precept rates.<sup>2</sup>

**RATIFICATION** is where a person adopts a contract or other transaction which is not binding on him, because it was entered into by an unauthorized agent,<sup>3</sup> or the like. Thus, if A. enters into a contract on behalf of B., without having B.'s authority to do so, B. may either repudiate or adopt the contract; if he adopts it he is said to ratify it, and it then takes effect as if it had been originally made with his authority.<sup>4</sup> It is sometimes a question whether a person's act amounts to a ratification, or is a fresh contract altogether. A fresh contract between the same parties always requires a consideration to support it, while in the case of a ratification there may or may not be a new consideration.<sup>5</sup> As to ratification by infants, see *Infant*.

§ 2. It follows from the nature of the thing that ratification, in the proper sense of the word, cannot take place where the party who professes to ratify a transaction was not in existence when it took place; as where a person enters into a contract as promoter or trustee on behalf of a company which is to be subsequently formed, and the company when formed adopts it. This is making a new contract, and not ratifying an existing one.<sup>6</sup>

Torts.

§ 3. The doctrine of ratification is also applied to torts: as where a person ratifies a trespass.<sup>7</sup>

See *Omnis Ratihabitio retrotrahitur, &c.*; *Adoption*; *Repudiation*; *Authority*; *Ultra Vires*.

**RATIONE TENURÆ** = "by reason or in respect of his tenure." Thus, when a person is liable to repair a highway by reason of his having the tenure or occupation of the adjoining lands, his obligation is said to be *ratione tenuræ*.<sup>8</sup>

**RATTENING** is where the members of a trade union cause the tools, clothes or other property of a workman to be taken away or hidden; in order to compel him to join the union or cease working. It is an offence punishable by fine or imprisonment.<sup>9</sup> (See *Molestation*.)

<sup>1</sup> Towns Improvement Clauses Act, 1847, ss. 156 *et seq.*; stat. 23 & 24 Vict. c. 30.

<sup>2</sup> Report on Local Taxation, x. *et seq.*

<sup>3</sup> Leake on Contracts, 268.

<sup>4</sup> *Bolton v. Hillersden*, 1 Ld. Raym. 224.

<sup>5</sup> *Ditcham v. Worrall*, 5 C. P. D. 410.

<sup>6</sup> *Melhado v. Porto Alegre, &c. Co.*, L. R., 9 C. P. 503; *In re Empress Engineering Co.*, 16 Ch. D. 125.

<sup>7</sup> *Hull v. Pickersgill*, 1 Brod. & B. 282.

<sup>8</sup> Smith's L. C. ii. 157 *et seq.*

<sup>9</sup> 38 & 39 Vict. c. 86, s. 7.

**RAVISHMENT** is the old name for the tortious act of taking away a wife from her husband, or a ward from his guardian; one of the remedies was by writ or action of ravishment, called in the case of a ward, ravishment de gard.<sup>1</sup>

**REAL.** See *Action*, § 22; *Covenant*, § 3; *Evidence*, § 4; *Personal*; *In Personam*; *In Rem*; *Real Property*; *Representative*; *Security*.

**REAL COMPOSITION** is an agreement made between the owner of land and the incumbent of a parish, with the consent of the ordinary and the patron of the living, that the land shall for the future be discharged from payment of tithes, by reason of some land or other real recompense given in lieu and satisfaction thereof. But since the stat. 13 Eliz. c. 10, no real composition can be made for any longer term than three lives or twenty-one years, and such compositions are now rarely heard of.<sup>2</sup> (See *Tithes*.)

**REAL PROPERTY** is property which, on the death of the owner intestate, passes to his heir. Real property is commonly divided into lands, tenements, and hereditaments. (See those titles.)

**REALTY** is the same as real property. In the old books, an "action in the realty" is a real action.<sup>3</sup>

**RE-ASSURANCE.** See *Re-insurance*.

**REBATE** is a deduction made from a payment. In bankruptcy a creditor who has proved for a debt payable in futuro does not receive the full amount of the dividends with the other creditors, but must deduct from each dividend a rebate of interest at five per cent. in respect of the period from the declaration of the dividend to the time when the debt becomes payable.<sup>4</sup>

**REBUT.**—§ 1. To rebut is to defeat or take away the effect of Presumption. something. Thus, when a plaintiff in an action produces evidence which raises a presumption of the defendant's liability, and the defendant adduces evidence which shows that the presumption is ill-founded, he is said to rebut it (see *Presumption*). § 2. So on a trial Evidence. when a fresh case, that is, a case not merely answering the case of the party who began, is set up by the responding party, and evidence is adduced in support of such fresh case, the party who began may give evidence to rebut it, called rebutting evidence, or proof of a rebutting case.<sup>5</sup>

**REBUTTER.**—§ 1. Under the old practice, both at common law and Pleading.

<sup>1</sup> Co. Litt. 136 b; Bl. Comm. iii. 139  
*et seq.*

<sup>2</sup> Bl. Comm. ii. 28; see stat. 2 & 3  
Will. 4, c. 100, s. 2, making valid all com-

positions confirmed in a certain manner.

<sup>3</sup> Litt. § 315.

<sup>4</sup> Bankruptcy Rules (1870), 77.

<sup>5</sup> Best on Evidence, 785.

in chancery, the rebutter was the pleading which followed the surrejoinder.<sup>1</sup> It was rare at common law, and had long been obsolete in chancery; but the name is still applicable to the corresponding pleading under the new system. (See *Pleading*, § 6.)

§ 2. In the old law of real property to rebut was to repel or bar a claim. Thus when a person was sued for land which had been warranted to him by the plaintiff or his ancestor, and he pleaded the warranty as a defence to the action, this was called a rebutter.<sup>2</sup>

**RECAPTION** is a species of remedy by act of the party which may be resorted to when a man has deprived another of his goods, or wrongfully detains his wife, child or servant: then the person injured may lawfully claim and retake them, so it be not in a riotous manner, or attended with a breach of the peace.<sup>3</sup> (See *Writ of Recaption*.)

**RECAPTURE.**—By the doctrine of postliminium (*q. v.*) property which has been captured by an enemy and recaptured within twenty-four hours or before being taken to a place of safety, reverts to its original owner; the rule, however, varies with different nations. By the Naval Prize Act, 1864, property captured at sea and recaptured at any time afterwards, is to be restored to the owner on his paying to the recaptor prize-salvage at a rate to be fixed by the Prize Court.<sup>4</sup>

**RECEIPT** generally means an acknowledgment of the receipt of money paid in discharge of a debt (see *Accountable Receipt*). A receipt under hand alone is in general only *primâ facie* evidence, but a receipt under seal amounts to an estoppel, and is conclusive.<sup>5</sup> The forgery of a receipt is felony, punishable with penal servitude for life (*maximum*).<sup>6</sup>

§ 2. Formerly, in certain real and mixed actions, if a man seised of land in right of his wife was sued in respect of the land and made default, the wife might be received or admitted as a feme sole to defend her right. This was called receipt or *defensio juris*.<sup>7</sup>

Property in  
litigation.

**RECEIVER.**—§ 1. In an action in the High Court, a receiver is a person appointed by the Court, on an interlocutory application, to receive the rents and profits of real estate, or to get in and collect personal property affected by the proceedings, where it appears desirable that he should do so in lieu of the person then having the control of the property, or where the latter is incompetent to do so, as in the case of an infant. The object is to protect the property until the rights of the parties have been ascertained; thus, in an action for the dissolution of a partnership, a receiver is frequently appointed to get in or realize the partnership assets. A receiver is an officer of the Court, and generally has to give security for the due performance of his duties.<sup>8</sup> (See *Manager*.)

Equitable  
execution.

§ 2. A receiver is also sometimes appointed to enforce a judgment when the property of the defendant is such that ordinary execution by *fi. fa.*, *elegit*, or the like, is inapplicable. As to this, see *Execution*, § 5.

<sup>1</sup> Steph. Pl. (5), 64; Mitford, Pl. 321.

<sup>2</sup> Co. Litt. 365 a; Termes de la Ley, s. v.

<sup>3</sup> Steph. Comm. iii. 242.

<sup>4</sup> Manning's Law of Nations, 190 *et seq.*

<sup>5</sup> Best on Evidence, 521.

<sup>6</sup> Steph. Crim. Dig. 276; stat. 24 & 25 Vict. c. 98, s. 23.

<sup>7</sup> Co. Litt. 352 b *et seq.*

<sup>8</sup> Daniell, Ch. Pr. 1563, 1575; Jud. Act, 1873, s. 25, § 8; Rules of Court, lii. 4.



§ 3. In bankruptcy, a receiver of the property of the debtor may be appointed by the Court at any time after the presentation of the petition for adjudication, liquidation, or composition. A receiver may also be appointed by the creditors themselves in an arrangement by liquidation or composition.<sup>1</sup>

Lunacy.

Agreement of parties.

§ 4. A receiver may be appointed in lunacy proceedings.<sup>2</sup>

§ 5. Sometimes provision is made by agreement for the appointment of a receiver in an extra-judicial matter: thus, a mortgage deed may contain an appointment of, or a power for the mortgagee to appoint, a person to be receiver or receiver and manager of the mortgaged property, in order to secure to the mortgagee the payment of his interest out of the rents and profits.<sup>3</sup> A debenture may contain a similar provision. (See *Debenture*.)

**RECEIVERS OF WRECK** are persons appointed by the Board of Trade. The duties of a receiver of wreck are to take steps for the preservation of any vessel stranded or in distress within his district; to receive and take possession of all articles washed on shore from the vessel; to use force for the suppression of plunder and disorder; to institute an examination on oath with respect to the vessel; and, if necessary, to sell the vessel, cargo or wreck.<sup>4</sup> (See *Wreck*.)

**RECEIVING STOLEN GOODS** is the short name usually given to the offence of receiving any property with the knowledge that it has been feloniously or unlawfully stolen, taken, extorted, obtained, embezzled or disposed of. The crime is a felony or misdemeanor according as the original stealing, &c. was a felony<sup>5</sup> or misdemeanor,<sup>6</sup> and is punishable with penal servitude or imprisonment for various terms, the maximum being fourteen years.<sup>7</sup>

**RECENT POSSESSION.** See *Possession*, § 4.

**RECIPROCITY** = mutuality (*q. v.*).<sup>8</sup> The term is used in international law to denote the relation existing between two states when each of them gives the subjects of the other certain privileges, on condition that its own subjects shall enjoy similar privileges at the hands of the latter state.

**RECITALS** in a deed, agreement or other formal instrument are statements introduced to explain or lead up to the operative part of the

<sup>1</sup> Robson's Bankr. 335, 653; Bankr. Act, 1869, s. 13; Bankr. Rules (1870), 260.

<sup>2</sup> Pope on Lunacy, 124.

<sup>3</sup> Fisher on Mortgage, 375; Davids. Conv. ii. 648: as to the statutory power, see 23 & 24 Vict. c. 145, s. 11. For the old sense of receiver as a person bound to account, see Co. Litt. 172 a.

<sup>4</sup> Merchant Shipping Act, 1854, ss. 439 *et seq.*

<sup>5</sup> Either at common law or under the statute 24 & 25 Vict. c. 96.

<sup>6</sup> Under the same statute.

<sup>7</sup> Stat. 24 & 25 Vict. c. 96, ss. 91 *et seq.*; Russell on Crimes, ii. 463; Stephen's Crim. Dig. 264.

<sup>8</sup> *Arnold v. Mayor of Poole*, 4 M. & G. 860.

**Narrative :** instrument. They are generally divided into narrative recitals, which set forth the facts on which the instrument is based ; and introductory recitals, which explain the motive for the operative part. Thus, in an assignment of leasehold property, the deed commences by reciting the lease, that is, by stating that by an indenture of such a date made between such and such parties the property was demised to the lessee for a certain term : this is a narrative recital ; the deed then recites that the assignee has agreed with the assignor (the original lessee) for the purchase of the property for the residue of the term : this is an introductory recital, being followed immediately by the operative part or assignment.<sup>1</sup> A formal recital always commences with the word "whereas."

§ 2. A recital is evidence as against the parties to the instrument and those claiming under them ; and in an action on the instrument itself (though not on a collateral matter) the recitals operate as an estoppel (*q.v.*).<sup>2</sup> By the Vendors and Purchasers Act, 1874, recitals in deeds and other instruments twenty years old are made *primâ facie* evidence of the truth of the facts, matters and descriptions therein recited.<sup>3</sup>

**RECOGNITORS** of an assise were the jurors in an assise of novel disseisin or the like.<sup>4</sup> (See *Assise*, § 2.)

At common  
law.

**RECOGNIZANCE.**—I. § 1. At common law a recognizance is an obligation or bond acknowledged before some court of record or magistrate duly authorized, or before special commissioners appointed by the Queen, and afterwards entered of record, that is, enrolled in some court of record (*q.v.*). The person acknowledging it, that is, the person bound by it, is called the conusor (or cognisor), and the person in whose favour it is made, the conusee (or cognisee). The object of a recognizance is to secure the performance of some act by the conusor, such as to appear at the assizes, to keep the peace, to pay a debt, to pay costs, &c.<sup>5</sup> A receiver appointed by the Chancery Division is sometimes ordered to enter into a recognizance with sureties to secure the payment of the moneys received by him, the cognisee generally being the Master of the Rolls ; the recognizance is enrolled.<sup>6</sup> (See *Enrolment* ; *Petty Bag Office* ; *Vacate*.)

§ 2. Formerly, a recognizance bound the lands of the conusor, but this is no longer so.<sup>7</sup> (See *Judgment*, § 16.) A recognizance, however, if enrolled, still has priority over the ordinary debts of the conusor on his death<sup>8</sup> (see *Administration*, § 2) ; and there are cases in which execution may be issued on a recognizance without any preliminary proceeding, namely, if no extrinsic evidence is required to show that the amount is due (*e.g.*, where the recognizance is a simple acknowledgment of a debt).<sup>9</sup> The most usual way of enforcing a recognizance is by *scire facias* (*q.v.*, and see *Estreat*).

<sup>1</sup> Davids. Conv. i. 44 *et seq.* ; Shepp. Touch. 76.

<sup>2</sup> Davids. Conv. i. 60 ; *Ex parte Morgan*, 2 Ch. D. 72.

<sup>3</sup> See *Bolton v. London School Board*, 7 Ch. D. 766.

<sup>4</sup> Litt. § 366 ; Co. Litt. 227 b.

<sup>5</sup> Bl. Comm. ii. 341 ; Wms. Saund. ii. 197.

<sup>6</sup> Daniell, Ch. Pr. ii. 1606 ; Chitty, Pr. 1757.

<sup>7</sup> Stat. 27 & 28 Vict. c. 112 ; Williams' R. P. 90.

<sup>8</sup> Watson's Comp. Eq. 36.

<sup>9</sup> Foster, Sci. Fa. 295 ; Wms. Saund. ii. 197.

II. § 3. Recognizances by statute are those created under 23 Hen. 8, Statutory. c. 6, and called recognizances in the nature of statute staples, because they have the same formalities and effects as statute staples, except that they are acknowledged before judges instead of mayors.<sup>1</sup> They are obsolete. (See *Statute Merchant and Staple*.)

III. § 4. In criminal law, a person who has been found guilty of an offence, may in certain cases be required to enter into a recognizance by which he binds himself to keep the peace for a certain period.<sup>2</sup> § 5. As to recognizances given in Courts of summary jurisdiction, and the mode of their enforcement, see the Summary Jurisdiction Act, 1879, s. 9. Criminal proceedings.

**RECONSTRUCTION OF COMPANY.**—A company in voluntary liquidation may be reconstructed under s. 161 of the Companies Act, 1862, by a transfer of its undertaking to another company. A company in liquidation, whether voluntary, compulsory, or under supervision, may be reconstructed by arrangement with its creditors under the Joint Stock Companies Arrangement Act, 1870.<sup>3</sup>

**RECONTINUANCE** seems to be used to signify that a person has recovered an incorporeal hereditament of which he had been wrongfully deprived. Thus, "A. is disseised of a mannor, whereunto an advowson is appendant, an estranger [*i. e.*, neither A. nor the disseisor,] usurpes to the advowson, if the disseisee [A.] enter into the mannor, the advowson is recontinued again, which was severed by the usurpation. . . . And so note a diversitie between a recontinuance and a remitter; for a remitter cannot be properly, unless there be two titles; but a recontinuance may be where there is but one."<sup>4</sup> (See *Remitter; Discontinuance*.)

**RECONVERSION** is that imaginary process by which a prior constructive conversion is annulled and the converted property restored in contemplation of law to its original state. Thus, if real estate is devised to A., upon trust to sell and to pay the proceeds to B., the realty, by virtue of this absolute trust, is constructively converted into personal estate; but if B., before the property is sold, elects to take it as land, it is then said to be reconverted, and A. is bound to convey the land to him accordingly.<sup>5</sup> This is called reconversion by act of the party. The right of reconversion cannot be exercised to the prejudice of other persons (*e. g.*, joint owners or remaindermen). Reconversion by operation of law is where the property originally directed to be converted comes into the possession of a person absolutely entitled to dispose of it, and is left by him in its original condition, without any declaration of his intention regarding it.<sup>6</sup> (See *Result*, § 3.)

<sup>1</sup> Bl. Comm. ii. 342; Wms. Saund. ii. 218.

<sup>2</sup> Criminal Consolidation Acts, 1861; Russell on Crimes, 81.

<sup>3</sup> See Lindley, Partn. 1303; *Re Wedgwood Coal and Iron Co.*, 6 Ch. D. 627.

<sup>4</sup> Co. Litt. 363 b.

<sup>5</sup> Haynes's Eq. 390; Snell's Eq. 160.

<sup>6</sup> Snell, 166.

**RECONVEYANCE** takes place where a mortgage debt is paid off, and the mortgaged property is conveyed again to the mortgagor or his representatives free from the mortgage debt. The operative words used in a reconveyance are the same as those which would be used if it were an ordinary conveyance between the parties, the habendum expressing that the property is discharged from the debt. The reconveyance is usually endorsed on the mortgage.<sup>1</sup>

**RECORD.**—I. § 1. Records “are the memorials of the legislature, and of the king’s Courts of justice, and are authentic beyond all matter of contradiction.”<sup>2</sup> “But legally records are restrained to the rolles of such [courts] only as are courts of record, and not the rolles of inferiour, nor of any other courts which proceed not *secundum legem et consuetudinem Angliæ*. And the rolles being the records or memorialls of the judges of the courts of record, import in them such incontrollable credit and veritie, as they admit no averment, plea, or prooffe to the contrarie. And if such a record be alleaged, and it be pleaded that there is no such record, it shall be tried only by it selfe.”<sup>3</sup> (See *Nul tiel Record; Res Judicata; Trial.*)

§ 2. Records are of the following principal kinds:—(i) acts of parliament, attainders and other parliamentary proceedings; (ii) judgments, fines, inquisitions, extents, returns to writs of mandamus, habeas corpus, &c., and other proceedings of Courts of Record; (iii) proceedings on the revenue side of the Exchequer, recognizances, crown grants, letters patent, and other instruments of an extrajudicial nature which have been enrolled.<sup>4</sup>

Stealing, &c.  
records.

§ 3. Stealing, injuring, forging or falsifying a record is felony, punishable by imprisonment or penal servitude varying from two to seven years.<sup>5</sup>

Nisi prius  
record.

II. § 4. Under the old common law practice, the nisi prius record was a copy of the issue (*q. v.*, § 8) as delivered in the action, engrossed on parchment. It was the official statement of the writ and pleadings for the use of the judge at nisi prius; to it were annexed the particulars of demand and set-off, if any (see *Particulars*); and on it were subsequently entered the postea (*q. v.*) and judgment. The record was delivered to the proper officer of the Court (generally the associate), which was commonly called entering the record, and it was retained by him until the case was disposed of, unless the plaintiff was not prepared to proceed with the trial, in which case he could withdraw the record, so as to prevent the trial from going on.<sup>6</sup> Now, in lieu of making up the record, the party entering the action for trial delivers to the officer two copies of the pleadings, one of which is for the use of the judge,<sup>7</sup> and is sometimes referred to as the record.<sup>8</sup> The practice of withdrawing the record has

<sup>1</sup> Davids. Conv. ii. 824.

<sup>2</sup> Gilb. Ev. 5.

<sup>3</sup> Co. Litt. 260 a. See Best on Evidence, 735.

<sup>4</sup> See the Report of the Committee on the Cottonian Library, 1732.

<sup>5</sup> Stats. 24 & 25 Vict. cc. 96, 98; 1 & 2 Vict. c. 94; 14 & 15 Vict. c. 99; Steph. Comm. iv. 223.

<sup>6</sup> Chitty, Pr. 361, 381.

<sup>7</sup> Rules of Court, xxxvi. 17, 17 a.

<sup>8</sup> See Judicature Act, 1875, s. 22.

been abolished; but the Court may order the action to be discontinued, on terms.<sup>1</sup>

**RECORD AND WRIT CLERKS** were officers of the Court of Chancery and of the Chancery Division of the High Court, having the management of the office where bills and answers (under the old practice), affidavits, &c. were filed and writs issued.<sup>2</sup> The existing Record and Writ Clerks were converted into Masters of the Supreme Court by the Judicature (Officers) Act, 1879, and their office abolished. (See *Masters*, § 1.)

**RECORDARI FACIAS LOQUELAM** was a writ formerly used to remove a suit from an inferior court not of record into one of the superior Courts of common law: e.g., a suit of replevin in the sheriff's County Court.<sup>3</sup> It seems to be obsolete. (See *Certiorari*.)

**RECORDER** of a borough is a barrister appointed by the crown under the Municipal Corporations Act to act as a justice of the peace in a borough having a separate Court of Quarter Sessions; he receives a salary, requires no property qualification, and takes precedence after the mayor. By virtue of his office he is in ordinary cases judge of any Court of Record existing within the borough.<sup>4</sup> (See *Borough Courts*.) § 2. There are also recorders in cities and boroughs not subject to the Municipal Corporations Acts (e.g., the city of London), whose office has existed from time immemorial, and who are appointed by the respective corporations.<sup>5</sup> (See *City of London Court*; *Mayor's Court of London*; *Commission*, §§ 10, 11.)

**RECOVERY**, in its general sense, is where a person obtains something which has been wrongfully taken or withheld from him, or to which he is otherwise entitled. (See *Remedy*.)

I. § 2. Proceedings for the recovery of land from a person wrongfully in possession of it, are taken either in the High Court of Justice, or in the County Courts, or before justices. Recovery of land.

(i) In the High Court the proceedings are of two kinds. § 3. The ordinary action for the recovery of land follows the same course as any other action, except in some cases as regards service of the writ (see *Service*) and appearance<sup>6</sup> (*q. v.*, see also *Joinder*, § 1). It is a substitute for the old action of ejectment (*q. v.*). § 4. An action for the recovery of land under the Common Law Procedure Act, 1852 (sects. 213 *et seq.*), may be brought where there is a contract of tenancy in writing, and the tenant holds over after the determination of the tenancy. The chief peculiarity of this action is that the defendant In High Court.

<sup>1</sup> Rules of Court, xxiii. 1; Archbold, Pr. 350.

<sup>2</sup> Second Report Legal Dep. Comm. 43; Daniell's Ch. Pr. 1712.

<sup>3</sup> Fitz. N. B. 70.

<sup>4</sup> Pritchard's Q. S. 15; stat. 5 & 6 Will. 4, c. 76, ss. 103, 118.

<sup>5</sup> Pulling's Laws of London, 9, 113.

<sup>6</sup> Rules of Court, ix. 8; xii. 18 *et seq.*; xiii. 7; xvii. 2; xlii. 3; xlviii.; Woodfall's L. & T. 750.

may be ordered to give bail by recognizance with two sureties, in default of which judgment is given for the plaintiff.<sup>1</sup>

In County  
Courts.

(ii) § 5. An action may be brought in a County Court by a landlord against his tenant for the recovery of land, the yearly value or rent of which does not exceed 50*l.*, where the tenant holds over, unless there is a dispute as to title.<sup>2</sup> As to ejectment in the County Courts, see *Ejectment*, § 2.

Before  
justices.

(iii) § 6. A summary mode of recovering the possession of land held for a term not exceeding seven years, and at a rent not exceeding 20*l.*, where the tenant holds over, is given by the stat. 1 & 2 Vict. c. 74, which empowers justices in petty sessions to grant a warrant for the eviction of the tenant.<sup>3</sup> A similar remedy is given in the case of premises held at a rack rent which have been deserted by the tenant.<sup>4</sup> (See *Deserted Premises*.)

Common  
recovery.

II. § 7. A recovery or common recovery was a mode of barring estates tail in use down to the year 1833. It was a judgment in a fictitious suit in the nature of a real action, brought by a friendly plaintiff against the tenant in tail, who, on being sued, vouched (that is, called upon) some person to defend the action, on the ground that he had granted the estate tail to the tenant in tail with warranty of title. (See *Warranty*; *Vouch*.) This person (the vouchee) was accordingly called on, and, being a party to the scheme, admitted the imaginary grant and warranty, and then allowed judgment to go against him by default; whereupon judgment was given for the plaintiff to recover the lands from the tenant in tail, and the tenant in tail had judgment against the vouchee for lands of equal value. The vouchee being a man of straw (generally the crier of the Court) the tenant in tail recovered no such lands, but his own land went to the plaintiff under the judgment, freed from the estate tail and the remainders and reversions expectant on it, and then the plaintiff conveyed it back to him in fee simple.<sup>5</sup> In some manors estates tail in copyholds were barred by customary recoveries.<sup>6</sup> Recoveries were also used for other purposes besides barring estates tail.<sup>7</sup> They were abolished by the Fines and Recoveries Act (*q. v.*), which substitutes a simpler disentailing assurance. (Compare *Fine*.)

**RECREATION.**—As to easements of recreation, see *Easement*, p. 303, note. Provision is made by the Inclosure Acts for the appropriation of commons, or parts of commons, for the purposes of exercise and recreation for the inhabitants of the neighbourhood<sup>8</sup> (see *Inclosure*); and by the Recreation Grounds Act, 1859, stat. 23 & 24 Vict. c. 30; 26 Vict. c. 13, and 35 Vict. c. 13, provision is made for the formation and management of recreation grounds in and near populous places.

Rectification  
of instrument.

**RECTIFICATION—RECTIFY.**—§ 1. To rectify is to correct or define something which is erroneous or doubtful. Thus, where the parties to an agreement have determined to embody its terms in the appropriate and conclusive form, but the instrument meant to effect this purpose

<sup>1</sup> Woodfall, 743.

<sup>2</sup> *Ibid.* 704; Follock's C. C. Pr. 277; County Courts Act, 1856.

<sup>3</sup> Woodfall, 783, where other summary modes of procedure are referred to.

<sup>4</sup> Stats. 11 Geo. 2, c. 19; 57 Geo. 3, c. 52; Woodfall, 789.

<sup>5</sup> Williams, R. P. 45; Williams on Seisin, 157; Bl. Comm. ii. 357; Steph. Comm. i. 568, where the proceedings are described in detail.

<sup>6</sup> Williams, 362.

<sup>7</sup> Shelford, R. P. Stat. 303.

<sup>8</sup> Inclosure Act, 1875, s. 30; Commons Act, 1876.

(*e.g.*, a conveyance, settlement, &c.) is by mutual mistake so framed as not to express the real intention of the parties, an action may be brought in the Chancery Division of the High Court to have it rectified.<sup>1</sup> The rectification is generally effected by endorsing on the instrument a copy of the judgment or order, declaring in what respects the instrument requires to be rectified.<sup>2</sup> (See *Mistake*; *Rescission*.)

§ 2. An action to rectify or ascertain the boundaries of two adjoining pieces of land may be brought in the Chancery Division of the High Court. The Court formerly directed a commission to issue (similar to a commission in a partition suit),<sup>3</sup> but at the present day it would probably direct an inquiry in chambers. (See *Inquiry*, § 2.) The Inclosure Commissioners have powers to settle confused boundaries in certain cases.<sup>4</sup>

§ 3. The rectification of a register is the process by which a person whose name is wrongly entered on (or omitted from) a register may compel the keeper of the register to remove (or enter) his name. The person aggrieved applies (generally by summons, motion, or other summary mode) to the Court having jurisdiction, and the Court makes an order directing the rectification of the register.<sup>5</sup> (See *Mandamus*.)

**RECTOR** is an officer of the church, having a benefice with cure of souls, that is, spiritual charge of his parishioners, with the right and duty of celebrating services and sacraments in the church. He obtains his benefice by ordination, presentation, institution, and induction (*q.v.*). He has an exclusive title to all the emoluments of the living, that is, the parsonage house and glebe, the tithes, &c.<sup>6</sup> An impropriator (*q.v.*) is sometimes called a lay rector. (See *Advowson*; *Benefice*; *Proprietary Chapel*.)

**REDDENDO SINGULA SINGULIS**.—A clause in an instrument is said to be read *reddendo singula singulis* ("giving each to each") when one of two provisions in one sentence is appropriated to one of two objects in another sentence, and the other provision is similarly appropriated to the other object. Thus, if a testator makes a will in these terms: "I devise and bequeath all my real and personal property to A.," it will be construed *reddendo singula singulis* by applying "devise" to "real property," and "bequeath" to "personal property."<sup>7</sup>

**REDDENDUM** (= "that which is to be paid or rendered") is that clause in a lease which specifies the amount of the rent and the time at which it is payable.<sup>8</sup> It begins with the words "yielding and paying."

<sup>1</sup> Pollock on Contract, 421, 427; *Mackenzie v. Coulson*, L. R., 8 Eq. 386; Snell's Eq. 354; White & Tudor's L. C. i. 36; Jud. Act, 1873, s. 34.

<sup>2</sup> Seton on Decrees, 1231; *White v. White*, L. R., 15 Eq. 247.

<sup>3</sup> Spence, Equity, i. 655; Daniell, Ch. Pr. 1033.

<sup>4</sup> Inclosure Acts, 1845-6; Hunt on Boundaries, 193.

<sup>5</sup> See the Companies Act, 1862, s. 35; Lindley on Partn. 171; Land Transfer Act, 1875, s. 96.

<sup>6</sup> Bl. Comm. i. 384 *et seq.*

<sup>7</sup> See an example in *Thornton v. Thornton*, L. R., 20 Eq. 599.

<sup>8</sup> Elphinstone, Conv. 236.

**REDEEM—REDEMPTION.**—Redeeming or redemption is where a person having the right to do so pays off a mortgage debt or charge upon property, and thus *buys back* (Latin *redimit*) the property; he thereupon becomes entitled to have it reconveyed to him by the mortgagee or creditor. An action or suit for redemption is one brought to compel the mortgagee to reconvey the property on payment of the debt and interest. (See *Reconveyance*.)

**REDUCTION INTO POSSESSION** is the act of exercising the right conferred by a chose in action, so as to convert it into a chose in possession; thus a debt is reduced into possession by payment.

By husband.

§ 2. The term is chiefly used with reference to the exercise by a husband of the right to reduce into possession choses in action belonging to his wife; and the question whether he has done so is of importance from the rule that his wife's choses in action do not vest in him, as her other chattels do, unless he has reduced them into possession during the coverture. Thus, if C. owes a debt of 500*l.* to A., a feme sole, and A. marries B., B. has the right to receive the 500*l.* from C., or to sue him for it: and if he does so, and obtains payment or judgment against C., he will have reduced the chose in action into possession, and the 500*l.* belongs to him;<sup>1</sup> if, however, B. dies without having enforced his right to the 500*l.*, it survives to A. as if she had never been married. Choses in action falling within this rule include debts, arrears of rent, legacies, residuary personal estate, money in the funds, shares, &c., but not chattels personal which at the time of the marriage were in the possession of third persons.<sup>2</sup> § 3. In order that the act of the husband may operate as a reduction into possession, there must be an intention to that end, coupled with some act giving effect to the intention.<sup>3</sup> As a general rule, any act by which the property is brought into the exclusive control of the husband (in his character of husband, and not as trustee, or executor, &c.), is a reduction into possession.<sup>4</sup> Thus, if a debt due to the wife is received by the husband, or he brings an action for the debt in his sole name and recovers judgment,<sup>5</sup> the debt is reduced into possession. And although an assignment by the husband of a debt due to the wife does not defeat her right by survivorship, unless the assignee reduces it into possession during the husband's lifetime,<sup>6</sup> yet if a bill of exchange or promissory note is made or endorsed to a married woman during coverture, and the husband endorses it to a stranger,<sup>7</sup> or if he causes stock belonging to his wife to be transferred into his sole name, this operates as a reduction into posses-

<sup>1</sup> Leake on Contracts, 633; Watson's Comp. Eq. 329; *Atchison v. Dixon*, L. R., 10 Eq. 589.

<sup>2</sup> Bright on Husband and Wife, 34; Macqueen, H. & W. 47.

<sup>3</sup> Watson's Comp. Eq. 330; Macqueen, 50.

<sup>4</sup> Spence's Equity, ii. 478.

<sup>5</sup> Williams, Executors, 803.

<sup>6</sup> Macqueen, 55; *Prole v. Soady*, L. R., 3 Ch. 220; *Barlow v. Bishop*, 1 East, 432.

<sup>7</sup> *Mason v. Morgan*, 2 Ad. & E. 30; *Scarpellini v. Atcheson*, 7 Q. B. 864; 14 L. J., Q. B. 333; Bright on Husband and Wife, 37.



sion. But if he transfers the stock into the joint names of himself and his wife, this does not operate as a reduction into possession.<sup>1</sup>

**REDUCTION OF CAPITAL.**—By the Companies Act, 1867, ss. 9 *et seq.*, any company limited by shares may pass a special resolution to reduce its capital: it must then add the words “and reduced,” as the last words of its name. The resolution is inoperative until the company has applied to the Court (*e.g.*, to the High Court, by petition presented in the Chancery Division) to confirm the reduction; and the Court, if satisfied that the creditors of the company consent to the reduction, or that their claims have been discharged or secured, may make an order confirming the reduction, and fixing the date until which the company must retain the words “and reduced” as part of its name.<sup>2</sup> The object of the act was to enable a company which had a larger unpaid-up capital than it required, to relieve the shareholders from the liability to calls; but it was not intended to enable a company to write off a part of its paid-up capital which has been lost,<sup>3</sup> or to return to its shareholders part of its paid-up capital which is not required for its business. But this may now be done under the Companies Act, 1877; and under the Companies Act, 1880, accumulated profits may be returned to shareholders in reduction of paid-up capital.

**RE-ENTRY.** See *Right of Entry*; *Proviso*.

**RE-EXAMINATION.** See *Examination*, § 3.

**RE-EXCHANGE** is the damages which the holder of a bill of exchange sustains by its being dishonoured in a foreign country where it was made payable.<sup>4</sup> “The theory of the transaction is this:—A merchant in London indorses a bill for a certain number of Austrian florins, payable at a future date in Vienna. The holder is entitled to receive in Vienna, on the day of the maturity of the bill, a certain number of Austrian florins. Suppose the bill to be dishonoured. The holder is now, by the custom of merchants, entitled to immediate and specific redress—by his own act—in this way. He is entitled, being in Vienna, then and there to raise the exact number of Austrian florins, by drawing and negotiating a cross bill, payable at sight, on his indorser in London, for as much English money as will purchase in Vienna the exact number of Austrian florins, at the rate of exchange on the day of dishonour: and to include in the amount of that bill the interest and necessary expenses of the transaction. This cross bill is called in French the *retraite*. The amount for which it is drawn is called in low-Latin *ricambrium*, in Italian, *ricambio*, and in French and English re-exchange. If the indorser

<sup>1</sup> See *Baker v. Hall*, 12 Ves. 497; *Wall v. Tomlinson*, 16 Ves. 413; *Nicholson v. Drury Buildings Estate Co.*, 7 Ch. D. 48; *Widgery v. Tepper*, 5 Ch. D. 516; Solicitors' Journal, 19 and 26 January, 1878.

<sup>2</sup> Daniell's Ch. Pr. 1978.

<sup>3</sup> *In re Ebbw Vale Co.*, 4 Ch. D. 827.

<sup>4</sup> *Willans v. Ayers*, 3 App. Cas. at p. 146.

pay the cross or re-exchange bill, he has fulfilled his engagement of indemnity. If not, the holder of the original bill may sue him on it, and will be entitled to recover in that action the amount of the *retraite* or cross bill, with the interest and expenses thereon. The amount of the verdict will thus be an exact indemnity for the non-payment of the Austrian florins in Vienna on the day of the maturity of the original bill.

"According to English practice, the *retraite* or re-exchange bill is now seldom drawn, but the right of the holder to draw it is settled by the law merchant of all nations: and it is only by a reference to this supposed bill that the re-exchange, in other words, the true damages in an action on the original bill, can be scientifically understood and computed."<sup>1</sup>

**RE-EXTENT** is a second execution by extent in respect of the same debt.<sup>2</sup> (See *Extent*.)

**REFER—REFERENCE.**—§ 1. To refer a question is to have it decided by a person nominated for the purpose, in lieu of the ordinary procedure by action, trial or other judicial proceedings. The person to whom the question is referred is sometimes called the referee, and the proceedings before him constitute the reference: these proceedings to a great extent resemble those on an ordinary trial, except that they are private; witnesses are examined, and the referee is addressed on behalf of each of the parties, and he makes an award or report containing his decision. (See *Award*; *Report*, § 1.)

Reference to  
arbitration.

References are of various kinds. § 2. When two persons agree to decide a dispute by a reference without any resort to litigation, or when an action is referred by order of the Court under the provisions of the Common Law Procedure Act, 1854, this is generally termed a reference to arbitration (see *Arbitration*): the decision of the arbitrator is on the whole case and is final.<sup>3</sup> § 3. Under the Judicature Acts, when an action has been brought, the Court may refer any question arising in the action to a referee for inquiry and report, and may adopt the referee's report, so as to give it the force of a judgment.<sup>4</sup> (See *Inquiry*.) § 4. The Court also has power, with the consent of the parties, and in certain cases whether they consent or not (*e. g.*, when complicated accounts are involved), to order any question of fact or issue arising in an action to be tried before a referee,<sup>5</sup> and may even allow the whole action to be tried before a special or official referee, unless one of the parties is entitled, and wishes, to have the action tried before a jury.<sup>6</sup> (See *Trial*.) The difference between references under the Common Law Procedure Act and those under the 56th section of the Judicature Act, 1873, is that in the former the decision of the

<sup>1</sup> Byles on Bills, 412; *In re General South American Co.*, 7 Ch. D. 637. As to the legality of a custom to allow a fixed per-centage in lieu of re-exchange, see *Willans v. Ayers*, 3 App. Ca. 133.

<sup>2</sup> Tidd's Pr. 1087.

<sup>3</sup> *Cruikshank v. Floating Swimming Bath Co.*, 1 C. P. D. 260.

<sup>4</sup> Jud. Act, 1873, s. 56.

<sup>5</sup> *Ibid.* s. 57.

<sup>6</sup> Rules of Court, xxxvi. 2 *et seq.*

arbitrator is final as to the whole question, while in the latter the report of the referee is used by the Court to found its judgment on, but has no conclusive force.<sup>1</sup> Where a trial before a referee is ordered under the 57th section or Order XXXVI., his report is conclusive, like the verdict of a jury, unless it is set aside by the Court or a re-trial is ordered.<sup>2</sup>

§ 5. In the practice of the Chancery Division, questions of detail arising in an action or suit are frequently "referred to chambers," that is, the judge's Chief Clerk is directed to inquire into them and certify the result to the Court. (See *Certificate*, § 4; *Inquiry*, § 2.) Sometimes a petition, instead of being disposed of in Court, is referred to chambers to be dealt with by the judge in private; *e. g.*, a petition for leave to marry a ward of Court.<sup>3</sup>

Reference to chambers.

§ 6. Similarly, in the Queen's Bench Division, when damages have to be assessed under an interlocutory judgment (see *Judgment*, § 5), and the amount is substantially a matter of calculation, the Court may direct it to be ascertained by one of the masters, who has the same powers as if he were acting under a writ of inquiry (*q. v.*). Such a reference (which is cheaper and quicker than a writ of inquiry) is generally ordered when the damages consist of interest, calls on shares, a sum of foreign money, &c.<sup>4</sup>

Reference to master.

§ 7. Under the Lands Clauses Consolidation Act, 1845, the Railways Clauses Consolidation Act, the Agricultural Holdings Act, 1875, and similar acts, questions of compensation are generally settled by a reference as provided by the acts. (See *Compensation*.)

§ 8. Every appeal to the Privy Council is theoretically supposed to be first submitted to the Queen in council, and then referred by her to the Judicial Committee, who report to her their opinion. But now a general Order in Council is made every year as a matter of course, directing all appeals presented within the next twelve months to be referred to the Judicial Committee.<sup>5</sup> Some matters, however, are not heard by the Judicial Committee without a special reference or direction by the Queen in Council: *e. g.*, a question of amotion or suspension from office.<sup>6</sup> (See *Amotion*, § 2.)

Privy Council.

**REFEREE** is a person to whom a question is referred for his decision or opinion (see *Refer*). In ordinary cases, the person to whom a question is referred is called an arbitrator, the name "referee" being generally used in cases under the Judicature Act, 1873 (ss. 56, 57), which empowers the Court to refer any question arising in a cause or matter to an official or special referee for inquiry and report. (See *Refer*, §§ 3 *et seq.*; *Trial*.) An official referee is a paid and permanent officer of the Court: the business referred to the official referees is distributed among them in rotation, unless a reference is directed to a particular referee.<sup>7</sup> A special referee

Official.

Special.

<sup>1</sup> *Cruikshank v. Floating Baths Co.*, 1 C. P. D. 260. As to the difference between the various kinds of references, see *Longman v. East*, 3 C. P. D. 142.

<sup>2</sup> *Jud. Act*, 1873, s. 58; *Rules of Court*, xxxvi. 34.

<sup>3</sup> *Daniell*, Ch. Pr. 1210.

<sup>4</sup> *Archbold's Pr.* 803; C. L. P. Act, 1852, s. 94.

<sup>5</sup> *Macpherson*, Privy C. Pr. 83.

<sup>6</sup> *Ibid.* 62.

<sup>7</sup> *Jud. Act*, 1873, ss. 83, 56 *et seq.*; *Rules of Court*, xxxvi. 29a *et seq.* Order as to fees to be paid to official referees.

is one who is agreed on between the parties and remunerated by them, the amount being determined by the Court.<sup>1</sup>

**Private bills.** § 2. In parliamentary practice, referees on private bills are persons who were originally appointed by the House of Commons to report on engineering questions arising on private bills, but now they only decide questions of locus standi (*q. v.*).<sup>2</sup>

**REFERENCE IN CASE OF NEED.**—When a person draws or endorses a bill of exchange, he sometimes adds the name of a person to whom it may be presented “in case of need,” that is, in case it is dishonoured by the original drawee or acceptor.<sup>3</sup> (See *Acceptance*, § 5.)

**REFERENCE TO RECORD.**—When an action is commenced, an entry of it is made in the cause-book according to the year, the initial letter of the surname of the first plaintiff, and the place of the action in numerical order among those commenced in the same year;<sup>4</sup> *e. g.*, “1876, A. 26;” and all subsequent documents in the action (such as pleadings, and affidavits) bear this mark, which is called the “reference to the record.” (See *Cause Books*; *Record*; *Title*.)

**REFORM.**—To reform an instrument is to rectify it. (See *Rectification*.)

The Reform Act is the stat. 2 Will. 4, c. 45. (See *Election*, note (6).)

**REFORMATORY.** See *Education Acts*.

**REFRESHER** is a fee paid to a counsel on the trial of an action in addition to the fee originally paid to him with his brief. In the practice of the Queen’s Bench Division, a refresher is usually paid to each counsel for every day the case lasts beyond the first day. Under the old chancery practice (where the evidence was seldom taken *vivâ voce*), the fee marked on the brief was made proportionate to the time the case was expected to last, and refreshers were therefore not generally required or allowed on taxation. The present practice is somewhat unsettled, but the correct rule seems to be that where the evidence is taken by affidavit or depositions, the fee on the brief should cover the whole time the case is likely to occupy; and where the evidence is to be given *vivâ voce*, the fee should only cover the first day, and be supplemented by refreshers if the case lasts longer.<sup>5</sup>

**REFRESHING MEMORY.**—A witness is in some cases allowed to refresh his memory while under examination, by referring to a document which is not itself admissible as evidence. Thus, a witness who has made a memorandum of a transaction may in many cases use it to

<sup>1</sup> Jud. Act, 1873, s. 57.

<sup>2</sup> May, Parl. Pr. 755, 761.

<sup>3</sup> Byles on Bills, 261; *In re Leeds Banking Company*, L. R., 1 Eq. 1; stats. 6 & 7 Will. 4, c. 58; 34 Vict. c. 17.

<sup>4</sup> Rules of Court, v. 8, xix. 7.

<sup>5</sup> See *Smith v. Buller*, L. R., 19 Eq. 482; *Harrison v. Wearing*, 11 Ch. D. 206.

refresh his memory.<sup>1</sup> So a tradesman may use his account books to refresh his memory when giving evidence in an action for goods supplied.<sup>2</sup>

**REGALIA** seems to be an abbreviation of *jura regalia*, royal rights, or those rights which a king has by virtue of his prerogative. Hence owners of counties palatine were formerly said to have *jura regalia* in their counties as fully as the king in his palace.<sup>3</sup> (See *County Palatine*.) § 2. Some writers divide the royal prerogative into *majora* and *minora regalia*, the former including the regal dignity and power, the latter the revenue or fiscal prerogatives of the crown.<sup>4</sup>

**REGARDANT** seems originally to have had the same meaning as appendant.<sup>5</sup> In Littleton's time, however, it was only applied to villeins (*q. v.*).<sup>6</sup>

**REGISTER — REGISTRAR — REGISTRATION — REGISTRY.**—§ 1. A register is a book in which statements or memoranda as to certain facts are entered to serve as memorials or evidence. Some registers are public, and others, such as the registers of shareholders, mortgages, &c., required to be kept by joint-stock companies, are private. The place or office where a public register is kept is called a registry, the act or system of registering is called registration, and the officer who keeps the register is called a registrar. Some registrars, however, do not keep registers under that name; for instance, the various registrars of the High Court enter the documents under their control in records or rolls, and not in registers.

The following are the principal public registries and registrars:—

§ 2. The Admiralty Registrar of the Probate, Divorce and Admiralty Division of the High Court performs, in the admiralty business of the division, functions corresponding to those discharged by the Masters of the Queen's Bench Division. (See *Masters*.) He also hears certain motions, and keeps account of all money paid into and out of Court.<sup>7</sup> (See *Registrar and Merchants*.) Admiralty.

§ 3. The registrars of the London Court of Bankruptcy perform duties somewhat similar to those of the Masters of the Queen's Bench Division and the Chancery Chief Clerks; but the Chief Judge may also delegate to them any of the powers vested in him, except the power to commit for contempt; and the registrars are ex officio trustees in the absence of specially-appointed trustees. (See *Trustee*.) In the office of the chief or senior registrar all bankruptcy petitions are filed, writs of execution issued, and other administrative business transacted. He also keeps the roll of solicitors practising in the London Bankruptcy Court.<sup>8</sup> The Registrar of Appeals receives notices of appeal, and appeal deposits, &c.,<sup>9</sup> Bankruptcy.

<sup>1</sup> Best on Evidence, 313.

<sup>2</sup> *Ibid.* 638.

<sup>3</sup> Bl. Comm. i. 117.

<sup>4</sup> *Ibid.*

<sup>5</sup> Co. Litt. 120 b.

<sup>6</sup> Litt. § 184; Britton, 152 a, 185 a. See Coke's attempt to explain the etymology

of the word, Co. Litt. 120 a.

<sup>7</sup> Second Rep. Legal Dep. Comm. (1874), 86.

<sup>8</sup> Robson's Bankr. 38 *et seq.*; Rep. Legal Dep. Comm. 72; Bankr. Rules (1870), 209 *et seq.*

<sup>9</sup> Bankr. Rules (1870), 143, 145.

and attends the Court of Appeal in bankruptcy.<sup>1</sup> (See *Arrangement with Creditors*, § 3.)

**Bills of sale.** § 4. Bills of sale under the Bills of Sale Act, 1878, are registered in the Central Office (*q. v.*), and the Masters of the Supreme Court, acting jointly or severally, are the registrar.<sup>2</sup>

**Births, deaths and marriages.** § 5. Under stats. 6 & 7 Will. 4, cc. 85, 86; 7 Will. 4 & 1 Vict. c. 22; 21 & 22 Vict. c. 25; 37 & 38 Vict. c. 88; 42 & 43 Vict. c. 8, every poor law union or parish is divided into registration districts, and whenever a birth or death occurs in England the duty is imposed on certain persons (namely, the near relatives, the persons present at the birth or death, and the occupier of the house where it occurred) to give particulars of the birth or death to the registrar of the district within a certain time. He also keeps a register of all marriages solemnized in the district. (See *Marriage Acts*, § 2.) Each parish or union has a superintendent registrar. Four times a year copies of the entries in every local register are transmitted to the Registrar-General at Somerset House, where a general register is kept. All these registers are open to public inspection, and certified copies of any entries may be obtained.<sup>3</sup>

**Building and Friendly Societies.** § 6. The Registrar of Building, Friendly, Industrial and Provident Societies is an official whose duty it is to register societies which comply with the acts of parliament relating to them, especially with reference to the provisions contained in their rules. He also has power to award the dissolution of a friendly society and the distribution of its funds.<sup>4</sup>

**Chancery.** § 7. The duties of a Registrar of the Chancery Division are to attend in Court and take note of the judgments or orders there made, and subsequently to draw them up in chambers.<sup>5</sup> (See *Minutes; Pass; Settle.*) He also issues certificates of sale and transfer. (See *Certificate*, § 18.) Conditional appearances are entered with the registrars. (See *Appearance*, § 5.)

**Charges.** § 8. As to the registration of charges under the Land Transfer Act, see *Charge*, § 6. Rent-charges created under the Improvement of Land Acts (*q. v.*) are also registered in the Land Registry.<sup>6</sup>

**County Court.** § 9. County Court Registrars perform the same duties in County Courts as the masters, registrars and chief clerks discharge in the various divisions of the High Court, as well as some others; they issue summonses, &c., attend the sittings of the Courts, tax costs, enter up judgments, &c.<sup>7</sup>

**Designs.** § 10. Designs: see *Registration of Designs*.

**District registries.** § 11. District Registries: see that title.

**Joint stock companies.** § 12. Joint Stock Companies: see *Companies Acts*.

<sup>1</sup> Bankr. Rules (1870), 212.

<sup>2</sup> Bills of Sale Act, 1878, s. 13; Jud. Act, 1879, s. 12.

<sup>3</sup> Steph. Comm. iii. 231 *et seq.* See also the Burial Laws Amendment Act, 1880, s. 10.

<sup>4</sup> See Friendly Societies Act, 1875, ss. 10, 25; F. S. Act, 1876.

<sup>5</sup> Rep. Leg. Dep. Comm. 48; Haynes's Eq. 54.

<sup>6</sup> Improvement of Land Act, 1864, s. 56.

<sup>7</sup> Pollock's County Court Practice, 11.

§ 13. Formerly a judgment for a sum of money bound the land of the defendant, provided the judgment was registered in an office established for that purpose, which now forms part of the Central Office (*q. v.*). Although no judgment entered up after the 29th July, 1864, affects any land until it has been actually delivered in execution, it is still necessary to register, in the name of the debtor, the writ of execution under which the land is delivered. (See *Judgment*, § 16.)<sup>1</sup>

Judgments.

§ 14. Land registries: see that title.

Land registries.  
Lunacy.

§ 15. The Registrar in Lunacy is an officer of the Lord Chancellor and judges having jurisdiction in lunacy; all petitions in lunacy (including petitions for inquiry into the state of mind of alleged lunatics) are filed in his office, and he draws up the orders made thereon, whether on affidavits only or in Court. Reports and certificates made by the Masters in Lunacy are also filed in his office, and the application of small properties to the maintenance of lunatics under the Lunacy Regulation Act, 1862, is entirely conducted in the registrar's office, and not in the Masters', as in ordinary cases.<sup>2</sup>

§ 16. The Privy Council Registrar performs for the Judicial Committee of the Privy Council the same functions as those discharged by the masters of the Queen's Bench Division.<sup>3</sup> (See *Masters*.)

Privy Council.

§ 17. The Registrars of the old Probate and Divorce Courts, now transferred to the Probate, Divorce and Admiralty Division of the High Court, are of two kinds—the four Registrars of the Principal Registry, and the District Registrars. The Principal Registry is in London, and forms the office for the transaction of probate business. It consists of four Registrars, of whom one attends the Court or judge when sitting, and takes down the decrees or orders pronounced; the others attend to the administrative business, that is, the supervision of the Clerks of Seats (*q. v.*), the taxation of costs, &c. They also act as the Registrars of the Court when sitting in divorce matters.<sup>4</sup> The District Registries are situated at various places throughout the country: each has a District Registrar. The business of these registries consists in granting probate and letters of administration in common form where the testator or intestate had a fixed place of abode within the district.<sup>5</sup>

Probate and Divorce.

Principal Registry.

District Registries.

§ 18. A register of all persons who serve in ships subject to the provisions of the Merchant Shipping Act, 1854, is kept in the port of London, and is made up from the lists and papers transmitted to the registrar by the masters of ships in accordance with the act.<sup>6</sup>

Seamen.

§ 19. Every British ship (with certain exceptions) must be registered either under the Registration or Registry Acts (from 12 Car. 2, c. 18 to 12 & 13 Vict. c. 29), or under the Merchant Shipping Acts, 1854—1862. There are a certain number of ports in the United Kingdom and the British possessions and colonies, at which registries for the registration of ships are kept; in the United Kingdom, the principal officer of

Ships.

<sup>1</sup> See Jud. Act, 1879, s. 14.

<sup>2</sup> Second Rep. Legal Dep. Comm. (1874), 66; Pope on Lunacy, 34, 36; Lunacy Reg. Act, 1853, ss. 10 *et seq.*

<sup>3</sup> Second Rep. Legal Dep. Comm. 90.

<sup>4</sup> Second Rep. Leg. Dep. Comm. 78.

<sup>5</sup> *Ibid.* 82; Court of Probate Act, 1857, s. 46.

<sup>6</sup> Maude & Pollock, Merch. Shipp. 137; M. S. Act, 1854, s. 271.

customs at the port is the registrar. The port at which a ship is registered for the time being is called her port of registry. All changes of ownership in a ship (*e. g.*, by sale, mortgage, death, bankruptcy) are registered.<sup>1</sup> (See *Bill of Sale*, § 3; *Managing Owner*, § 2; *Mortgage*, § 17.)

Solicitors.

§ 20. The Registrar of Solicitors has for his duties to keep an alphabetical list of solicitors and to issue certificates for practice. The Incorporated Law Society is the registrar.<sup>2</sup>

Voters.

§ 21. As to the registration of voters in parliamentary boroughs, see 2 Will. 4, c. 45; 6 & 7 Vict. c. 18; 28 & 29 Vict. c. 36; 30 & 31 Vict. c. 102; 41 & 42 Vict. c. 26;<sup>3</sup> and *Revising Barrister*.

**REGISTRAR AND MERCHANTS.**—In Admiralty actions, the Court itself does not enter into details relating to the assessment of damages or matters of account, and whenever in the course of a cause it becomes necessary that the Court should be informed upon such questions, it is usual to direct a reference to the registrar, assisted by merchants,<sup>4</sup> usually two in number. After hearing the evidence the registrar draws up his report. If either party objects to it, he must file a notice of objection. The objection is argued either on motion or on “petition in objection;” if it is sustained or held to be valid the report is overruled: otherwise it is confirmed.<sup>5</sup>

**REGISTRATION OF DESIGNS.**—By the statutes 5 & 6 Vict. c. 100; 6 & 7 Vict. c. 65; 13 & 14 Vict. c. 104; 21 & 22 Vict. c. 70, and 24 & 25 Vict. c. 73, provision is made for the registration of designs for the manufacture or ornament of certain articles, such as metal works, paper hangings, textile fabrics, &c. The registry is now under the control of the Commissioners of Patents.<sup>6</sup> Registration gives the right to the exclusive use of the design for a number of years varying with the nature of the article to which it is to be applied.<sup>7</sup> (See *Copyright; Trademark*.)

**RE-GRANT.**—In the law of real property, when, after a person has made a grant, the property granted comes back to him (*e. g.*, by escheat or forfeiture) and he grants it again, he is said to re-grant it. The phrase is chiefly used in the law of copyholds. Thus, before the Fines and Recoveries Act, one mode of barring an entail in copyholds was a preconcerted forfeiture of the lands by the tenant, followed by a regrant from the lord to him in fee-simple<sup>8</sup> (see *Estate Tail*, § 6). As to re-grants in the sense of voluntary grants, see *Grant*, § 3.

**REGRATING** was the offence of buying corn, &c. in any market and selling it again in the same place, so as to raise the price. It was abolished by stat. 7 & 8 Vict. c. 24.<sup>9</sup> (See *Engrossing*, § 3; *Forestall*, § 2.)

<sup>1</sup> Smith's Merc. Law, 177 *et seq.*; Maude & Pollock, Merch. Shipping, 2 *et seq.*

<sup>2</sup> Solicitors Act, 1843, s. 21; Act of 1877, s. 16.

<sup>3</sup> Steph. Comm. ii. 354.

<sup>4</sup> Williams & Bruce's Admiralty, 275.

<sup>5</sup> *Ibid.* 283.

<sup>6</sup> 38 & 39 Vict. c. 93. This and the other acts are called the Copyright of Designs Acts; but the application of the term “copyright” to manufactures is inaccurate.

<sup>7</sup> Shortt on Copyright, 602 *et seq.*

<sup>8</sup> Williams, R. P. 363.

<sup>9</sup> Steph. Comm. iv. 266.



**REGRESS** is used principally in the phrase "free entry, egress and regress" (*q. v.*), but it is also used to signify the re-entry of a person who has been disseised of land.<sup>1</sup> (See *Right of Entry*.)

**RE-HEARING** is where a cause or matter which has been already adjudicated upon is re-argued and a second judgment pronounced. The term is derived from the practice of the Court of Chancery, in which an appeal from a Vice-Chancellor or the Master of the Rolls to the Lord Chancellor was looked upon as a re-hearing, because they were the delegates of the Chancellor and members of the same Court; the same practice was kept up when the Court of Appeal in Chancery (*q. v.*) was created.<sup>2</sup>

§ 2. By the Judicature Acts every appeal to the Court of Appeal is to be by way of re-hearing.<sup>3</sup> This means that the Court of Appeal is in the same position as if the re-hearing were the original hearing, and hence it may receive further evidence in addition to that before the Court below,<sup>4</sup> and it may review the whole case and not merely the points as to which the appeal is brought.<sup>5</sup> (See *Appeal*, § 2; *Error*.)

**RE-INSURANCE** is where an insurer procures the whole or part of the sum which he has insured (*i. e.*, contracted to pay in case of loss, death, &c.) to be insured again to him by another person. This is commonly done in the case of marine insurance, either when the insurer is a company, because the sum which they have insured is larger than the constitution of the company allows,<sup>6</sup> or for some similar reason; or, in the case of an underwriter, because subsequent events make the risk greater than he originally intended.<sup>7</sup>

§ 2. Formerly, by 19 Geo. 2, c. 37, s. 4, re-insurance was prohibited except in certain cases;<sup>8</sup> but this provision was repealed by 30 & 31 Vict. c. 23.<sup>9</sup>

See *Insurance*.

**REJOIN—REJOINDER.**—In pleading, the rejoinder is the pleading which follows the reply (*q. v.*). Unless it is a simple joinder of issue (*q. v.*) a rejoinder cannot be delivered without leave of the Court or a judge.<sup>10</sup> (See *Pleading*.)

**RELATE—RELATION.**—The doctrine of relation is that by which an act is made to produce the same effect as if it had occurred at an earlier time. Thus, an adjudication in bankruptcy relates back to the

<sup>1</sup> Co. Litt. 318 b.

<sup>2</sup> See Daniell's Ch. Pr. 1339 *et seq.* Under the old Chancery practice the judges of first instance could also rehear their own decrees and the decrees of their predecessors. This practice is abolished; *In re St. Nazaire Co.*, 12 Ch. D. 88; but as to bankruptcy appeals, see *Ex parte Banco de Portugal*, 14 Ch. D. 1.

<sup>3</sup> Rules of Court, lviii. 2.

<sup>4</sup> *Ibid.* 5.

<sup>5</sup> *Purnell v. Great W. Rail. Co.*, 1 Q. B.

D. p. 640.

<sup>6</sup> *Great Western Insurance Co. v. Cunliffe*, L. R., 9 Ch. 531, note.

<sup>7</sup> Emerigon, 6.

<sup>8</sup> Maude & Pollock, Merch. Shipp. 346.

<sup>9</sup> *Mackenzie v. Whitworth*, L. R., 10 Ex. 142.

<sup>10</sup> Rules of Court, xxiv. 2; *Sheward v. Lord Lonsdale*, 5 C. P. D. 47. As to rejoinders at common law and in equity under the old practice, see Smith's Action (11th edit.), 92, 101; Mitford, Pl. 321.

first act of bankruptcy committed by the bankrupt during the preceding twelve months, so as to invalidate all alienations, executions, &c. made or suffered during that period fraudulently or in favour of any person having notice of the act of bankruptcy.<sup>1</sup> So if a person has an authority to enter on land, and after entering he abuses the authority, he becomes a trespasser ab initio, because his wrongful act relates back to the time of his entry.<sup>2</sup> (See *Omnis Rati habitio*, &c.)

**RELATION—RELATOR.**—In the practice of the Chancery Division of the High Court, where an action by way of information (*q. v.*) is instituted in the name of the crown, but not immediately concerning its rights, the proceedings are taken on the relation, that is, on the narrative or information, of a private person, whose name is inserted in the proceedings, and who is called the relator. Thus, in the case of a public nuisance, any one who wishes to prevent it may cause an information to be exhibited by the Attorney-General on his relation. A "relator for the purpose of answering costs" is sometimes introduced in informations directly concerning the rights of the crown, in order to avoid the injustice arising from the crown's immunity from costs in ordinary suits.<sup>3</sup>

Of claim.

**RELEASE.**—I. § 1. In the most general sense of the word, "a release is the giving or discharging of the right or action which a man hath or may have or claim against another man or that which is his."<sup>4</sup> Thus, if A. commits a breach of a contract which he has entered into with B., and B. gives up the right of action which he has thus acquired, he is said to release A.<sup>5</sup> So a person may release property from a charge. (See *Discharge*.)

General release.

§ 2. When two persons have had several dealings, from which demands and rights of action, whether mutual or not, have arisen or may in future arise, a release of all such demands and rights of action is called a general release. When trustees or executors have wound up an estate they usually require a release from the persons beneficially entitled before handing over or dividing it, in order to clear themselves of responsibility.

By operation of law.

§ 3. A release sometimes takes place by operation of law. Thus, if A. covenants not to sue B. for a debt which he owes him, this operates as a release, because otherwise A. might sue B. for the debt, and then B. might sue A. for breach of his covenant, which would cause a circuitry of action. But if A. has a right of action against two or more, and covenants with one of them not to sue him, this does not operate as a release of the others, though an express release to him would have that effect (see *Joint*, § 5).<sup>6</sup> For the same reason, although a bankrupt or liquidating

<sup>1</sup> Bankr. Act, 1869, s. 11; *Cooper v. Chitty*, 1 Burr. 20.

<sup>2</sup> *Six Carpenters' Case*, 8 Co. 146 a; *Smith, L. C. i.* 133; for other instances of relation, see *Roe v. Griffiths*, 4 Burr. 1952.

<sup>3</sup> *Mitford's Pl.* 23; *Daniell's Ch. Pr.* 13 *et seq.*; *Att.-Gen. v. Mayor of Brecon*, 10 Ch. D. 204.

<sup>4</sup> *Shepp. Touch.* 320; *Litt.* § 444.

<sup>5</sup> As to releases generally, see *Chitty on Contracts*, 706 *et seq.*; *Leake on Contracts*, 497 *et seq.*

<sup>6</sup> *Hutton v. Eyre*, 6 Taunt. 289; *Crague v. Jones*, L. R., 8 Ex. 81; *Green v. Wynn*, 4 Ch. App. 204.

debtor who obtains his discharge, or a debtor who effects a composition with his creditors, is thereby released by operation of law from all his debts, with certain exceptions (see *Bankrupt*, § 3; *Discharge*, § 4), this does not release persons with whom he is jointly liable for any debt.<sup>1</sup>

II. § 4. In the law of real property a release is where a person having a right, title or claim in or to land, gives it up to some one else who has an interest in the land of such a nature as to qualify him for taking the right so relinquished.<sup>2</sup> (See *Conveyance*, § 4.) Examples are given below.

A release may enure (that is, operate or take effect) in four ways.<sup>3</sup>

§ 5. First, by way of *mitter l'estate*, that is, by giving or transferring an estate or interest; as where one of three joint tenants releases his interest in the land to one of his co-tenants.<sup>4</sup> § 6. Secondly, by way of *mitter le*

Real property.

By mitter l'estate.

*droit*, that is, by giving or transferring a right of entry or similar right, as where a person who has been disseised of land releases his right of entry to the disseisor, and thus vests the full title to the land in him.<sup>5</sup>

By mitter le droit.

§ 7. Thirdly, by way of extinguishment; thus, if the owner of a seignory which involves a service due from the tenant in fee releases it to the tenant, this operates by way of extinguishment, because the tenant cannot have a service to receive from himself.<sup>6</sup> This is sometimes called a release by way of extinguishment as against all persons, as opposed to a release by which the right passes to the releasee, and which, therefore, operates by way of extinguishment only so far as the releasor is concerned, and does not otherwise affect the existing interests in the land; thus, if a man is disseised and the disseisor makes a feoffment to two men in fee, and the disseisee then releases to one of the feoffees, this shall enure to both of them by way of extinguishment.<sup>7</sup> § 8. Fourthly, by way of creation or enlargement of an estate, as where the owner of the fee simple in land grants a lease for years and afterwards releases his estate to the lessee and his heirs, then the fee simple is vested in the lessee. But the releasee must be in possession or seisin of the land to make such a release effectual: an *interesse termini* is not sufficient.<sup>8</sup> (See *Lease and Release*.)

By extinguishment.

By creation or enlargement.

III. § 9. In Admiralty actions, when a ship, cargo or other property has been arrested, the owner may obtain its release by giving bail or paying the value of the property into Court;<sup>9</sup> upon this being done he obtains a release, which is a kind of writ under the seal of the Court, addressed to the marshal, commanding him to release the property.<sup>10</sup>

Admiralty.

**RELEGATION** is said to be where a man is temporarily exiled or banished by special act of parliament. It was never a civil death.<sup>11</sup> (See *Abjuration*.)

<sup>1</sup> *Megrath v. Gray*, L. R., 9 C. P. 216.

<sup>2</sup> *Burton's Comp.* § 45.

<sup>3</sup> *Shepp. Touch.* 321; *Co. Litt.* 193 b.

<sup>4</sup> *Litt.* § 304.

<sup>5</sup> *Ibid.* §§ 466, 306; *Co. Litt.* 194 a, 266 a. -If a man is disseised by A. and B. and releases his right to A., this vests the title in A. to the exclusion of B. This is sometimes called a release by way of entry and feoffment, because it produces the same effect (for some purposes) as if the

disseisee had entered and then made a feoffment to A. *Litt.* §§ 472, 306; *Co. Litt.* 276 a, 278 a.

<sup>6</sup> *Litt.* § 479.

<sup>7</sup> *Ibid.* §§ 307, 470, 478; *Co. Litt.* 280 a.

<sup>8</sup> *Litt.* §§ 459, 465; *Dauids. Conv.* i. 72.

<sup>9</sup> *Williams & Bruce's Admiralty*, 209.

<sup>10</sup> *Ibid.* 220, Form 30.

<sup>11</sup> *Co. Litt.* 133 a.

**RELEVANCY—RELEVANT.**—§ 1. In the law of evidence, a fact is said to be relevant when it is so connected, directly or indirectly, with a fact in issue in an action or other proceeding, that evidence given respecting it may reasonably be expected to assist in proving or disproving the fact in issue. Thus, if A. is tried for the murder of B. by poison, the fact that he had previously been guilty of other crimes would be irrelevant; but the fact that before B.'s death A. procured poison similar to that by which B. died would be relevant. So if the question in an action is whether A., the owner of land adjoining a river, owns the entire bed of it or only half the bed at a particular spot, the fact that he owns the entire bed a little lower down the river is relevant.<sup>1</sup>

§ 2. The question of the relevancy of a fact to a given inquiry is of importance, because evidence is not admissible to prove an irrelevant fact.<sup>2</sup> (See *Admissible*.)

**ETYMOLOGY.**—Latin, *relevare*, to lift up or support; a fact is relevant when it supports the contention of one of the parties. The use of the word in this sense seems to be modern.

**RELICTA VERIFICATIONE.** See *Cognovit*, note (1).

**Real property.** **RELIEF.**—I. § 1. In the law of real property, a relief is a payment which a tenant of full age is bound to pay to the feudal lord on succeeding to the land by descent. By the common law it is an incident to the service of every free tenure, and is hence sometimes called relief-service;<sup>3</sup> but owing to the gradual extinction of seignories in ordinary cases, reliefs are now rarely met with, except where freehold land is held of the lord of a manor at a yearly quit rent of sufficient value to make it worth collecting, in which case the relief consists of one year's rent.<sup>4</sup> This is a socage-relief: reliefs incident to knights' service were abolished by stat. 12 Car. 2, c. 24. A relief lies in render (*q. v.*) and may be distrained for.<sup>5</sup>

**Relief by custom, &c.** § 2. Improper reliefs differ from ordinary reliefs in being derived from custom, prescription or express reservation. A prescriptive relief is one which is presumed to have been reserved by a deed which has been lost (see *Lost Grant; Prescription*). A customary relief (or relief-custom) is due by the special custom of some manors on every descent, and in some cases on every purchase, of freehold tenements held of the manor, and in some manors the customary fines in respect of copyholds are called reliefs (see *Fine*, §§ 3 *et seq.*). Reliefs due by custom and prescription

<sup>1</sup> *Jones v. Williams*, 2 M. & W. 326.

<sup>2</sup> Best on Evidence, 352; Stephen's Indian Evidence Act, 52; Stephen's Evid. Dig. 135; Mr. F. Pollock in Fortnightly Review for Sept. 1876. On the peculiar use of "relevant" as equivalent to "admissible," by Sir J. Stephen, see Solicitors

Journal, 30th Sept. 1876.

<sup>3</sup> Co. Litt. 83 a; Litt. § 126; Co. Copy. § 25.

<sup>4</sup> Williams on Seisin, 26; Warrick v. Queen's College, L. R., 6 Ch. 716.

<sup>5</sup> Co. Copyh. § 25; Co. Litt. 83 a, 162 b.

are not recoverable by distress unless the custom or prescription warrants it.<sup>1</sup>

ETYMOLOGY.]—Norman-French, *relef*, *reliefve*, *relief*; late Latin, *relevium*, *relevatio*, because, it is said, the heir paid it to take up (*relevare*) his inheritance.<sup>2</sup>

II. § 3. Every action (except actions for discovery and a few others) is instituted for the purpose of obtaining relief, that is, satisfaction for a past injury, or the prevention of a threatened injury, or the enforcement or protection of a right. A plaintiff usually claims not only a particular kind of relief ("specific relief"), but also "general relief," by asking for such further or other relief as the nature of the case may require, and he may ask for "alternative relief:"<sup>3</sup> that is, he may mention two kinds of relief, and ask for one of them, *e. g.*, either specific performance or damages.

Relief by action.

III. § 4. As to the relief of paupers, see *Poor Law*.

Paupers.

RELIEVE, in feudal law, is to depend: thus the seignory of a tenant in capite relieves of the crown, meaning that the tenant holds of the crown. The term is not common in English writers.<sup>4</sup> (From Latin, *relevare*, to lift up, support; probably through the French.<sup>5</sup>)

RELINQUISHMENT.—When a person admitted to the office of priest or deacon in the Church of England has resigned his office, he may execute a deed of relinquishment, and after a certain period he becomes incapable of acting in any way as a priest or deacon, loses all privileges attached to the office, and is freed from all liabilities and disabilities to which he would otherwise have been subject.<sup>6</sup> (See *Resignation*.)

REM. See *In Rem*.

REMAINDER.—§ 1. A remainder is a "remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time."<sup>7</sup> Thus, if A., a tenant in fee simple, grants land to B. for life, and after B.'s decease to C. and his heirs, C.'s interest is termed a remainder in fee expectant on the decease of B.<sup>8</sup>

§ 2. As regards its incidents, a remainder chiefly differs from a reversion (*q. v.*) in this, that between the particular tenant (B.) and the remainderman (C.) no tenure exists, from which it follows that no rent-service can be incident to a remainder.<sup>9</sup> (See *Rent*, § 2; *Tenure*.)

§ 3. In the above instance the remainder is said to be vested (that is, vested in interest), because it is ready to come into possession the moment

<sup>1</sup> Elton, Copyh. 190; Co. Litt. 93 a, and Hargrave's note.

<sup>2</sup> Britton, 177 b; Bracton, 86 a; Spelman on Feuds (Post. Works, 31); Hargrave's note to Co. Litt. 83 a. See further Cnut's Laws, ii. 70; Grimm, D. R. A. 371.

<sup>3</sup> Rules of Court, xix. 8.

<sup>4</sup> See an instance in Madox, Bar. Ang. 2.

<sup>5</sup> Littré, Dict. s. v. *Relever*.

<sup>6</sup> Clerical Disabilities Act, 1870.

<sup>7</sup> Co. Litt. 49 a, 143 a.

<sup>8</sup> Wms. Real P. 253.

<sup>9</sup> *Ibid.* 252.

B.'s estate happens to determine;<sup>1</sup> in other words, the existence of B.'s estate is the only thing which prevents C.'s estate from coming into possession; and, therefore, whenever B. dies, the land passes to C., if he is living, or to his heir or devisee if he is dead.

#### Contingent.

§ 4. If, however, A. had limited the land after B.'s estate to the heir of C., a living person, the remainder would not be ready to come into possession at once, because until C. dies there is no one to take the remainder; for *nemo est hæres viventis*, and during C.'s life there is no such person as his heir.<sup>2</sup> So if land is limited to B. for life, and after his death, if C. should then be living, to D., D.'s remainder is not vested, because its coming into possession depends not merely on the determination of B.'s estate, but on its determination during C.'s life: hence such a remainder is termed a contingent remainder, being "a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate."<sup>3</sup> (See *Contingent*.) When the uncertainty is removed, the remainder becomes vested. The possibility that a remainder may never come into possession at all, does not of itself make the remainder contingent: thus, if land be granted to A. for life, remainder to B. for life, B.'s remainder is vested, although he may die before A.; and consequently never come into possession.<sup>4</sup>

#### Trustees to preserve contingent remainders.

§ 5. Every contingent remainder was formerly liable to destruction by the determination of the particular estate before the remainder vested: thus, suppose land to be limited to A., a bachelor, for life, and after his death to his eldest son and the heirs of his body, and in default of such issue to B. and his heirs, then if A., before the birth of a son, forfeited or surrendered his life estate, or merged it by purchasing B.'s remainder in fee, the contingent remainder to his son would have been destroyed.<sup>5</sup> To prevent this, the following plan was adopted in settlements and similar instruments giving contingent remainders to the children of a tenant for life. Following the limitation of the estate to the tenant for life, an estate, to commence on the determination of his estate by any means during his life, was given to certain persons and their heirs during his life as trustees to preserve the contingent remainders, for which purpose they were if necessary to enter on the premises, but to permit the tenant for life to receive the rents and profits during the rest of his life.<sup>6</sup> These were called trusts to preserve contingent remainders. But the stat. 8 & 9 Vict. c. 106, s. 8, enacted that contingent remainders should not in future be liable to be destroyed by the forfeiture, surrender or merger of any preceding estate of freehold; and now by the act 40 & 41 Vict. c. 33, no contingent remainder created by any instrument executed after the 2nd August, 1877, can be destroyed by the determina-

<sup>1</sup> Fearne's Cont. Rem. 216; Williams' R. P. 255.

<sup>2</sup> Williams, 267.

<sup>3</sup> Fearne, I.

<sup>4</sup> *Ibid.* 216.

<sup>5</sup> Williams, 281 *et seq.*; Fearne, 316. But if the legal estate was outstanding in a

mortgagee the remainder would be preserved: *Astley v. Micklethwait*, 15 Ch. D. 59.

<sup>6</sup> Williams, R. P. 285; Elphinstone, Conv. 323. The original form devised by Sir O. Bridgman is given in Williams on Seisin, 193.

tion of the particular estate before the remainder vests, if the remainder would have been valid as a springing or shifting use, or executory devise, or other limitation, had it not had a sufficient estate to support it as a contingent remainder. Thus, if land is limited to A. for life, with remainder to his eldest son who shall attain twenty-one, and A. dies before any of his sons attains twenty-one, the remainder will nevertheless take effect as soon as a son attains twenty-one. If, however, land is limited to A. for life, with remainder to his eldest son who shall attain twenty-five, the remainder will only take effect if the son attains twenty-five before A.'s death, because such a limitation could not take effect as an executory limitation by way of use or trust, being contrary to the rule against perpetuities. So that the only difference now between a contingent remainder and an executory devise is, that the former is not affected by the rule against perpetuities, if it vests before the particular estate determines.<sup>1</sup> But an equitable contingent remainder is void for remoteness if it infringes the rule against perpetuities.<sup>2</sup>

§ 6. Contingent remainders are subject to a rule resembling that against perpetuities, for an estate cannot be given to an unborn person for life, followed by any estate to any child of such unborn person; in such a case the estate given to the child of the unborn person is void.<sup>3</sup> (See *Perpetuity*.)

§ 7. A remainder may be vested in interest and contingent as to the property comprised in it. Thus if land is limited to A. for life, remainder to the children of B. in common in fee, each child of B. on his birth in A.'s lifetime takes a vested remainder in an undivided share, the amount of which is contingent on the number of children of B. who may be born in A.'s lifetime. If the remainder is to the children of B. now or hereafter to be born, whether in the lifetime of A. or not, the time for ascertaining the persons to take will also be the death of A., unless the remainder is limited by an instrument executed after the passing of the Contingent Remainders Act, 1877 (2nd August), in which case the time will be the death of B.

Vested in interest, contingent as to amount.

§ 8. Cross-remainders arise when land is given in undivided shares to two persons, A. and B., for particular estates, in such a manner that upon the determination of the particular estates in A.'s share, the whole of the land goes to B., and vice versa, the remainderman or reversioner not being let in till the determination of all the particular estates in both shares.<sup>4</sup> Perhaps the commonest instance of cross-remainders occurs in an ordinary settlement of land (whether by deed or will), where, after limiting an estate tail in the land to each of the sons of the tenant for life in succession, provision is made for the failure of male issue by limiting it to the daughters in equal shares as tenants in common in tail, with a clause that on the death of any daughter without issue, her share (both original and accrued) shall go to the other daughters in tail, so

Cross-remainders.

<sup>1</sup> Williams, R. P. 273; Williams on Seisin, 205; Charley's R. P. Stat.

<sup>2</sup> *Abbiss v. Burney*, 17 Ch. D. 211.

<sup>3</sup> Williams, 276.

<sup>4</sup> Co. Litt. 195 (b); Butler's note (1).

that if all the daughters but one die without issue, that one takes everything,<sup>1</sup> and the remainderman or reversioner in fee takes nothing unless and until they all die without issue.

**REMAND.**—To remand a defendant or prisoner in a proceeding before a magistrate or justices of the peace, is to adjourn the hearing for a certain time.<sup>2</sup>

**REMANET**, in the practice of the Queen's Bench Division, is an action which has been set down for trial at one sittings, but has not come on, so that it stands over to the next sittings.

**REMEDY** is the means by which the violation of a right is prevented, redressed, or compensated. Remedies are of four kinds: (1) by act of the party injured, the principal of which are defence, recaption, distress, entry, abatement and seizure; (2) by operation of law, as in the case of retainer and remitter; (3) by agreement between the parties, *e.g.*, by accord and satisfaction, and arbitration; and (4) by judicial remedy, *e.g.*, action or suit. (See the various titles.) The last are called judicial remedies, as opposed to the first three classes, which are extra-judicial. As to the distinction between a remedy and a right, see *Limitation*, § 6; and as to the distinction between equitable injuries and equitable remedies, see *Injury*, note (3).

**REMEMBRANCER.** See *Queen's Remembrancer*. The Remembrancer of the city of London is parliamentary solicitor to the corporation, and is bound to attend all Courts of aldermen and common council when required.<sup>3</sup>

Remitting  
cause.

**REMIT—REMISSION.**—§ 1. As in the majority of cases, a Court of Appeal sits merely to decide questions of law, and has not the machinery to carry its decisions into effect, it is obliged, when it reverses or varies the decision of an inferior tribunal in such a way as to make further steps necessary, to remit or send back the case to the inferior tribunal, so that such steps may be taken there as are necessary to carry the decision into effect. Thus, supposing a Court gives judgment for the defendant in an action in which, if the plaintiff were successful, inquiries would have to be taken, then, if the House of Lords or Privy Council reverses that decision and gives judgment for the plaintiff, it remits the case to the lower Court in order that the inquiries may be taken, or it may remit the case with directions as to the relief to be given to the plaintiff. This is sometimes called remitter.<sup>4</sup>

Remission.

§ 2. In Privy Council practice, on a cause being remitted to the inferior Court, a document called a remission is in some cases (*e.g.*, ecclesiastical

<sup>1</sup> Elphinstone's Conv. 340. As to cross remainders in wills, see Watson's Comp. Equity, 1316 *et seq.*

<sup>2</sup> Stone's Justice, 115.

<sup>3</sup> Pulling's Laws of London, 122.

<sup>4</sup> Macpherson, Privy C. Pr. 149.



appeals) required to be issued. It is a kind of writ commanding the judge to resume and proceed with the cause.<sup>1</sup>

**REMITTER** "is where a man hath two titles to lands or tenements, viz. one a more antient title, and another a more latter title; and if he come to the land by a latter title, yet the law will adjudge him in by force of the elder title, because the elder title is the more sure and more worthie title;"<sup>2</sup> but the second title must come to him without his own act or default.<sup>3</sup> Thus, if A. disseises B., tenant in fee simple of land, and then makes a lease of the land to him by deed poll for a term of years, and B. enters under the lease, this entry is a remitter to B.; that is, he regains his original estate in fee simple, and is not considered as entitled to the land by virtue of the lease to him by A.<sup>4</sup> But if B. took an estate from A. by indenture, this would estop him from claiming any estate, except that given him by the deed, and would thus prevent a remitter, because a "deed indented is the deed of both parties, and therefore as well the taker as the giver is concluded."<sup>5</sup> (See *Recontinuance*.)

**REMITTITUR DAMNA.**—When one of the parties to an action in the Queen's Bench Division obtains judgment for damages which he is either not entitled to, or is willing to abandon, he makes an entry on the record called a remittitur damna, by which he gives up or remits those damages. Thus, if the jury give greater damages than the plaintiff has claimed by his pleading, the mistake is rectified by entering a remittitur damna as to the excess. So when the defendant, in an action of replevin, obtains judgment by default, he is entitled not only to a return of the goods replevied, but also to damages for being deprived of them, which must be assessed by a writ of inquiry; but the damages being usually trifling in amount, they are generally remitted, in order to save the expense of a writ of inquiry.<sup>6</sup>

**REMOTE.**—§ 1. Damage is said to be too remote to be actionable Damage. when it is not the legal and natural consequence of the act complained of: thus, if a master discharge his servant on account of slanderous words spoken of him, the damage caused by the dismissal is too remote to entitle the servant to damages in respect of it against the person guilty of the slander, because it is not the legal and natural consequence of the slander.<sup>7</sup> So damage caused by failure to transmit a telegraphic message is too remote.<sup>8</sup>

§ 2. As to limitations being void for remoteness under the rule against perpetuity, see *Perpetuity*; as to remote possibilities, see *Possibility*, § 2; and as to remote heirs, see *Heir*, § 8.

<sup>1</sup> Macpherson (App.) 129; Williams & Bruce's Admiralty, 319. Admiralty appeals no longer go to the Privy Council, but "remissions" seem to be still used in ecclesiastical appeals.

<sup>2</sup> Litt. § 659.

<sup>3</sup> Co. Litt. 347 b.

<sup>4</sup> Litt. § 695; Butler's note to Co. Litt. 347 b.

<sup>5</sup> Co. Litt. 363 b.

<sup>6</sup> Archbold, Pr. 805, 1209; Chitty, Pr. 994, 1093, 1517.

<sup>7</sup> *Vicars v. Willcock*, 8 East, 1; Smith's L. C. ii. 534.

<sup>8</sup> *Sanders v. Stuart*, 1 C. P. D. 326.

Poor law.

**REMOVAL.**—§ 1. The casual poor of a parish (as opposed to its "settled" poor) are only entitled to relief in that parish until they can be removed to their parish of birth or settlement, under an order of removal made by two justices of the peace, unless they have acquired the status of irremovability.<sup>1</sup> (See *Poor; Settlement; Irremovability.*)

Actions in district registries.

§ 2. An action commenced in the Central Office of the High Court may be removed from London to a district registry for any sufficient reason,<sup>2</sup> and an action proceeding in a district registry may be removed into the Central Office by the defendant as of right at any time between appearance and defence, except where the plaintiff has applied for and obtained judgment under Order XIV.<sup>3</sup> (See *Judgment*, § 9.)

County Courts.

§ 3. A cause may be removed from a County Court into the High Court by writ of certiorari where the sum claimed exceeds a certain amount,—(i) if the defendant gives security for the amount claimed with costs, or (ii) if a judge of the High Court thinks it a fit case to be tried in the High Court and the applicant gives security for costs.<sup>4</sup> As to the removal of judgments, see *Judgment*, § 17.

Inferior Courts.

§ 4. A cause may be in general removed from an inferior Court not of record into the High Court by habeas corpus cum causâ or certiorari (*q. v.*), if the sum claimed exceeds 5*l.* and the defendant gives security for the amount and costs.<sup>5</sup>

**RENDER.**—§ 1. To render is to yield or pay, as to render a rent.<sup>6</sup> So some kinds of heriots are said to lie in render, that is, the tenant is bound to give the heriot to the lord. Hence profits are divided into profits lying in render, or those which the tenant is bound to yield or pay, such as rent,<sup>7</sup> and profits lying in prender, which the person entitled to must take for himself. (See *Profit*, § 3.)

§ 2. Where a mine, quarry or the like is leased, it is sometimes stipulated that a certain proportion of the minerals gotten shall be delivered to the lessor by way of rent or royalty. This is called a render.<sup>8</sup> It is a royalty in kind. (See *Royalty.*)

**RENEWAL.** See *Writ of Summons.*

**RENOUNCE—RENUNCIATION.**—A renunciation is a document by which a person appointed by a testator as his executor, or a person who is entitled to take out letters of administration to the effects of an intestate in priority to other persons, renounces or gives up his right to take out probate or letters of administration; the document is filed in the registry.<sup>9</sup> (See *Retraction.*)

<sup>1</sup> Steph. Comm. iii. 57.

<sup>2</sup> Rules of Court, xxxv. 13.

<sup>3</sup> *Ibid.* 11 *et seq.*

<sup>4</sup> Archbold, Pr. 1412; stat. 19 & 20 Vict. c. 108, ss. 38, 39.

<sup>5</sup> Archbold, Pr. 1404, and see Jud. Act. 1873, s. 90.

<sup>6</sup> Litt. § 214.

<sup>7</sup> Co. Litt. 142 a.

<sup>8</sup> Elphin. Conv. 264.

<sup>9</sup> Browne's Probate Practice, 138; Coote's Probate Pr. 192; Williams on Executors, 270 *et seq.*

RENT is a periodical payment due by a tenant of land or other corporeal hereditament; it is usually payable in money, but it may also be reserved in fowls, wheat, spurs or the like.<sup>1</sup> When land is let free of rent and the landlord wishes to be able to obtain an acknowledgment of the tenancy when necessary, a nominal rent is frequently reserved, consisting of one peppercorn a year to be paid when demanded.<sup>2</sup>

Nominal or  
peppercorn.

Rents are of several kinds:—

(i) § 2. Rent service is always incident to tenure; in other words, it is that which is due when one man holds land of another by fealty (or any other service) and rent; as where a man holds land of another in fee simple at a rent reserved before the Statute Quia Emptores (see *Fee Farms*), or where an owner of land in fee at the present day leases it to another for 99 years at a yearly rent. In the latter case the rent is an incident to the reversion of the lessor or reversioner and passes with it if he grants it to another.<sup>3</sup> Payment of a rent service may be enforced by distress (*q. v.*).<sup>4</sup> “It is called a rent service because it hath some corporall service annexed unto it, which at least is fealty,”<sup>5</sup> but at the present day fealty is never exacted.<sup>6</sup> § 3. If the rent is severed from the reversion (as where either is assigned without the other) it becomes a rent in gross.<sup>7</sup> § 4. A rack rent is a rent of the full annual value of the land, or near it.<sup>8</sup> § 5. When land is leased to a person on condition that he erects certain buildings on it, the rent reserved (which is small in comparison with the rent of the land when built on) is called the ground rent. When the lessee has erected the building, he may sub-let at a rack rent (calculated at an amount sufficient to repay to him with a profit the amount expended in building the house and also to cover the ground rent), or he may take from the sub-lessee a fine amounting to not much less than what he has expended on the house, reserving a rent a little larger than the ground rent; this is generally called an improved ground rent.<sup>9</sup> § 6. When a mine, quarry, brick-work or similar property is leased, the lessor usually reserves not only a fixed yearly rent but also a royalty or galeage rent, consisting of royalties (*q. v.*), varying with the quantity of minerals, bricks, &c. produced during each year. In this case the fixed rent is called a dead rent. A footage rent is a rent payable for every acre a foot thick of minerals, and so in proportion for a greater or less thickness. A spoil-bank rent is a sum payable according to the quantity of rubbish from a mine deposited on land belonging to the lessor.<sup>10</sup>

Rent service.

Rack rent.

Ground rent.

Dead rent.

Footage rent.

Spoil-bank  
rent.

(ii) § 7. A rent charge is where a rent is payable in respect of land to a person who has no reversion in it, and a right to distress is given him by express agreement between the parties: as where a man (since Quia Emptores) conveys land in fee to another, reserving to himself and his

Rent charge.

<sup>1</sup> Co. Litt. 142 a; Woodfall's Landlord & Tenant, 338; Fawcett, L. & T. 109.

<sup>2</sup> Williams, R. P. 246.

<sup>3</sup> Litt. § 229.

<sup>4</sup> *Ibid.* § 213.

<sup>5</sup> Co. Litt. 142 a, 87 b.

<sup>6</sup> Williams, R. P. 245.

<sup>7</sup> Co. Litt. 148 b.

<sup>8</sup> Bl. Comm. ii. 43.

<sup>9</sup> Elphinstone, Conv. 245.

<sup>10</sup> *Ibid.* 264.

heirs a certain rent with the right of distress, or if a man seised of land grants to another a yearly rent issuing out of it with a clause of distress.<sup>1</sup>

*Rent seck.* (iii) § 8. Formerly where a rent (not being a rent service) was reserved or created without a clause of distress, the grantee had no remedy by distress, and hence the rent was called a rent seck (*redditus siccus*, a dry rent).<sup>2</sup> So if the owner of a rent service granted the rent to another, reserving the fealty to himself, the grantee had only a rent seck.<sup>3</sup> But this distinction between rent charges and rent seck was abolished by stat. 4 Geo. 2, c. 28, s. 5, which gave the owner of every rent seck a right of distress for it: so that every rent created by grant is now in effect a rent charge.<sup>4</sup>

*Tithe rent charge.* § 9. Under the Tithe Commutation Acts, a rent charge varying with the price of corn has been substituted for the right to take tithes in kind. An extraordinary tithe rent charge is payable in respect of highly productive land, such as hop-grounds and market gardens.<sup>5</sup> (See *Tithes*.)

*Fee farm and quit rents.* § 10. Before the Statute Quia Emptores, a person could convey land in fee simple to be held of him and his heirs, and reserving a rent service from the grantee. Some instances of rents thus created still exist either under the name of fee farm rents (see *Fee Farm*) or of quit rents, so called because in consideration of their payment the tenants are quit or discharged of all other services.<sup>6</sup> Such rents are now found almost only in manors, being frequently due both by the freeholders and the copyholders: they are sometimes called customary rents, being due by custom;<sup>7</sup> or rents of assise, from being fixed in amount; and those of the freeholders are frequently called chief rents.<sup>8</sup>

*Customary, assise, and chief rents.*

Every rent, except a rent service incident to a reversion, is an incorporeal hereditament. It may belong to a man in fee, or in tail, or for any other estate.<sup>9</sup>

See *Annuity*; *Apportionment*.

ETYMOLOGY.]—Norman-French, *rente*,<sup>10</sup> from *render*, to yield; Latin, *reddere*. (See *Render*.)

**REPATRIATION** takes place when a person who has been expatriated regains his nationality.<sup>11</sup> Under sect. 8 of the Naturalization Act, 1870, a natural-born British subject who has become a statutory alien (that is, expatriated himself) under the act may repatriate himself in the same way as an ordinary alien may obtain a certificate of naturalization. (See *Naturalization*.)

**REPLEADER**.—In the old common law practice judgment of repleader was given in an action when the pleadings had failed to raise a definite and material issue. (See

<sup>1</sup> Litt. §§ 217, 218.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.* § 225. See, however, Co. Litt. 153 a, where a rent seck which may be distrained for is mentioned.

<sup>4</sup> *Dodds v. Thompson*, L. R., 1 C. P. 133.

<sup>5</sup> Stat. 6 & 7 Will. 4, c. 71.

<sup>6</sup> Bl. Comm. ii. 43.

<sup>7</sup> See *Hastings v. Hurley*, 16 Ch. D. 730.

<sup>8</sup> Bl. 42; Williams on Seisin, 26; Elton on Copyholds, 190.

<sup>9</sup> Williams, R. P. 331. As to barring an estate tail in a rent, see Butler's note (2) to Co. Litt. 298 a; Shelford's R. P. Stat. 321.

<sup>10</sup> Britton, 105 b.

<sup>11</sup> Rep. on Natur. App. 5.

*Pleading.*) Its effect was that the pleadings were begun again at the point where the defect first occurred.<sup>1</sup>

**REPLEVIN—REPLEVISOR—REPLEVY.**—§ 1. Replevin is the remedy which may be adopted by a person in almost all cases in which chattels are unlawfully taken from him; but it is not often adopted, except in cases of wrongful distress for rent or damage feasant, when it is brought for the purpose of trying the legality of the distress: it may also be used to decide a question of title to land or other hereditaments. (See *Distress.*)

§ 2. The first step is for the replevisor or distrainee (*i. e.*, the person whose goods have been distrained) to obtain a replevy of the goods, which he does by procuring from the registrar of the County Court of the district a warrant directing the high bailiff to cause the goods to be delivered to him: this is granted on the replevisor giving security (usually a bond with two sureties) to commence and prosecute an action for the wrongful taking against the distrainor, either in the County Court or in the High Court, and to return the goods to the distrainor if a return shall be adjudged.<sup>2</sup> Under the old practice, if this action (which is called an action of replevin) was brought in one of the superior Courts of common law, proceedings up to declaration were the same as in an ordinary action, the replevisor being the plaintiff (see *Action*); but where, as was usually the case, the defendant claimed a return of the goods replevied, the subsequent pleadings were peculiar. If the defendant insisted that they were lawfully taken by him, he either made *avowry* *i. e.*, he *avowed* taking the distress in his own right, and set forth the reason of it (as for rent in arrear), or he made *conusance* or *cognizance*, *i. e.*, he *acknowledged* the taking, but insisted that it was lawful, as he did it by the command of one who had a right to distrain;<sup>3</sup> the plaintiff's next pleading was called a plea in bar, that of the defendant a replication, and so on.<sup>4</sup> Under the present practice, the pleadings in an action of replevin are similar to those in ordinary cases.<sup>5</sup> (See *Pleading.*) If the plaintiff obtains judgment, he retains the goods and is awarded damages for the unlawful taking; if the defendant is successful, he obtains judgment for a return of the goods taken, formerly enforceable by a writ called *de retorno habendo*,<sup>6</sup> now by a writ of delivery (*q. v.*)<sup>7</sup> (See also *Writ of Recaption.*)

§ 3. Formerly, the only remedy in cases of wrongful distress was the writ of replevin (*replegiari facias*), under which the proceedings were in the sheriff's County Court; but by 52 Hen. 3, c. 21, the sheriff was authorized to grant replevins without this writ. If the goods had been eloigned (*q. v.*), the replevisor might have a writ of *capias* in *withernam* (*q. v.*), under which the sheriff took the distrainor's own goods as a

Warrant of replevy.

Replevin bond.

Action of replevin.

Avowry.

Conusance.

Writ of replevin.

Capias in withernam.

<sup>1</sup> Chitty, Pr. 1553.

<sup>2</sup> Smith's Action, 434; Chitty, Pr. 1081 *et seq.*; Pollock's County Court Practice, 282 *et seq.*; Woodfall's Landlord & Tenant, 454 *et seq.*; stat. 19 & 20 Vict. c. 108.

<sup>3</sup> Bl. Comm. ii. 150.

<sup>4</sup> Smith's Action, 439; Tidd's Pr. 645.

<sup>5</sup> Rules of Court, xix. 1; Woodfall, 469, 471; Archbold, Pr. 890.

<sup>6</sup> Smith's Action, 440.

<sup>7</sup> Woodfall, 482.

Second deliverance.

Return irreplevisable.

punishment. If the plaintiff in an action of replevin was nonsuited he was allowed a writ of second deliverance, under which the goods were again delivered to him; but if he was nonsuited in the second action, the defendant obtained a writ of return irreplevisable, which was an absolute bar to the plaintiff's claim.<sup>1</sup> The two latter proceedings are, it would seem, impliedly abolished by the new rule respecting nonsuits.<sup>2</sup>

ETYMOLOGY AND HISTORY.]—Old French, *pleige* or *plege*<sup>3</sup> (law Latin, *plegius*), a pledge or bail; *plevine*,<sup>4</sup> a giving security, *plevir* (law Latin, *plegiare*), to pledge. The most probable etymology is that of Diez,<sup>5</sup> who derives the phrase *plevir la fey*,<sup>6</sup> to pledge one's word (afterwards shortened into *plevir*), from *præbere fidem*, *pleige* from *præbium*. Replevin, therefore, is re-gaining possession by giving security (*plevine*).<sup>7</sup>

**REPLEVISABLE.**—Goods for which replevin proceedings can be taken are said to be replevisable. Where goods are delivered under a contract, they are irreplevisable, because a wrongful taking is essential to replevin proceedings.<sup>8</sup>

Divorce practice.

**REPLICATION.**—§ 1. In matrimonial suits in the Probate, Divorce and Admiralty Division of the High Court, the replication is the pleading filed by the petitioner in reply to the answer of the respondent.<sup>9</sup>

Criminal practice.

§ 2. In criminal prosecutions by indictment or information, the replication is the pleading following the plea (*q. v.*).<sup>10</sup>

§ 3. Under the old practice of the Chancery and Common Law Courts, the replication was the pleading filed or delivered by the plaintiff in answer to the defendant's plea or answer. In Chancery, however, the replication had for many years been merely a joinder of issue (*q. v.*), special replications (which were used where the defendant introduced new matter into his plea or answer) having been superseded by the practice of amending the bill.<sup>11</sup> (See *Amendment*; *Pleading*; *Reply*.)

**REPLY.**—§ 1. In its general sense, a reply is what the plaintiff, petitioner or other person who has instituted a proceeding says in answer to the defendant's case.

In pleading.

§ 2. In an action in the High Court the reply is the pleading delivered in answer to the defendant's Statement of Defence. Usually the reply is delivered by the plaintiff, but if the defendant has set up a counter-claim against any person other than the plaintiff, the answer of that person to the counter-claim is called a reply,<sup>12</sup> although it is rather in the nature of a Statement of Defence. In simple actions the reply is usually a mere joinder of issue (*q. v.*).

On trial or argument.

§ 3. When a case is tried or argued in Court, the speech or argument of the plaintiff in answer to that of the defendant is called his reply. In some cases the plaintiff is not entitled to reply. (See *Trial*; *Opening*; *Right to begin*.)

<sup>1</sup> Bl. iii. 147 *et seq.*; Chitty, Pr. 1086; Woodfall's L. & T. 485.

<sup>2</sup> Rules of Court, xli. 6.

<sup>3</sup> Britton, 55 a.

<sup>4</sup> *Ibid.* 54 b.

<sup>5</sup> Grimm, ii. 401.

<sup>6</sup> Cf. *plevine par sa fey*, Britton, 180 a.

<sup>7</sup> Co. Litt. 145 b.

<sup>8</sup> *Galloway v. Bird*, 4 Bing. 299; *Mennie v. Blake*, 6 El. & B. 842.

<sup>9</sup> Browne on Divorce, 228.

<sup>10</sup> Archbold, Crim. Pl. 135.

<sup>11</sup> Mitford, Pl. 321; Daniell's Ch. Pr. 731 *et seq.*

<sup>12</sup> Rules of Court, xxii. 8.

As to affidavits in reply, see *Affidavit*, § 2.

§ 4. Under the old practice of the Chancery and Common Law Courts, to reply was to file or deliver replication (*q. v.*).

**REPORT.**—I. § 1. When a question is referred to a referee under the Judicature Act, 1873, his decision is given in the form of a report to the Court.<sup>1</sup> (See *Refer*, §§ 3 *et seq.*; *Referee*.)

§ 2. The Masters in Lunacy embody the results of their inquiries as to the estates or persons of lunatics in the form of reports to the Lord Chancellor, which require to be confirmed before they can be carried into effect.<sup>2</sup> (See *State of Facts*.) As to reports in Admiralty actions, see *Registrar and Merchants*.

§ 3. Under the old practice in Chancery, when an inquiry was referred to the Master, he gave the result in a report, which was filed in an office, called for that reason the Report Office.<sup>3</sup> In more modern practice, chief clerks' certificates, petitions, &c. were also filed there\* (see *Certificate*, § 4; *Masters*, § 3). After the abolition of the Masters in Chancery, the Report Office was added to that of Records and Writs by stat. 18 & 19 Vict. c. 134,<sup>5</sup> and has now been amalgamated with the Central Office<sup>6</sup> (*q. v.*).

§ 4. The judgment of the Judicial Committee of the Privy Council on an appeal or reference is technically a report to the Queen in Council, giving the opinion of the Court on the question involved in the case.<sup>7</sup> (See *Judicial Committee*; *Refer*, § 8.)

II. § 5. Report also signifies a published account of a legal proceeding, giving a statement of the facts, the arguments on both sides, and the reasons the Court gave for its judgment. Reports by barristers published with the reporter's name or otherwise sanctioned by persons of standing in the profession are cited in argument as precedents,<sup>8</sup> and are of more or less authority according to the reputation of the reporter and of the judges whose decisions are reported. (See *Year Books*.)

A list of the principal reports will be found in the list of abbreviations at the beginning of the present work.

**REPRESENTATION.**—I. § 1. One person is said to represent another when he takes his place. Thus, an agent represents his principal, an heir his ancestor, an executor his testator, and an administrator the intestate whose estate he administers. (See *Representative*.) As to parliamentary representation, see *House of Commons*; *House of Lords*.

§ 2. In the law of intestacy, the rule of representation is that rule of law by which the children or other descendants of a deceased person, who, if he had lived, would have taken property by virtue of an intestacy, stand in his place, so as to take the property which he would have taken if he had lived. As regards realty, the rule of representation is universal,

<sup>1</sup> Jud. Act, 1873, s. 56; Rules of March, 1879. See an example of a report in *Schuster v. Fletcher*, 3 Q. B. D. 418; for the form of judgment, see Jud. Act, 1875, sched. App. D., No. 6.

<sup>2</sup> Pope on Lunacy, 33.

<sup>3</sup> Gilbert, Chanc. 168.

<sup>4</sup> Daniell, Ch. Pr., Index, s. v.

<sup>5</sup> Second Rep. Legal Dep. Comm. 44.

<sup>6</sup> Judicature (Officers) Act, 1879, s. 5.

<sup>7</sup> Macpherson, Privy C. Pr. 148.

<sup>8</sup> Bl. Comm. i. 71; Co. Litt. 293 a.

namely, that all lineal descendants represent their ancestor (see the fourth canon of descent, *Descent*, § 5).<sup>1</sup> In the case of personalty, representation only takes place (i) where the intestate has left children and grandchildren by deceased children, in which case the grandchildren stand in their parents' place; and (ii) where the intestate has left a mother, or a brother, or sister, and also nephews or nieces by a deceased brother or sister, in which case the nephews or nieces take their parent's share. (See *Distribution*; *Next of Kin*; *Per Capita*.)

## Contract.

II. § 3. In the law of contracts, a representation is a statement or assertion made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. In ordinary contracts a representation as such has no legal effect, even if untrue, and even if the person making it knew it to be so. Thus if a vendor of goods simply represents them as worth a high price, while in fact they are not, this gives the purchaser no right either to rescind the contract or to bring an action of damages. (See *Caveat Emptor*.) But a representation may take the form of a warranty or condition, or may amount to fraudulent or negligent misrepresentation, all of which have important legal effects.<sup>2</sup>

## Insurance.

(See the respective titles.) § 4. Contracts of insurance being contracts *uberrimæ fidei* (*q.v.*), representations which relate to material facts connected with an insurance must be complied with, but a substantial compliance is sufficient. Thus where the assured asserted that his vessel mounted twelve guns and twenty men, and the ship sailed with less than this number of men and guns, but carried in addition a number of boys and swivels, which made her force in fact greater than that stated, it was held that, this being a representation and not a warranty, and having been substantially complied with, the underwriters were liable.<sup>3</sup>

## Public Worship Act.

III. § 5. Under the Public Worship Act, 1874, complaints against incumbents, &c. on matters within that act, are made by a document called a representation, containing a statement of the nature of the com-

<sup>1</sup> As to gavelkind land, see *Hook v. Hook*, 1 H. & M. 43.

There is also another and, in the opinion of many, an incorrect use of the term representation in the law of descent. If A. acquires land by purchase and dies intestate, leaving two daughters, B. and C., his land descends to them as coparceners. If B. dies intestate, leaving a son D., the question arises to whom will her share descend? The Inheritance Act says that in case of a descent, the title to inherit shall be traced from the purchaser, who in this case is A., so that the provisions of the act would seem to be fulfilled by making B.'s share descend to C. and D. in equal shares, D. standing in the place of his deceased mother. (Hayes' Conv. i. 314.) No doubt this result would be absurd, the obvious conclusion being that the legislature did not contemplate such a case. It has, in fact, been decided that in the case above supposed B.'s share descends to D. (*Cooper v. France*, 14 Jur. 214; 19 L. J., Ch. 313.)

No reasons are given for the decision except that the same result would have followed under the old law, and that the act did not intend to make an alteration. In addition to this reason, however, it is argued by Mr. Joshua Williams (R. P. 113, and App. B.; Williams on Seisin, 79) that the case is governed by the rule of representation, D. standing in the place of his deceased mother. It is quite clear that the rule of representation referred to is not the ordinary rule stated in the text, because that only applies to the case of a person pre-deceasing the intestate. It is true that under the old law, in certain cases, if a coparcener died intestate her share descended to her issue, but this was by virtue of a special rule which has never been adequately explained. (Solicitors' Journal, 23rd February, 1878.)

<sup>2</sup> *Behn v. Burness*, 3 B. & S. 751; Pollock on Contract, 445, 476.

<sup>3</sup> *Maude & Pollock, Merch. Shipp.* 395, citing *Pawson v. Watson*, 2 Cowp. 785.



plaint, and signed by the person or persons making it.<sup>1</sup> (See *Public Worship Regulation Act.*)

**REPRESENTATIVE** is a person who represents or takes the place of another. The executor or administrator of a deceased person is called **Personal**. his personal representative, because he represents him in respect of his personal estate. For a similar reason an heir is sometimes called the **Real**. real representative of his ancestor.

As to representative peers, see *House of Lords*.

§ 2. A representative action or suit is one brought by a member of a class of persons on behalf of himself and the other members of the class. In the proceedings before judgment the plaintiff is, as a rule, *dominus litis* (*q. v.*), and may discontinue or compromise the action as he pleases; therefore a member of the class who is dissatisfied with an order obtained by the plaintiff cannot appeal against it; he may, however, apply to be made a defendant, and, in a proper case, might obtain the conduct of the proceedings.<sup>2</sup> As soon as judgment is given for the plaintiff he ceases to be *dominus litis*, and all members of the class who are willing to contribute to the expenses of the suit may join in, and take the benefit of, the subsequent proceedings.<sup>3</sup>

**REPRIEVE**, in criminal procedure, is the withdrawal of a sentence for a time, whereby the execution of it is suspended. It may be granted either by the Court or by the crown. In two cases the Court is bound to grant a reprieve, namely, where a female prisoner under sentence is pregnant, and where a prisoner becomes insane after judgment.<sup>4</sup> (See *Jury*, § 10.)

**REPRISAL** is the same thing as recaption (*q. v.*).

**REPRISALS**, in international law, include every species of means, **Special**. short of war, employed by one state to procure redress for an injury committed by another state. The term therefore includes embargo and retorsion (*q. v.*). Reprisals are negative when a state refuses to fulfil an obligation, and positive when they consist in seizing the subjects or property of the offending state.<sup>5</sup> § 2. The reprisals above described are **General**. sometimes called special, as opposed to general reprisals, which are only used in time of war, and consist in authorizing any individuals whatever, whether suffering from private grievances or not, to act against the subjects of the opposed state.<sup>6</sup> (See *Privateers*; *Letters of Marque*.)

**REPUBLICATION** of a will is where it is re-executed by the testator. This is generally done when the will has been revoked and the testator wishes to revive it.<sup>7</sup> (See *Publication*; *Revival*.)

<sup>1</sup> Sect. 8.

<sup>2</sup> *Watson v. Cave*, 17 Ch. D. 19.

<sup>3</sup> *Daniell*, Ch. Pr. 215, 694.

<sup>4</sup> *Archbold*, Crim. Pl. 187; *Bl. Comm.*

iv. 394.

<sup>5</sup> *Manning's Law of Nations*, 145.

<sup>6</sup> *Ibid.* 155.

<sup>7</sup> *Williams on Executors*, 198.

**REPUGNANT** means contrary to or inconsistent with. Thus, if A. grants land to B. in fee, upon condition that he shall not alien it, this condition is "repugnant to the estate," that is, inconsistent with the nature of a fee simple, and therefore void.<sup>1</sup>

As to repugnant gifts by deed or will, see *Inconsistency*.

**REPUTATION.**—§ 1. In the law of evidence, matters of public and general interest, such as the boundaries of counties or parishes, rights of common, claims of highway, &c., are allowed to be proved by general reputation, *e. g.*, by the declarations of deceased persons made ante litem motam, by old documents, &c., notwithstanding the general rule against secondary evidence.<sup>2</sup> § 2. So evidence of the general reputation of a family, as proved by a surviving member of it, is admissible in questions of pedigree.<sup>3</sup>

As to a manor by reputation, see *Manor*, § 2.

As to personal reputation, see *Libel*; *Character*; *Slander*.

**REPUTED OWNERSHIP.**—The doctrine of reputed ownership was first introduced into the bankrupt laws by the statute 21 Jac. 1, c. 19, s. 11, with the object of protecting the creditors of a trader from the consequences of the false credit which he might acquire by being suffered to have in his possession, as apparent owner, property which does not really belong to him. If the circumstances under which the property is in the trader's possession, order or disposition, are such as to lead to a fair and reasonable inference amongst persons likely to have dealings with him, that he is the owner, and if the real owner is a consenting party, then on the trader becoming bankrupt, that property is divisible among his creditors.<sup>4</sup> The doctrine does not apply to property comprised in a registered bill of sale,<sup>5</sup> nor does it apply in cases where there is a custom or usage of trade rebutting the presumption of ownership.<sup>6</sup> (See *Order and Disposition*.)

**REQUEST.**—§ 1. A request may give rise to an implied or tacit promise. Thus, if I request a workman to do work for me, I tacitly agree to pay him for it. And if I request a person to do something for me which would not of itself give rise to a tacit promise to pay him, and after he has done it I promise to pay him, this promise couples itself with the antecedent request and makes a good contract.<sup>7</sup>

§ 2. In some cases a request will itself be implied by the law (quasi-request): thus, if A. has been compelled to do that which B. is legally compellable to do, the law will imply a request by B. to A. to do the act.<sup>8</sup> (See *Contract*, §§ 5 *et seq.*; *Promise*; *Quasi-Contract*: also *Courts of Request*; *Letters of Request*.)

Quasi-request.

<sup>1</sup> Co. Litt. 206 b.

<sup>2</sup> Best on Evidence, 632.

<sup>3</sup> *Ibid.* 634.

<sup>4</sup> Robson's Bankruptcy, 412, 413; *In re Blanshard*, 8 Ch. D. 601.

<sup>5</sup> Bankr. Act, 1869, s. 15, § 5; Bills of Sale Act, 1878, s. 20.

<sup>6</sup> *Ex parte Lovering*, L. R., 9 Ch. 621.

<sup>7</sup> Chitty on Contracts, 49; Pollock on Contract (2nd edit.), 28.

<sup>8</sup> Chitty, 50.

**REQUISITIONS ON TITLE.**—When a contract for the sale of real property has been entered into, and the vendor has delivered the abstract of title to the purchaser, the latter goes through the abstract, and if there are any defects in or questions as to the vendor's title, he puts his objections into writing and delivers them to the vendor. These are called requisitions, because they require the vendor to remove the defects or doubts pointed out. A formal contract of sale always stipulates that the requisitions shall be made within a certain time after the delivery of the abstract. It also generally stipulates that the title shall commence with a certain document, and that no requisitions shall be made in respect of the earlier title; not unfrequently it is provided that no requisitions shall be made in respect of some specified defect in the title which the vendor is unable to remove.<sup>1</sup> (See *Vendors and Purchasers*.)

**RES**, in an Admiralty action in rem, is the ship, cargo or other property proceeded against.<sup>2</sup> (See *Action*, § 11; *Arrest*, § 7; *Bail*, § 4; *In Personam*, § 5.)

**RES GESTÆ** are the facts surrounding or accompanying a transaction which is the subject of legal proceedings. The phrase is chiefly used in the law of evidence, the rule being, that evidence of words used by a person may be admissible (notwithstanding the general rule against derivative evidence), on the ground that they form part of the *res gestæ*, provided that the act which they accompanied is itself admissible in evidence, and that they reflect light upon or qualify that act.<sup>3</sup> Therefore, where a woman went to be examined by a surgeon with a view to effecting a policy of insurance on her life, and a few days afterwards stated to a friend that she was ill when she went, and that she was afraid she would not live until the policy was made out, and then her husband could not get the money: evidence of these statements was held admissible in an action on the policy, on the ground that as the woman's previous statements to the surgeon were admissible in evidence, her statements to her friend were also admissible, being part of the *res gestæ*, that is, as following and explaining her previous statements.<sup>4</sup> Similarly on an indictment for treason in leading on a riotous mob, evidence of the cry of the mob is admissible, because it forms part of the *res gestæ*.<sup>5</sup>

**RES INTER ALIOS ACTA.**—The rule *res inter alios acta alteri nocere non debet* means that persons are not to be prejudiced by the acts or words of others, to which they were neither party nor privy, and which they consequently had no power to prevent or control. In other words, a person is not to be affected by what is done behind his back.<sup>6</sup>

<sup>1</sup> Greenwood's Conv. (5th edit.), 7, 31  
*et seq.*; Dart, V. & P. 124 *et seq.*

<sup>2</sup> Roscoe's Admiralty, 187.

<sup>3</sup> Best on Evidence, 663; *Wright v.*

*Tatham*, 7 A. & E. 313; 5 Cl. & F. 670.

<sup>4</sup> *Aveson v. Lord Kinnaird*, 6 East, 188.

<sup>5</sup> Best on Evid. 630.

<sup>6</sup> *Ibid.* 150, 643.

**RES JUDICATA.**—*Res judicata pro veritate accipitur*: a judicial decision is conclusive until reversed, and its verity cannot be contradicted. (See *Record*.) But a judgment inter partes only binds the parties and privies to it; as regards other persons, it is *res inter alios judicata*.<sup>1</sup> (See *In Personam*; *Res inter alios acta*.)

**RE-SALE** is where a person who has sold goods or other property to a purchaser sells them again to someone else. Sometimes a vendor reserves the right of re-selling if the purchaser commits default in payment of the purchase-money, and in some cases (*e. g.*, on a sale of perishable articles) the vendor may do so without having reserved the right.<sup>2</sup>

**RESCIND—RESCISSION.**—§ 1. Rescission, or the act of rescinding, is where a contract is put an end to by the parties, or one of them. § 2. Thus, a contract is said to be rescinded where the parties agree that it is to be at an end,<sup>3</sup> or where one of the parties to a contract is entitled to avoid it by reason of the act or default of the other party, and elects to do so, either by giving notice of his election to the other party, by setting up the invalidity of the contract as a defence to proceedings taken by the other party, or by instituting proceedings to have the contract judicially set aside (judicial rescission).<sup>4</sup> (See *Restitutio in Integrum*.) § 3. The most frequent instances of rescission by one party occur where there is fraud or mistake (see *Fraud*, § 17; *Mistake*, § 10), and in certain cases where there is a continuing contract, and a failure of performance by one of the parties in an essential part of the contract. Thus, if a person who has contracted to supply a certain quantity of goods every month fails to supply a sufficient quantity the first month, the other party is entitled to rescind the contract.<sup>5</sup> Similarly, if a party to a contract fails to comply with a condition precedent, or by his own act makes the performance of the contract impossible, the other party may in general rescind the contract.<sup>6</sup> (See *Affirm*.)

**RESCOUS** = rescue<sup>7</sup> (*q. v.*).

**ETYMOLOGY.**—Old French, *rescosse*, from *rescorre*, to release; late Latin, *reīxcutere*, to shake off again.<sup>8</sup>

Of person :  
civil arrest :

**RESCUE.**—I. § 1. Rescue is the act of forcibly and knowingly freeing a person from an arrest or imprisonment.<sup>9</sup> In the case of a person arrested in a civil action, the rescuer is liable to an action by the plaintiff for the loss thereby caused to him, and to attachment for contempt of

<sup>1</sup> Best on Evidence, 734.

<sup>2</sup> See Benjamin on Sales, 643; Chitty on Contracts, 394; *Maclean v. Dunn*, 4 Bing. 722.

<sup>3</sup> Chitty on Contracts, 675; Leake on Contracts, 413; *James v. Cotton*, 7 Bing. 266.

<sup>4</sup> Pollock on Contract, 489.

<sup>5</sup> Chitty, 676.

<sup>6</sup> *Ibid.*; *Tully v. Howling*, 2 Q. B. D. 182.

<sup>7</sup> Litt. § 237; Co. Litt. 47 b, 160 b; Britton, 108 b.

<sup>8</sup> Diez, Etym. Wörtl. v. *Scutere*; Müller, Etym. Wörtl. v. *Rescue*.

<sup>9</sup> Bl. Comm. iv. 131; Co. Litt. 160 b.

Court.<sup>1</sup> § 2. In the case of a prisoner arrested in criminal proceedings, criminal the punishment for a rescue varies with the degree of the offence for arrest. which the person rescued was in custody.<sup>2</sup>

II. § 3. Rescue also signifies the act of forcibly taking back goods Of goods. which have been distrained and are being taken to the pound. If the distress was unlawful, the owner may lawfully rescue the goods;<sup>3</sup> if the distress was lawful, the rescuer is liable to an action by the distrainer.<sup>4</sup> (See *Double Damages*; *Pound*; *Pound-breach*, § 4.) A rescue in law is Rescue in law. where the cattle, &c. come again into the possession of the owner without his act, and he refuses to deliver them to the distrainer.<sup>5</sup>

ETYMOLOGY.]—See *Rescous*.

**RESERVATION** "is a clause of a deed whereby the feoffor, donor, lessor, grantor, &c. doth reserve some new thing to himself out of that which he granted before [by the same deed]. And this doth most commonly and properly succeed the *tenendum*."<sup>6</sup> (See *Deed*, § 3.)

The commonest instance of a reservation is the rent in an ordinary lease.<sup>7</sup>

A reservation, in the proper sense of the word, cannot, it seems, be validly made in favour of a stranger to the deed,<sup>8</sup> but the same effect may be produced by a grant, covenant or condition in favour of the stranger, for he need not now<sup>9</sup> be a party to the deed. And it is said that a reservation to a stranger creates an implied covenant in his favour.<sup>10</sup>

As to the difference between a reservation and an exception, see *Exception*.

**RE-SETTLEMENT.**—Where land has been settled on a marriage, and the eldest son has attained twenty-one during his father's lifetime, and thus acquired an estate tail in remainder, it is usual for the father as protector (*q.v.*) to give his consent to the son's estate tail being barred on condition of a re-settlement being made. The terms of such a re-settlement generally are that the estate of the son shall be cut down to an estate for life, with remainder to his children (if he should marry) successively in tail, subject to the usual provisions for his widow and younger children (see *Jointure*; *Portion*), while the father on his side charges his life estate with an annuity for the son and a jointure for the son's widow, as a provision for them before the son's estate comes into possession.<sup>11</sup> Such a re-settlement will not, however, be supported in equity, if it appears from the unfairness of its terms or otherwise not to have been understood by the son.<sup>12</sup> (See *Disentailing Deed*; *Estate Tail*, § 10; *Settlement*.)

<sup>1</sup> Bl. iii. 146.

<sup>2</sup> Steph. Crim. Dig. 88; Russell on Crimes, i. 582.

<sup>3</sup> Co. Litt. 47 b, 160 b; Woodfall's Landlord & Tenant, 442; Smith & Soden's L. & T. 225.

<sup>4</sup> Bl. Comm. iii. 146; see also Litt. § 237.

<sup>5</sup> Co. Litt. 161 a.

<sup>6</sup> Shepp. Touch. 80.

<sup>7</sup> Litt. § 215.

<sup>8</sup> Co. Litt. 47 a, 213 a.

<sup>9</sup> Stat. 8 & 9 Vict. c. 106, s. 5.

<sup>10</sup> Bythewood, Conv. iv. 348.

<sup>11</sup> Elphinstone, Conv. 420.

<sup>12</sup> *Ibid.*; Watson's Comp. Eq. 62.

**RESIANT** is a resident. The term is chiefly used in speaking of manors.<sup>1</sup> (See *Court Leet*.)

**RESIDENCE** is used in law to denote the fact that a person dwells in a given place, or, in the case of a corporation, that its management is carried on there: thus, if a company is formed in England for the purpose of carrying on a trade (such as mining or manufacturing) in a foreign country, but its business is under the control of a board of directors in England, the company is said to have its residence in England.<sup>2</sup> In the case of a person, residence connotes the idea of home, or at least of habitation, and need not necessarily be permanent or exclusive.<sup>3</sup>

Effect of residence.

Bonâ fide residence.

Voters.

Paupers.

Actual or constructive.

§ 2. Residence is of importance in several ways: first, as an element in ascertaining a person's domicile (*q. v.*), and, secondly, as determining whether he is subject to the authorities having jurisdiction or powers within the district where he resides. Thus, where a person who was born and had long resided in Ireland came over to England, and shortly afterwards filed a petition for judicial separation in the Court of Divorce, it was held that his residence in England was not bonâ fide, and was therefore not sufficient to found the jurisdiction of the Court.<sup>4</sup> Residence is, however, chiefly of importance as forming part of some of the qualifications for voting at parliamentary and municipal elections; and in ascertaining whether a pauper has acquired a settlement or irremovability in a parish.<sup>5</sup> (See *Occupation; Rates*.)

§ 3. Sometimes a distinction is drawn between actual and constructive residence, the latter term being used to mean that a person has the liberty of returning, and also the intention of returning, whenever he pleases, to the place at which he usually resides, although he may be actually absent from it for some time.<sup>6</sup>

As to the residence of clergymen, see *Non-Residence*.

**RESIDUE—RESIDUARY.**—§ 1. In administering the personal estate of a testator or intestate, the debts, funeral and testamentary expenses and the costs of the administration are first paid, and what remains is the residue in the sense of the net personal estate;<sup>7</sup> then, in the case of a testator's estate, the legacies, annuities, &c. are paid, and what remains is the ultimate residue or residuary estate in the ordinary sense of the word. Sometimes there is a residue within a residue, or a particular residue as opposed to a general residue: as where a fund is

<sup>1</sup> See Williams on Commons, 272, 280.

<sup>2</sup> *Cesena Sulphur Co. v. Nicholson*; *Calcutta Jute Mills Co. v. Same*, 1 Ex. D. 428. See also Thring on Companies, 91.

<sup>3</sup> See the cases cited *infra*.

<sup>4</sup> *Manning v. Manning*, L. R., 2 P. & D. 223; *Westman v. Aktiebolaget, &c.*, 1 Ex. D. 237.

<sup>5</sup> As to residence under the Registration Acts, see *Beal v. Ford*, 3 C. P. D. 73. As

to residence in questions of the irremovability and settlement of paupers, see *Reg. v. Whitby*, L. R., 5 Q. B. 325; *Reg. v. Abingdon*, *ibid.* 406, and the cases cited in each.

<sup>6</sup> See *Reg. v. St. Leonard*, L. R., 1 Q. B. 21.

<sup>7</sup> See *Trethewy v. Helyar*, 4 Ch. D. 53; *Fenton v. Wills*, 7 Ch. D. 33; *Blann v. Bell*, 7 Ch. D. 382.

given to A. subject to the payment thereof of certain legacies, so that if any of those legacies fail, they fall into the particular residue given to A.,<sup>1</sup> while the general residue of the estate is given to B.<sup>2</sup>

§ 2. A residuary bequest, that is, a bequest of the testator's residuary personal estate, passes all the personalty belonging to the testator at his death and not otherwise disposed of, including lapsed legacies.<sup>3</sup> As to the effect of a residuary devise, see *Devise*, § 2. Where a testator does not effectually dispose of the residue of his property he dies intestate as to it, and it goes to his heir or next of kin, according to its nature. (See *Intestate*.)

Residuary bequest.

**RESIGNATION** is where a parson, vicar or other beneficed clergyman voluntarily gives up and surrenders his charge and preferment to those from whom he received the same. It is usually done by an instrument attested by a notary.<sup>4</sup> (See *Relinquishment*.)

**RESIGNATION BONDS.**—A resignation bond is a bond given by a presentee to a benefice, binding himself to resign the benefice either within a certain time, or indefinitely, whenever the patron should require it.<sup>5</sup> Such bonds were formerly held legal, and might be either general or in favour of a specified person or persons, but, by two modern cases,<sup>6</sup> it was decided that all resignation bonds were illegal. Shortly afterwards the stat. 9 Geo. 4, c. 94, was passed, making valid, in certain cases, resignation bonds in favour of specified persons related by blood or marriage to the patron.

**RESOLUTION.**—§ 1. A resolution is an expression of opinion or intention by a meeting (*q.v.*).

§ 2. Under the Companies Acts, resolutions of the members of a company are either ordinary, special, or extraordinary. An ordinary resolution is one passed by a simple majority in number at an ordinary meeting. A special resolution requires first to be passed by a majority of three-fourths of the members present at a meeting summoned for the purpose, and then to be confirmed by a simple majority at a meeting held for the purpose pursuant to notice between a fortnight and a month from the first meeting.<sup>7</sup> An extraordinary resolution is a resolution passed by a majority of three-fourths of the members present at a meeting summoned for the purpose; it is, therefore, the same as an unconfirmed special resolution.<sup>8</sup>

Companies.

Ordinary.

Special.

Extraordinary.

§ 3. In bankruptcy and liquidation proceedings, an ordinary resolution is one decided by a majority in value of the creditors present (personally or by proxy) at the meeting, and voting on the resolution.<sup>9</sup> A special

Bankruptcy.

Ordinary,  
special.

<sup>1</sup> *Champney v. Davy*, 11 Ch. D. 949.  
<sup>2</sup> *Watson's Comp. Equity*, 1258, 1268.

<sup>3</sup> *Ibid.* 1268.

<sup>4</sup> *Phillimore*, Eccl. Law, 517. See also the Incumbents Resignation Act, 1871.

<sup>5</sup> *Gibson's Codex*, 799; *Phillimore's Eccl. Law*, 1119.

<sup>6</sup> *Bishop of London v. Ffytche* in 1780, *Phill.* 1121; *Fletcher v. Soudes*, 5 B. & A.

335; 3 Bing. 598.

<sup>7</sup> *Companies Act*, 1862, s. 51; *Thring on Companies*, 167. The Friendly Societies Act, 1875, s. 24, and The Industrial and Provident Societies Act, 1876, s. 16, contain similar provisions.

<sup>8</sup> *Sect.* 129.

<sup>9</sup> *Bankr. Act*, 1869, s. 16, § 7.

Extraordi-  
nary.

resolution is one passed by a majority in number and three-fourths in value of the creditors present (personally or by proxy) at the meeting, and voting on the resolution.<sup>1</sup> An extraordinary resolution is one passed by a majority in number and three-fourths in value, and confirmed by a majority in number and value at a subsequent meeting;<sup>2</sup> certain requirements as to notices, and the interval between the two meetings, have to be observed.<sup>3</sup> Debts amounting to 10*l.* and under are not taken notice of in computing a majority of value on a resolution for liquidation or composition (*q.v.*).<sup>4</sup>

**RESPITE** is to discharge or dispense with. Thus, a lord is said to respite fealty when he does not exact it from his tenant. (See *Fealty*; *Homage*, § 2.)

Criminal  
proceedings.

**RESPONDEAT OUSTER**, in criminal procedure, is that judgment which is given when a prisoner fails to substantiate a special plea in bar. Thus, if he pleads *auterfois acquit* and fails to prove it, judgment is given that he "answer over," or plead to the indictment again, in which case he may plead the general issue—not guilty.<sup>5</sup> (See *Plea*, § 2.) In practice, however, a prisoner always pleads "not guilty," in addition to a special plea in bar; and therefore, if he fails to substantiate it, judgment of *respondeat ouster* is not necessary, but the trial proceeds as if no special plea had been pleaded.<sup>6</sup>

Civil actions.

§ 2. In ordinary common law actions, judgment of *respondeat ouster* was formerly given when the defendant pleaded a dilatory plea (*e.g.*, a plea in abatement) and failed, in which case he had to plead in bar.<sup>7</sup> Under the present practice, however, pleas in abatement are abolished; the Statement of Defence contains all the defendant's objections to the action (unless he demurs), and they are all tried at the same time; judgment of *respondeat ouster* therefore no longer exists; power, however, is given to decide questions of law before the trial, and to order some questions of fact to be tried before the others.<sup>8</sup>

**RESPONDEAT SUPERIOR** means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. (See *Master and Servant*, § 3; *Quasi-Tort*.)

**RESPONDENT** is a person against whom a petition is presented, a summons issued, or an appeal brought, just as a defendant is a person against whom an action is brought. (See *Co-Respondent*; *Defendant*; *Petition*.)

**RESPONDENTIA** was formerly used to denote the hypothecation of the cargo or goods on board a ship as security for the repayment of a

<sup>1</sup> Bankr. Act, 1869, s. 16, § 8.

<sup>2</sup> *Ibid.* s. 126.

<sup>3</sup> Bankr. Rules (1870), 282.

<sup>4</sup> Bankr. Act, 1869, ss. 125, 126.

<sup>5</sup> Steph. Comm. iv. 405.

<sup>6</sup> Archbold, Crim. Pl. 140. As to pleas in abatement, see *ibid.* 131.

<sup>7</sup> Smith's Action (11th edit.), 187.

<sup>8</sup> Rules of Court, xix. 13, 18; xxxiv. 2; xxxvi. 6.



loan, the term *bottomry* being confined to hypothecations of the ship herself; but now the term *respondentia* is seldom used, and the expression *bottomry* is generally employed whether the vessel or her cargo or both be the security.<sup>1</sup> (See *Bottomry*; *Hypothecation*; *Necessaries*, § 4.)

**RESPONSALIS** "was he that was appointed by the tenant or defendant [in an action] in case of extremity and necessitie to alledge the cause of the parties absence, and to certifie the Court upon what tryall he will put himselfe."<sup>2</sup> By the common law a party could not appear by attorney without the king's special warrant; when this rule was relaxed *responsales* became obsolete.<sup>3</sup> (See *Attorney*.)

ETYMOLOGY.—Latin, *respondere*, to answer.

**RESTITUTIO IN INTEGRUM** is a phrase borrowed from the Roman law,<sup>4</sup> where it was applied to cases where a person who, according to strict law, had lost a right, was restored to his original position by the judgment of a Court acting on equitable principles.<sup>5</sup> In English law it is used to denote the equitable relief which is given in rescinding contracts on the ground of fraud, and in similar cases, where both parties can be restored to their original position.<sup>6</sup>

**RESTITUTION.**—§ 1. In civil actions, where a defendant appeals Civil action. and the judgment is reversed, he is entitled to be restored to all he has lost by the execution of the judgment. In most cases he may obtain redress by application to the Court or a judge, but a writ of restitution may in all cases be issued, while in some cases it appears to be the only remedy.<sup>7</sup>

§ 2. In a prosecution for larceny, embezzlement, &c., where the Stolen goods. offender is prosecuted by the owner of the goods and convicted, the property is to be restored to the owner, and the Court may issue a writ of restitution, or make an order for restitution in a summary manner.<sup>8</sup>

**RESTITUTION OF CONJUGAL RIGHTS.**—Where one of two married persons has without lawful cause withdrawn from living with the other, the latter may present a petition to the High Court in the Probate, Divorce and Admiralty Division praying restitution of conjugal rights, on which the Court will, in a proper case, compel the other to return to cohabitation.<sup>9</sup>

**RESTRAINING ORDERS**, in the practice of the Chancery Division of the High Court, are of two kinds. § 1. In the general sense of Injunction. the term, a restraining order is an order of the High Court (under the original jurisdiction of the Court of Chancery) restraining a person from doing an act, *e. g.*, obstructing ancient lights; such orders are now more

<sup>1</sup> Maude & Pollock, Merch. Shipp. 433; Smith's Merc. Law, 416.

<sup>2</sup> Co. Litt. 128 a.

<sup>3</sup> *Ibid.*

<sup>4</sup> See Dig. iii. 3, fr. 39, § 6; iv. 2 fr. 9, § 3.

<sup>5</sup> Savigny, Syst. vii. 91 *et seq.*; Thibaut, Pand. § 680.

<sup>6</sup> *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. at p. 448.

<sup>7</sup> Smith's Action (11th edit.), 229; Archbold's Pr. 549.

<sup>8</sup> Steph. Comm. iv. 437; stats. 24 & 25 Vict. c. 96, s. 100; 30 & 31 Vict. c. 35, s. 9.

<sup>9</sup> Browne on Divorce, 83.

Restraining  
order under  
5 Vict. c. 5.

commonly called injunctions (*q. v.*).<sup>1</sup> § 2. In its special and more usual sense, a restraining order is an order under stat. 5 Vict. c. 5, s. 4, by which the Bank of England or any other public company may be restrained from permitting the transfer of stock or shares in their books or from paying dividends thereon; the application may be made in a summary way (without the institution of a suit or action) by any person interested in the stock, the object generally being to prevent any dealing with the stock until the rights of the parties have been ascertained by an action instituted in the regular manner.<sup>2</sup> (See *Distringas*; *Stop Order*.)

**RESTRAINT OF MARRIAGE.**—§ 1. Marriage being an institution encouraged by the state, the general rule is that every contract, the object of which is to restrain a person from marrying at all, is void,<sup>3</sup> and so is an agreement not to marry anyone except a specific person.<sup>4</sup> § 2. As to conditions in restraint of marriage, the general rule is that such a condition is valid if it is a condition precedent.<sup>5</sup> As to conditions subsequent, there is some difference in the case of real and personal estate. With regard to real estate, it would seem, on principle, that a condition subsequent is void, if in general restraint of marriage; but is valid if in partial restraint.<sup>6</sup> With regard to personal estate, a condition subsequent in general restraint of marriage is bad, whether there is a gift over or not, while a condition subsequent in partial restraint of marriage is good if there is a gift over, but not otherwise. A condition restraining the second marriage of a man or a woman is valid.<sup>7</sup> § 3. A limitation of property until marriage is good, whether to a widow, a widower, or an unmarried person; but in the case of an unmarried person, it seems that to make the restriction valid there must be a limitation over in the event of the donee marrying,<sup>8</sup> because such gifts are construed rather as provisions for the donee until marriage, than as restraints on marriage.<sup>9</sup> So that a condition in restraint of marriage may be void, while the same result might be attained by a limitation.

**RESTRAINT OF SHIP.** See *Action*, § 17; *The Talca*, 5 P. D. 169.

**RESTRAINT OF TRADE.**—§ 1. The general rule is that a man ought not to be allowed to restrain himself by contract from exercising any lawful trade or business at his own discretion and in his own way,<sup>10</sup> the reason being that such a contract tends to deprive the public of the advantage of employing him, and would pro tanto create a monopoly (*q. v.*).<sup>11</sup> § 2. A contract in general restraint of trade is one which provides that

General  
restraint.

<sup>1</sup> Daniell, Ch. Pr. 1462, 1537.

<sup>2</sup> *Ibid.* 1538.

<sup>3</sup> Chitty on Contracts, 619.

<sup>4</sup> *Lowe v. Peers*, 4 Burr. 2225; Wilmot, 364.

<sup>5</sup> See *Scott v. Tyler*, 2 Dickens, 712.

<sup>6</sup> *Jones v. Jones*, 1 Q. B. D. 279; *Fenner v. Turner*, 16 Ch. D. 188. In the former case the object of the testator was held to

be not to restrain marriage, but to provide for the devisee until marriage, and the condition was therefore held to be valid.

<sup>7</sup> Pollock on Contract, 307.

<sup>8</sup> Watson's Comp. Eq. 1139.

<sup>9</sup> *Morley v. Reynoldson*, 2 Ha. 580.

<sup>10</sup> Pollock on Contract, 284.

<sup>11</sup> *Mitchel v. Reynolds*, 1 P. W. 181; Smith's L. C. i. 406.

one of the parties shall not carry on a particular trade at all, or shall carry it on under the control of another person who has a rival business, or the like;<sup>1</sup> such contracts are, as a general rule, void.<sup>2</sup> § 3. A contract in restraint of trade may, however, be valid if it is limited to a certain district or area, and is not unreasonable in its terms; thus an agreement, for valuable consideration, not to carry on a business for a term of years, or within a certain district, may be valid.<sup>3</sup> Such a stipulation is not unfrequently inserted in an agreement of partnership, where the partner, who is the owner of the goodwill, wishes to be protected against a rival business being set up in his neighbourhood by the other partner when the partnership comes to an end. Partial restraint.

**RESTRAINT ON ALIENATION** is where property is given to a married woman to her separate use without power of alienation. The validity of such a provision is allowed by law as an exception to the general rule that every owner of property is at liberty to alienate it, the object being to prevent a married woman from being induced by her husband to alienate her property for his benefit. The restraint only takes effect so long as she is married.<sup>4</sup>

**RESTRAINT ON ANTICIPATION.** See *Anticipation*, § 1.

**RESTRICTION.**—In the case of land registered under the Land Transfer Act, 1875, a restriction is an entry on the register made on the application of the registered proprietor of the land, the effect of which is to prevent the transfer of the land or the creation of any charge upon it, unless notice of the application for a transfer or charge is sent by post to a certain address, or unless the consent of a certain person or persons to the transfer or charge is obtained, or unless some other thing is done.<sup>5</sup> The object of this provision is not very clear; it has been suggested that it will be employed “by an owner who is fearful of his estate being conveyed away from him behind his back by means of forgery or personation.”<sup>6</sup> (See *Caution; Inhibition*.)

**RESTS.** See *Account*, §§ 9 *et seq.*

**RESULT.**—§ 1. In law, a thing is said to result when, after having been ineffectually or only partially disposed of, it comes back to its former owner or his representatives. § 2. Thus, if A. conveys land to B. and his heirs to the use of C. for life, on C.'s death the use results to A., that is, A. or his heirs again become the owners of the land, because no disposition is made beyond C.'s life.<sup>7</sup> This is a resulting use. A resulting trust is similar. (See *Trust; Use*.)

Resulting uses and trusts.

<sup>1</sup> *Hilton v. Eckersley*, 6 E. & B. 47, 66; and see *Jones v. North*, L. R., 19 Eq. 426.

<sup>2</sup> Chitty on Contracts, 614. For instances of exceptions, see *Wallis v. Day*, 2 M. & W. 273; *Leather Cloth Co. v. Lorsont*, L. R., 9 Eq. 345.

<sup>3</sup> Chitty, 615.

<sup>4</sup> Snell's Eq. 290; White & Tudor, L. C. i. 468; *In re Ridley*, 11 Ch. D. 645.

<sup>5</sup> Sects. 58, 59.

<sup>6</sup> Charley's Real P. Acts, 218.

<sup>7</sup> Williams, R. P. 158.

- Conversion. § 3. When land is directed to be converted into money for a special purpose and the object fails, so that either the sale becomes unnecessary, or (if the sale has taken place) the proceeds are not required to be applied for the purpose directed, then the land or the proceeds of sale (as the case may be) result to the settlor, or his heir, residuary devisee, &c.<sup>1</sup> The same rule applies to the converse case of a conversion of money into land. Thus, if a testator directs his real estate to be sold, and the purposes for which he has directed the conversion, or some of them, fail to take effect (*e. g.* by lapse), then the real estate, if it has not been sold, or the undisposed-of proceeds if it has, result to the heir or residuary devisee as if the conversion had not been directed;<sup>2</sup> and this is none the less so where the testator has created a "blended fund" (see that title). In the case of a total failure of the objects for which the conversion is directed, there is no difference whether the instrument is inter vivos or testamentary; that is, the property results to the author of the trust or his representatives in its original state. Thus, if a testator directs his land to be sold, and the proceeds to be divided between A. and B., and they both predecease the testator, then the land goes to the testator's heir as land.
- Total failure.
- Partial failure. But in case of a partial failure of the purposes for which conversion is directed, the general rule is that where the instrument is one inter vivos (*e. g.* a deed), the property results to the settlor in the condition into which he has directed it to be converted (whether realty or personalty), and therefore devolves as such on his death, unless he has otherwise disposed of it;<sup>3</sup> while, where the instrument is a will, there is a distinction between a conversion of land into money, and money into land; for if a testator directs a conversion of land into money, and some of the purposes fail, that part of the proceeds which is undisposed of results to the testator's heir as money, so that on the heir's death it devolves with the rest of his personalty, unless specially disposed of by him;<sup>4</sup> but if a testator directs a conversion of money into land, and some of the purposes fail, the money which is undisposed of results to the next of kin as personalty, and not as land.<sup>5</sup>

See *Blended Fund*; *Conversion*, §§ 3 *et seq.*; *Reconversion*.

**RE-SURRENDER.**—Where copyhold land has been mortgaged by surrender, and the mortgagee has been admitted, then on the mortgage debt being paid off, the mortgagor is entitled to have the land reconveyed to him, by the mortgagee surrendering it to the lord to his use. This is called a re-surrender.<sup>6</sup> (Compare *Re-Conveyance*.)

- By executor. **RETAINER.**—I. § 1. The right of retainer is the right which the executor or administrator of a deceased person has to retain out of the assets sufficient to pay any debt due to him from the deceased in priority to the other creditors whose debts are of equal degree.<sup>7</sup> The executor

<sup>1</sup> *Ackroyd v. Smithson*, 1 Bro. C. C. 503;  
White & Tudor's L. C. i. 783.

<sup>2</sup> *Watson*, Comp. Equity, 109.

<sup>3</sup> *Clarke v. Franklin*, 4 K. & J. 257.

<sup>4</sup> *Smith v. Claxton*, 4 Mad. 484.

<sup>5</sup> *Reynolds v. Godlee*, 1 Johns. 536.

<sup>6</sup> *Davids*, Conv. ii. 1332, n.

<sup>7</sup> *Steph. Comm.* iii. 263.

does not forfeit this right by instituting an administration suit in his character of creditor.<sup>1</sup> (See *Action*, § 9.)

II. § 2. A retainer is the engagement of a barrister or solicitor to take or defend proceedings, or to advise or otherwise act for the client.<sup>2</sup> Of counsel or solicitor.

§ 3. Retainers to solicitors (which are not commonly in writing) are of two kinds. A special retainer is an engagement for a particular action or proceeding. A general retainer extends to all business, present and future, until it is determined.<sup>3</sup> § 4. Retainers to counsel (which can only be given by solicitors, not by the client himself, and involve the payment of a fee) are of three kinds. A general retainer is one given on behalf of a client for all future business in which he may require the counsel's services. The better opinion seems to be that such a retainer entitles the counsel to a common retainer (*infra*, § 5), when the client becomes a party to a proceeding in the Court or on the circuit in which the counsel generally practises. In some cases a restricted general retainer is given. Thus, where a ship has been lost, the insurers may give a retainer to counsel for all actions arising out of the loss. § 5. A common retainer (sometimes called, especially in Chancery practice, a special retainer) is one given in a particular action or proceeding. § 6. A special retainer (in the strict sense) is one given to a counsel to conduct a case on a foreign circuit, that is, a circuit on which he does not usually practise.

**RETIRE**, as applied to a bill of exchange, usually means that an indorser has taken it up by paying his immediate or some subsequent indorsee, after which he is in a position to recover from the antecedent parties. But it is sometimes used in the case of an acceptor who has paid and extinguished the bill.<sup>4</sup>

As to the retirement of a trustee, see *Trustee*.

**RETORSION**.—In international law, when a sovereign is not satisfied with the manner in which his subjects are treated by the laws and customs of another nation, he is at liberty to declare that he will treat the subjects of that nation in the same manner. This is called retorsion.<sup>5</sup> (Compare *Reprisals*; *Embargo*.)

**RETRACTATION**, in probate practice, is a withdrawal of a renunciation (*q. v.*). A retractation is only allowed in special cases: it would apparently be permitted where the person in whose favour the renunciation was made has not availed himself of it, or has died.<sup>6</sup>

**RETRAXIT**, in the old common law practice, was a mode of withdrawing from an action, and took place where a plaintiff or demandant abandoned his action at the trial, and thus lost his right of action altogether.<sup>7</sup> (See *Nonsuit*.) It has long been practically obsolete.<sup>8</sup>

<sup>1</sup> *Ex parte Campbell*, 16 Ch. D. 198.  
See also *Crowder v. Stewart*, 16 Ch. D. 368.

<sup>2</sup> Chitty, Pr. 85.

<sup>3</sup> *In re Snell*, 5 Ch. D. 815.

<sup>4</sup> Byles on Bills, 222.

<sup>5</sup> Manning's Law of Nations, 142.

<sup>6</sup> Coote's Probate Pr. 221; see stat. 20 & 21 Vict. c. 77, s. 79.

<sup>7</sup> Co. Litt. 138 b.

<sup>8</sup> Chitty, Pr. 1515.

**RETREAT.** See *Drunkenness*, § 2.

To writ.

**RETURN.**—§ 1. A return is a report by an officer of a Court showing the manner in which he has performed a duty imposed on him. Thus, the sheriff or other officer executing a writ of execution has to return or report to the Court what he has done in pursuance of it, though in most cases it is not usual for a return to be made, unless ulterior proceedings are contemplated.<sup>1</sup> If a return is required, an order calling upon the sheriff to make it (called in the language of common law practice a rule to return) may be obtained.<sup>2</sup> The return is usually written on the back of the writ, which is then filed. Returns to writs are commonly known by the first words of the old returns, which were given in Latin, *e. g.*, “nulla bona,” “fieri feci,” “non est inventus” (see the various titles). As to the return to a writ of mandamus,<sup>3</sup> see *Mandamus*, § 2.

Citation.

§ 2. As to the consequences of a false return, see *False Return*.

Official returns.

§ 3. In probate practice, a citation (*q. v.*, § 4) must be returned into the registry as soon as it has been served.<sup>4</sup>

§ 4. Companies and other associations established under acts of parliament are in many cases required to send in periodical returns to a public officer with reference to their condition. Thus every company formed under the Companies Act, 1862, and having a share capital, is bound to send in a yearly return to the Registrar of Joint Stock Companies, giving a list of its shareholders, and showing the position of its capital and the alterations in its register of shareholders since the last return.<sup>5</sup>

**RETURN IRREPLEVISABLE.** See *Replevin*, § 3.

**RETURNABLE.**—§ 1. Writs of execution, writs of mandamus, and many other kinds of writs, are returnable, that is, the person to whom they are directed is bound or may be required to make a return to them. The term is, however, chiefly used with reference to the time when the writ is returnable. Some writs are returnable at a date named in them, while others, such as writs of execution, are returnable as soon as they are executed.<sup>6</sup> § 2. By analogy to this use of the word, a summons is said to be returnable on the day appointed for hearing it.

**REVENUE.** See *Exchequer*.

**REVERSE.**—A judgment is said to be reversed when it is set aside by a Court of Appeal.

In land.

**REVERSION—REVERSIONER.**—§ 1. Where a tenant in fee simple grants the land to another person for a term of years, or for life,

<sup>1</sup> Smith's Action, 203.

<sup>2</sup> *Ibid.* 204.

<sup>3</sup> See an instance of a return to a mandamus, *Queen v. Postmaster-General*, 1 Q. B. D. 658.

<sup>4</sup> Browne's Probate Pr. 276.

<sup>5</sup> Sect. 26; see stat. 33 & 34 Vict. c. 61,

as to returns by life assurance companies; stats. 7 Geo. 4, c. 46, and 7 & 8 Vict. c. 32, as to returns by bankers and banking companies. Industrial and Provident Societies and Friendly Societies are also required to make returns.

<sup>6</sup> Archbold, Pr. 532.

or in tail, the estate so created is called a particular estate, being only a part, or *particula*, of the estate in fee, and the interest of the tenant in fee simple, which still remains undisposed of, is called his reversion. It is a present or vested estate, by virtue of which he will have the possession of the land again on the determination of the particular estate. Similarly, if a tenant for life grants a lease for years, or if a tenant for years grants an underlease for a shorter term, the estate which remains in him is called a reversion. The owner of a reversion is called the reversioner.

§ 2. The relationship of tenure exists between the owner of the reversion and the particular tenant, and therefore fealty (*q. v.*) is nominally due from the latter to the former. A rent service or other service may also be reserved by the owner of the reversion, and thus made incident to the reversion, so that if the reversion is aliened the rent or service passes with it. The rent may be severed from the reversion, but the fealty cannot; therefore if the owner grants the reversion to another person, he may reserve the rent to himself, but not the fealty<sup>1</sup> (see *Attornment; Rent*, § 3.) A condition of re-entry may also be annexed to a reversion, and will pass with it on an assignment.<sup>2</sup> As to the difference between a reversion and a remainder, see *Remainder*.

§ 3. If A., being a tenant in fee simple, grants a lease to B., and B. grants an underlease to C., reserving a rent, this rent is incident to B.'s reversion: consequently if A. grants his reversion to B., this causes a merger or destruction of B.'s reversion, and, at common law, C.'s rent, being incident to it, would also be destroyed. B. would be tenant in fee simple in reversion, but his right to the rent would be gone. To prevent this it has been enacted (in effect) that where the reversion expectant on a lease is surrendered or merges, the estate next in reversion or remainder shall, for the purpose of preserving the incidents to the reversion so merged, be deemed to be the reversion expectant on the lease.<sup>3</sup> In the case supposed, therefore, the rent payable by C. would be converted into a rent incident to B.'s reversion in fee simple.

Merger of reversion.

As to covenants running with the reversion, see *Covenant*, § 5.

§ 4. "Reversion" is also used to denote a reversionary interest, *e. g.*, an interest in personal property subject to the life interest of some other person. (See *Reversionary Interest*.)

In personality.

As to sales of reversions, see *Reversionary Interest*, § 4.

**REVERSIONARY INTEREST.**—§ 1. Any right in property, the enjoyment of which is deferred, is a reversionary interest in the wide sense of the term; but in the ordinary sense of the term, reversionary interests are interests in property which are not reversions or remainders in the strict sense, but are analogous to them. Thus, if personal property is limited to A. for life, and after his death to B., this gives B. a reversionary interest analogous to a remainder in land. Similarly, if A.

<sup>1</sup> Co. Litt. 142 b *et seq.*; Williams, R. P. 243.

<sup>2</sup> Stat. 32 Hen. 8, c. 34; Co. Litt. 215a.

<sup>3</sup> Stat. 8 & 9 Vict. c. 106, s. 9; Williams, 251.

gives B. a life interest in chattels, A. retains a reversionary interest, analogous to a reversion in land.

§ 2. Reversionary interests were formerly only recognized by the Court of Chancery, being equitable interests. (See *Equity*.) They are usually created by means of trusts, the legal estate in the property being conveyed to trustees, as in the case of an ordinary marriage settlement of personal property.<sup>1</sup> (See *Settlement*.)

Malins's Act. § 3. By stat. 20 & 21 Vict. c. 57, every married woman, with the concurrence of her husband, may by deed dispose of every future or reversionary interest in personal property, whether vested or contingent, to which she, or her husband in her right, may be entitled under any instrument made after the 31st December, 1857, or release or extinguish any power or equity to a settlement in regard to such personal property. Every such disposition must be acknowledged by her under the Fines and Recoveries Act. (See *Acknowledgment*, § 2.) The statute does not apply to marriage settlements, nor to reversionary interests which the married woman is restrained from alienating.

Sales of re-  
versions. § 4. Formerly there was a rule in equity, that in the case of the sale of a reversionary interest in real or personal estate, the purchaser was bound to show that he had given the fair market price for it, and if he was unable to do so, the sale was set aside; this rule was abolished by stat. 31 Vict. c. 4,<sup>2</sup> but in cases of fraud or unfair dealing equity still interferes. (See *Expectant Heir*; *Inadequacy*.)

**REVERT.**—To revert is to return: thus when the owner of an estate in land has granted a smaller estate to another person, on the determination of the latter estate the land is said to revert to the grantor. (See *Reversion*; *Reverter*.)

**REVERTER.**—§ 1. In feudal times, on every grant of land "a right remained in the grantor to the services of the grantee during the continuance of his estate, and to a return of the land on its expiration. Whether this right of the grantor depended on an estate for life or in fee, it was of the same nature and indifferently called his *reverter* or *escheat*; but from the remoter probability of the return when the fee was granted, it became customary to call it, after a grant of the fee, his *possibility of reverter*; by degrees that expression was applied to those cases only where a limited fee had been granted, and the word *escheat* was applied to those where the grant had conferred an absolute estate in fee simple. A grant to a man and the heirs of his body was at common law a limited fee; and therefore after such a grant, a possibility of reverter was said to remain in the grantor. When the statute *De Donis* converted such estates into estates tail, the return of the land was secured by it to the donor and was called his reverter. In all these cases, the words reverter and reversion are synonymous."<sup>3</sup> A reverter after an estate in fee simple condi-

Possibility of  
reverter.

Reverter after  
estate tail.

<sup>1</sup> See Williams, P. P. 310.

<sup>2</sup> Williams, R. P. 464; Pollock on Contract, 529; *Earl of Aylesford v. Morris*,

L. R., 8 Ch. p. 490.

<sup>3</sup> Butler's note to Fearnie on Cont. Rem. 381.



tional is still called a 'possibility of reverter. (See *Formedon; Possibility*, note (3).)

**REVIEW.**—When a taxing master has taxed a bill of costs, any party who is dissatisfied with the taxation may, before the certificate or allocatur is signed, deliver to the opposite party and carry in before the taxing master an objection specifying the items of which he complains, and apply to the master to review the taxation accordingly.<sup>1</sup> If any party is dissatisfied with the result of this preliminary review, he may apply to a judge at chambers for an order to review the taxation, and the judge thereupon gives such directions (if any) to the taxing master as he thinks proper.

As to bills of review, see *Bill of Complaint*, § 8; as to the Court of Review, see *Commissioners in Bankruptcy*.

**REVISING BARRISTERS** are barristers appointed to revise the lists of voters for parliamentary elections, on which occasion they decide disputed claims to the right of voting. An appeal lies to the High Court in the Common Pleas Division.<sup>2</sup> (See *Overseers*, § 2.)

**REVIVAL—REVIVOR.**—§ 1. The term revival is sometimes applied to wills. Thus, where a testator revokes a will, he is said to revive it if he subsequently re-executes it, or executes a will or codicil showing an intention to revive it.<sup>3</sup>

§ 2. In the law of divorce, condonation (*q. v.*) being forgiveness of a conjugal offence with an implied condition that the injury shall not be repeated, and that the condoning party shall be treated with conjugal kindness, it follows that on breach of the condition, even by the commission of a slighter offence, the right to a remedy for the former injury is revived: thus cruelty will revive condoned adultery.<sup>4</sup>

§ 3. Under the practice of the Court of Chancery, when a suit became defective by the death, marriage or bankruptcy of one of the parties, or by an assignment of the subject-matter of the suit pendente lite, or by some other change in the interest of some of the parties, it was necessary to revive it, that is, take steps for carrying on the proceedings: this was generally done by an order of revivor obtained as of course, but in some cases a new bill, called a bill of revivor, had to be filed.<sup>5</sup> Under the new practice, an order of revivor is only required where it is necessary to carry on the proceedings between the continuing parties and some new party: thus, where a defendant becomes bankrupt, an order of revivor may be obtained continuing the proceedings against his trustee as if he had originally been a defendant.<sup>6</sup> (See *Abatement*, § 5.)

Revivor of action, &c.

§ 4. In the common law Courts, also, if six years elapsed, or if one of

Revivor of judgment.

<sup>1</sup> Rules of Court (12 Aug. 1875), 30 *et seq.*

<sup>2</sup> Steph. Comm. ii. 355; stat. 6 & 7 Vict. c. 18; 36 & 37 Vict. c. 70, and intermediate statutes.

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<sup>3</sup> Jarman on Wills (4th edit.), 145.

<sup>4</sup> Browne on Divorce, 102.

<sup>5</sup> Daniell's Ch. Pr. 1377 *et seq.*

<sup>6</sup> Rules of Court, l.; *Chorlton v. Dickie*, 13 Ch. D. 160.

the parties died, after the recovery of a judgment, it became necessary to revive it by writ of revivor, scire facias or suggestion (*q. v.*).<sup>1</sup> Under the new practice, when six years have elapsed from the recovery of a judgment, or any change has taken place in the parties to the judgment (*e. g.*, by death), an application must be made for leave to issue execution: on that application the Court or judge may either order execution to issue, or may direct any question necessary to determine the rights of the parties to be tried.<sup>2</sup> (See *Judgment*, § 21.)

**REVOCABLE** is that which may be revoked. See *Revocation; Power; Will*.

**REVOCATION—REVOKE.**—§ 1. To revoke literally means to recall (Latin, *revocare*). Thus, to revoke an offer or authority is to withdraw it. Revocation is the operation of revoking. Revocation is of three kinds—by act of the party; by operation of law; and by order of a Court of justice (judicial revocation).

By act of the party.

§ 2. Revocation by act of the party is an intentional or voluntary revocation. The principal instances occur in the case of authorities and powers of attorney and wills. The two former require no particular form of revocation.<sup>3</sup> A will may be revoked by a subsequent inconsistent will or codicil, or by a writing declaring an intention to revoke, and executed with the same formalities as a will, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking it.<sup>4</sup> As to revocation by marriage, see *infra*, § 3; and as to alterations in wills, see *Alteration*, § 4.

In law, or constructive.

§ 3. A revocation in law, or constructive revocation, is produced by a rule of law, irrespectively of the intention of the parties. Thus, a power of attorney is in general revoked by the death of the principal.<sup>5</sup> A will is always revoked by the subsequent marriage of the testator, except when made in exercise of a power of appointment under which the property appointed would not, in default of appointment, pass to the real or personal representatives or next of kin of the testator.<sup>6</sup> As to the effect of insanity in revoking an authority, see *Lunacy*, § 2, note (4). As to powers of revocation, see *Power*, § 12. As to the revocation of a guarantee, see *Guarantee*, § 5.

Judicial.

§ 4. When a grant of probate or letters of administration has been improperly obtained, it may be revoked by the Court at the instance of a person interested. The grant is then produced at the registry, and cancelled.<sup>7</sup>

<sup>1</sup> Smith's *Action* (11th edit.), 300 *et seq.*; Steph. Comm. iii. 591.

<sup>2</sup> Rules of Court, xlii. 19.

<sup>3</sup> Stokes on Powers of Att.; Pollock on Contract, 10; Smith's *Merc. Law*, 153.

<sup>4</sup> Stat. 1 Vict. c. 26, s. 26; Williams on Executors, 123.

<sup>5</sup> Stokes. But after the 31st December, 1881, acts done under a power of attorney without notice of its revocation will be good (see *Addenda*: title *Power of Attorney*).

<sup>6</sup> 1 Vict. c. 26, s. 18.

<sup>7</sup> Coote's *Probate Pr.* 164 *et seq.*; Browne's *Probate Pr.* 244.

**RIENS IN ARRERE** (= "nothing in arrear") was the name of the plea in bar used by the plaintiff in an action of replevin when he alleged that the rent had been paid or satisfied before the distress was taken. The reply which has taken the place of the plea in bar under the new practice is sometimes called by the same name.<sup>1</sup> (See *Replevin*.)

**RIENS PER DESCENT** was the plea pleaded under the old common law practice by an heir at law sued for a debt of his ancestor when he had no lands by descent.<sup>2</sup> (See *Judgment*, § 12.)

**RIGHT.**—I. § 1. A right, in its most general sense, is either the liberty (protected by law) of acting or abstaining from acting in a certain manner, or the power (enforced by law) of compelling a specific person to do or abstain from doing a particular thing. "We may therefore define a 'legal right' as a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others."<sup>3</sup> It follows that every right involves (1) a person invested with the right, or entitled; (2) a person or persons on whom that right imposes a correlative duty or obligation;<sup>4</sup> (3) an act or forbearance which is the subject matter of the right.<sup>5</sup> In some cases there is also (4) an object, that is, a person or thing to which the right has reference, as in the case of ownership.

I. With reference to their ultimate object or purpose, rights and duties are either primary [substantive, original], or secondary [adjective, sanctioning].

(i) § 2. Primary rights are those which can be created without reference to rights already existing. Thus, if A. contracts to pay me 50*l.*, my right to the payment of that sum is a primary right. Primary rights are of two classes: (1) those rights to which every member of the community is *primâ facie* entitled; they consist of (a) personal (or absolute<sup>6</sup>) rights, *e. g.*, the right to life, health and liberty of action (see *Tort*), and (b) public rights, which are those rights by which every member of the community is *primâ facie* entitled to use certain things which either belong to the state, or, if they belong to private persons, are subject to the right of public user; such are the rights of the public in respect of the sea, navigable rivers, highways, public parks, &c. (see the various titles, and *Publici Juris*); (2) those rights which arise from relations other than membership of a community, and include the ordinary rights arising from ownership, contract, marriage, and similar relations.<sup>7</sup>

Primary.

Secondary.

<sup>1</sup> Woodfall's *Landlord & Tenant*, 476.

<sup>2</sup> Archbold, Pr. 1013.

<sup>3</sup> Holland's *Jurisp.* 56.

<sup>4</sup> It is sometimes said (*e. g.* Stephen's *Comm.* i. 136) that the correlative of "right" is "wrong," but this is hardly correct; a wrong is a right plus a violation; in other words, a right may exist without a wrong. Possibly the ethical use of the

words led to the confusion.

<sup>5</sup> Mr. John Stuart Mill (3 *Dissert. and Disc.*) suggests that the idea of benefit to the person entitled is involved in the conception of a right, but this is erroneous. The question of benefit is one for the legislator, not for the jurist.

<sup>6</sup> *Bl. Comm.* i. 123.

<sup>7</sup> *Ibid.*

or enforcing primary rights. They are either preventive [protective] or remedial [reparative].

Preventive.

(1) § 4. Preventive or protective secondary rights exist in order to prevent the infringement or loss of primary rights. They are judicial when they require the assistance of a Court of law for their enforcement, and extra-judicial when they are capable of being exercised by the party himself. The right to prevent a threatened injury by injunction, the right to take proceedings to obtain a judicial recognition of a right which might be lost by lapse of time or adverse user, the right to institute proceedings for the administration of the estate of a deceased person or the assets of an insolvent person or corporation, and the right to security against the commission of a crime, are instances of judicial preventive rights, and the right of self-defence is an instance of an extrajudicial preventive right. (See also *Administration*; *De bene esse*; *Legitimacy*; *Ne exeat Regno*; *Perpetuation of Testimony*.)

Remedial.

(2) § 5. Remedial or reparative secondary rights are also either judicial or extrajudicial. They may further be divided into (a) rights of restitution or restoration, which entitle the person injured to be replaced in his original position; (b) rights of enforcement, which entitle the person injured to the performance of an act by the person bound; and (c) rights of satisfaction or compensation. A right of entry or re-entry is an extrajudicial right of restitution, a lien is an extrajudicial right of enforcement, a right of distress or retainer is an extrajudicial right of satisfaction, the right of bringing an action of ejectment or detinue is a judicial restitutive right, the right of obtaining an injunction for specific performance and the right to compel the payment of a debt are judicial rights of enforcement, and the right of bringing an action of damages for breach of contract or tort is a judicial right of satisfaction. (See *Remedy*.)

II. With reference to the nature of the obligation which they impose, rights are either in rem [real rights, general rights, rights against the whole world, *jura in rem*] or in personam [personal rights, relative rights, rights against determinate persons, *jura in personam*].

Rights in rem.

(1) § 6. A right in rem is one which imposes an obligation on persons generally, that is, either on all the world or on all the world except certain determinate persons. Thus, if I am entitled to exclude all persons from a given piece of land, I have a right in rem in respect of that land; and if there are one or more persons, A., B. and C., whom I am not entitled to exclude from it, my right is still a right in rem. So if I am entitled to the services of a servant, I have a right in rem which obliges all other persons not to interfere wrongfully with that relation. (See *Master and Servant*, § 3; *Service*.) A right in rem is always negative.

Rights in personam.

(2) § 7. A right in personam is one which imposes an obligation on a definite person. Thus, if A. agrees to pay me 50*l.*, my right to that sum against A. is a right in personam, belonging to the class of primary rights (*supra*, § 2). My right to liberty of action, so long as I do not interfere with other persons' rights, is a right in rem; if B. infringes that right by imprisoning or assaulting me, I acquire a right to recover damages against him, which is a right in personam belonging to the class

of secondary rights (*supra*, § 5). § 8. Primary rights in personam are either affirmative [positive] or negative, according as they require for their performance an act or a forbearance. Thus, if A. contracts with B. not to carry on business in a certain place, B. has a negative right against A. § 9. Primary rights in personam are also subject to the following divisions:—absolute and conditional, legal and equitable, personal and transmissible, and of perfect and imperfect obligation.<sup>1</sup> (See the various titles, and *Contract*, § 11; *Obligation*, § 3.)

II. § 10. "Right" is used by the old writers on real property law in the technical sense of a right which an owner of land has when he has been disseised, so that he has only the right of recovering possession either by entry or action. His estate was then said to be turned to a right.<sup>2</sup> If A. was disseised by B., and B. died while in possession, so that the land descended to his heir, A. could not recover possession by entry, but had to bring a possessory action (see *Descent cast*); if A. further suffered a certain time to elapse, or had judgment given against him in a possessory action, he could no longer recover by a possessory action, but only by an action on the right, meaning the right of ownership as opposed to the right to possession. Hence his estate was said to be turned to a mere, bare or naked right.<sup>3</sup> These distinctions no longer exist, real actions having been abolished.

"Right" and  
"estate."

Mere right.

III. § 11. "Right," like "title" (*q. v.*), sometimes connotes the idea of a mode of acquisition. Thus, a person is said to hold or own property in his own right, or in right of another (in *auter droit*). If it descends to him, or he purchases it, he obtains it in his own right; but if he acquires it as representing another person, he is said to take it in *auter droit*. The principal mode of taking personal property in *auter droit* is by executorship or administration, for the executor or administrator holds the goods of the deceased as his representative. So when a man marries a woman seised of land in fee in her own right, he gains an estate of freehold in her right, lasting during the coverture.<sup>4</sup> The difference is of importance with regard to the law of merger (*q. v.*, § 3).

§ 12. In the phrase "of common right," the word "right" seems to be used in a somewhat similar sense. Thus, when it is said that the remedy of distress for arrears of a rent-service exists of common right,<sup>5</sup> and that every freehold tenant of a manor has a right of common of pasture appendant of common right,<sup>6</sup> it is meant that the right is created by law, and not by agreement between the parties.

Of common  
right.

IV. § 13. "Right" is used in law, as well as in ethics, as opposed to "wrong." Thus a person may acquire a title by wrong. (See *Title*.)

"Right" and  
"wrong."

<sup>1</sup> As to rights generally, see Austin's *Jurisprudence*, Markby's *Elements of Law*, and Holland's *Jurisprudence*, *passim*.

The divisions of rights into public and private, and into normal and abnormal, are not given here, because they are merely another way of classifying the law itself. (See *Law*; *Status*.)

<sup>2</sup> Co. Litt. 345 a; *Archer's Case*, 1 Rep. 67 a.

<sup>3</sup> Co. Litt. 266 a, notes to 239 a and 278 b.

<sup>4</sup> *Ibid.* 350 b.

<sup>5</sup> *Ibid.* 142 a; where, however, the phrase "common right" is said to mean "common law."

<sup>6</sup> *Ibid.* 122 a.

**RIGHT OF ACTION** is the right to bring an action. Thus, a person who is wrongfully dispossessed of land has a right of action to recover it. (See *Cause of Action*; *Chose in Action*; *Actio Personalis moritur cum Personâ*; *Remedy*.)

§ 2. In the old writers, "right of action" is commonly used to denote that a person has lost a right of entry (*q. v.*), and has nothing but a right of action left.<sup>1</sup> (See *Right*, § 10.)

**RIGHT OF ENTRY** is the right of taking or resuming possession of land by entering on it in a peaceable manner. (See *Entry*.)

Original or mere.

Rights of entry are of two kinds. § 2. An original or mere right of entry is a right of entry and nothing more. Thus, where a person has been disseised of land, or where an estate has determined, so that he becomes entitled to the possession of the land, he has an original right of entry. This kind of right was formerly inalienable, but may now be disposed of by deed.<sup>2</sup> It is sufficient to support a contingent remainder, if the estate of the disseisee was itself sufficient.<sup>3</sup>

On breach of condition, &c.

§ 3. A right of entry, by the exercise of which an existing estate is defeated, is a right attached to a reversion. It was formerly called a title of entry, to distinguish it from an original right of entry, because it could not be enforced by action, and was therefore not a right in the technical sense.<sup>4</sup> It is also sometimes called a right of re-entry. The commonest instance of this kind of right occurs in an ordinary lease, in which it is usual to reserve to the lessor the right of determining the lease by re-entry, if the lessee fails to pay the rent or perform the covenants.<sup>5</sup> This kind of right is inalienable by itself, although the benefit of the condition passes on an assignment of the reversion, so that the assignee can take advantage of any breach of the condition committed after the assignment.<sup>6</sup>

See *Continual Claim*; *Descent cast*; *Right of Action*; *Title*.

## **RIGHT OF REPRESENTATION AND PERFORMANCE.—**

By the acts 3 & 4 Will. 4, c. 15, and 5 & 6 Vict. c. 45, the author of a play, opera, or musical composition, or his assignee, has the sole right of representing or causing it to be represented in public at any place in the British dominions during the same period as the copyright in the work exists. The right is distinct from the copyright, and requires to be separately registered.<sup>7</sup> At one time they were distinguished by being called book copyright and stage copyright,<sup>8</sup> but this is inaccurate.

§ 2. The act 7 & 8 Vict. c. 12 provides for the protection, by Order in Council, of the right of representing or performing in this country dramatic

<sup>1</sup> Co. Litt. 363 b.

<sup>2</sup> Stat. 8 & 9 Vict. c. 106, s. 6 (see cases cited in note (6) as to the construction of this section); Williams on Seisin, 124; Litt. §§ 414 *et seq.*

<sup>3</sup> *Archer's Case*, 1 Rep. 66 b.

<sup>4</sup> Co. Litt. 240 a, 345 b; Feame, C. R. 381, n.

<sup>5</sup> Litt. § 325.

<sup>6</sup> Stat. 32 Hen. 8, c. 34; *Hunt v. Bishop*, 8 Ex. 680; *Hunt v. Remnant*, 9 Ex. 640; Williams on Seisin, 125; Woodfall, L. & T. 289.

<sup>7</sup> Shortt on Copyright, 114 *et seq.*; Coryton on Stage-Right.

<sup>8</sup> *Reade v. Conquest*, 11 C. B. (N. S.) 479. (See *Stage-Right*.)

pieces or musical compositions first publicly represented or performed in a foreign country.

**RIGHT TO BEGIN**, on the hearing or trial of a cause, or the argument of a demurrer, petition, &c., is the right of first addressing the Court or jury. The right to begin is frequently of importance, as the counsel who begins has also the right of replying or having the last word after the counsel on the opposite side has addressed the Court or jury. This rule is subject to the exception that where the second counsel at a trial before a jury does not call witnesses, the counsel who began has no right of reply.

The general rule is, that the plaintiff has the right to begin if the affirmative of the issue is on him, or if the onus of proving any one material issue, or of proving the amount of damages, rests on him. Otherwise, if the affirmative of the issue lies on the defendant, he has the right to begin.<sup>1</sup>

**RINGS.** See *Serjeant at Law*.

**RIOT.**—§ 1. A riot is an unlawful assembly which has actually begun to execute the purpose for which it assembled by a breach of the peace, and to the terror of the public. A lawful assembly may become a riot if the persons assembled form and proceed to execute an unlawful purpose, to the terror of the people, although they had not that purpose when they assembled. But a riot cannot take place unless three persons at least are present. Every person convicted of riot is liable to be sentenced to fine and imprisonment with or without hard labour.<sup>2</sup>

§ 2. Where twelve or more persons are committing a riot, it is the duty of the mayor, sheriff, and certain other officers to make a proclamation in the Queen's name, commanding them to disperse;<sup>3</sup> and every person who obstructs the making of the proclamation, or continues to riot for one hour afterwards, is guilty of felony, and liable to penal servitude for life, or three years' imprisonment with hard labour.<sup>4</sup>

Reading the Riot Act.

§ 3. The riotous demolition, or attempted demolition, of any building, machinery, or mining plant, is felony punishable with penal servitude for life, or two years' imprisonment with hard labour. Riotous damage or injury to any building, machinery, or mining plant, is a misdemeanor, punishable with seven years' penal servitude, or two years' imprisonment.<sup>5</sup>

Riotous injuries to property.

See *Unlawful Assembly; Rout; Affray*.

**RIPARIAN** is that which relates to or is connected with the bank of a river.<sup>6</sup> A riparian proprietor or owner is a person who owns land

<sup>1</sup> Archbold, Pr. 354, 368.

<sup>2</sup> Stephen's Crim. Dig. 41; Russell on Crimes, i. 364 *et seq.*, 389; stat. 3 Geo. 4, c. 114.

<sup>3</sup> Commonly called reading the Riot Act.

<sup>4</sup> Stat. 1 Geo. 1, st. 2, c. 5; Russell, i. 374.

<sup>5</sup> Stat. 24 & 25 Vict. c. 97; Russell, i. 368. See also stat. 33 Geo. 3, c. 67.

<sup>6</sup> Not the bed of the river: *Lyon v. Fishmongers' Co.*, 1 App. Ca. at p. 683.

through or past which a river runs ; and riparian rights are those arising from such a property. The riparian owner whose land is nearer the source of the river is called the upper riparian owner as compared with him whose land is more remote from the source.<sup>1</sup>

As to the rights of riparian owners, see *Water*.

**RISK**, in the law of marine insurance, denotes—I. a danger or peril insured against ; II. the possibility of the loss happening under such circumstances as to make the underwriter liable;<sup>2</sup> when this possibility has arisen (*e.g.*, by the departure of the vessel), the risk is said to commence or attach,<sup>3</sup> and the assured's interest is said to be at risk.<sup>4</sup> § 2. When the insurance is of such a nature that the peril which would make the underwriter liable for a total loss may happen as soon as the risk commences, the risk is said to be entire ; if, on the other hand, some circumstance which would have contributed to the happening of the peril insured against has not taken place, the risk is divided or apportionable. For instance, if the ship deviate, the underwriter is discharged, but inasmuch as if she had been lost before the deviation he would have been liable, he has run the whole risk, and it is therefore said to be entire ; but if part of the risk insured against has not been run (as where part of the cargo insured has not been shipped), the risk is divided, and the assured is entitled to a return of that proportion of the premium which covered the risk not run.<sup>5</sup>

**RIVERS.**—§ 1. A public navigable river is one which is actually navigable and in which the tide ebbs and flows ; all other rivers on which navigation is carried on are private rivers over which the public have acquired a right or easement of navigation.<sup>6</sup> The ownership of the bed of a public navigable river is *primâ facie* in the crown. As to the right of navigation, see *Navigable* ; as to the right of fishing in a public river, see *Fishery*, §§ 2, 5.

§ 2. All rivers and streams above the flow and reflow of the tide are *primâ facie* private, although many have become by immemorial user or by act of parliament subject to public rights of navigation. The right of navigation gives no right of property, or of fishing. § 3. When a private river runs through land belonging to one person, he is *primâ facie* the owner of the bed ; when a private river separates the lands of two owners, each is *primâ facie* owner of the soil of the bed to the middle of the stream (*ad medium filum aquæ*).<sup>7</sup> As to the effect of alluvion and dereliction, see those titles ; see further as to rivers, and as to the rights of riparian owners, title *Water*.

§ 4. The pollution of rivers is forbidden by the Rivers Pollution Act, 1876.

<sup>1</sup> *Swindon Waterworks Co. v. Wilts, &c. Co.*, L. R., 7 H. L. 697.

<sup>2</sup> See *Ionides v. Pender*, L. R., 9 Q. B. at p. 538.

<sup>3</sup> *Maude & Pollock*, Merch. Shipp. 428.

<sup>4</sup> *Allison v. Bristol, &c. Co.*, 1 App. Ca. 209.

<sup>5</sup> *Maude & Pollock*, 429 ; *Smith's Merc. Law*, 398 *et seq.*

<sup>6</sup> *Coulson & Forbes on Waters*, 58.

<sup>7</sup> *Ibid.* 92 *et seq.*



**ROBBERY** is where a person, either with violence or with threats of injury, takes and carries away a thing which is on the body, or in the immediate presence of the person from whom it is taken, under such circumstances that in the absence of violence or threats the act committed would be a theft.<sup>1</sup>

The punishment for robbery is imprisonment or penal servitude, varying according to the nature of the violence or threats used.<sup>2</sup>

**ETYMOLOGY.**—Teutonic, *roup*; Anglo-Saxon, *reaf*, the act of violently taking away something from the person of another, especially armour or clothing from a vanquished enemy.<sup>3</sup>

**ROGATIO TESTIUM**, in making a nuncupative will, is where the testator formally calls upon the persons present to bear witness that he has declared his will.<sup>4</sup> (See *Will*.)

**ROGUES.** See *Vagrancy*.

**ROLLING STOCK** of a railway company cannot be taken in execution<sup>5</sup> (see *Execution*, § 7); and the rolling stock of a railway company, when in use in a manufactory, pier, mine, or similar place belonging to some person or company other than the railway company, cannot be taken in distress for rent payable by the tenant of the manufactory, pier, mine, &c., provided it is conspicuously marked as belonging to the railway company.<sup>6</sup>

**ROLLS.**—§ 1. In ancient times all the principal records were written on pieces of parchment stitched together so as to form a long continuous piece, which was rolled up when not in use. Hence such records were called "rolls." This practice was followed up till modern times in the Court of Chancery, when decrees were not unfrequently enrolled (see *Enrolment*, § 3), and seems to be still employed in the case of recognizances entered into by receivers, liquidators, &c. appointed by the High Court. In most other cases, however, the practice of writing on rolls has been abandoned for the more convenient method of inscribing in books.

§ 2. The Parliament Rolls are the records of the proceedings of parliament, especially acts of parliament, and therefore when any misprint appears in a printed copy of a statute, the parliament roll is consulted to correct the error.<sup>7</sup> Parliamentary.

§ 3. The Patent Rolls contain grants of liberties, privileges, lands, offices, &c., creations of peers, and other letters patent (*q.v.*), while the Close Rolls are the records of letters close (*q.v.*).<sup>8</sup> There are also Patent and close rolls, &c.

<sup>1</sup> Stephen's Crim. Dig. 208; Russell on Crimes, ii. 78.

<sup>2</sup> Stat. 24 & 25 Vict. c. 96, ss. 40 *et seq.*

<sup>3</sup> Schmitt. Wörtb. s. v. *Raub*. Spelman and Coke (Co. Litt. 288 a) derive it from *roba*, while in truth *roba* comes from *roup*: Littré, s. v. *Dérober*; *Robe*.

<sup>4</sup> Williams, Ex. 116; Browne's Probate Pr. 59.

<sup>5</sup> See *Midland Wagon Co. v. Potteries*

*Rail. Co.*, 6 Q. B. D. 36.

<sup>6</sup> Stat. 35 & 36 Vict. c. 50.

<sup>7</sup> Formerly there was a distinction between the parliament rolls and the statute rolls (Bl. Com. i. 182); but this seems not to exist at the present day: see *In re Venour's Settled Estates*, 2 Ch. D. at p. 525.

<sup>8</sup> Report on Public Records (1837), 67; Steph. Comm. i. 618.

numerous other kinds of rolls of a similar nature, such as the charter rolls, fine rolls, liberate rolls, perambulation rolls, hundred rolls, &c.<sup>1</sup>

The rolls above described form part of the public records of the kingdom, and are kept at the Public Record Office in London.

Court rolls of manor.

§ 4. The court rolls of manors were in ancient times long pieces of parchment, rolled up into convenient bundles; but in modern times what is called the court roll is neither more nor less than a large book in which the steward enters every transaction relating to the copyhold lands of the manor.<sup>2</sup> (See *Copyhold*, § 1.)

Roll of solicitors.

§ 5. The admission of every solicitor of the Supreme Court requires to be enrolled in a roll or book kept for that purpose by the Clerk of the Petty Bag.<sup>3</sup> A solicitor is said to be struck off the rolls when his name is taken out of this roll, either on his own application, where he wishes to cease practising as a solicitor, or on the application of some one else, when he has been guilty of misconduct.

Common law practice.

§ 6. In the old common law practice the steps in every action were entered on a roll, which was called the plea roll, the issue roll, and the judgment roll, according to the stage which the action had reached. This kind of roll no longer exists, the cause book and judgment book having taken its place.<sup>4</sup>

**ROMAN CATHOLICS.**—The only disabilities to which Roman Catholics are now subject seem to be inability to present to a benefice, and incapacity to hold certain public offices, especially that of Lord Chancellor, Lord Lieutenant of Ireland, or any office in the Church of England or Scotland, or in the ecclesiastical Courts, or in the universities, colleges or public schools of this kingdom.<sup>5</sup>

**ROOT OF DESCENT** is the same as “stock of descent.” (See *Descent*, §§ 2 *et seq.*)

**ROOT OF TITLE.** See *Title*.

**ROUT.**—A rout is an unlawful assembly which has made a motion towards the execution of the common purpose of the persons assembled.<sup>6</sup> It is, therefore, between an unlawful assembly and a riot (*q. v.*).

Taking part in a rout seems to be a misdemeanor at common law.<sup>7</sup>

See *Unlawful Assembly*.

**ROYAL FISH** are whale and sturgeon, and these, when either thrown ashore or caught near the coast, are the property of the king.<sup>8</sup> (See *Prerogative*, § 2.)

**ROYAL MINES.** See *Minerals*, § 2.

<sup>1</sup> Report on Public Records (1837), 67; Steph. Comm. i. 618.

<sup>2</sup> Williams on Seisin, 37.

<sup>3</sup> Solicitors Act, 1877; Reg. 2, Nov. 1875; Archbold, Pr. 63.

<sup>4</sup> Smith's Action, 59 *et seq.*

<sup>5</sup> Stat. 10 Geo. 4, c. 7; Steph. Comm. ii. 711.

<sup>6</sup> Stephen, Crim. Dig. 41; Russell on Crimes, i. 372.

<sup>7</sup> Russell, 389.

<sup>8</sup> Bl. Comm. i. 290.

**ROYALTY** is a payment reserved by the grantor of a patent, lease of a mine or similar right, and payable proportionately to the use made of the right by the grantee. It is usually a payment of money, but may be a payment in kind, that is, of part of the produce of the exercise of the right.<sup>1</sup> (See *Rent*, § 6.)

Royalty in kind.

§ 2. Royalty, also, sometimes means a payment which is made to an author or composer by an assignee or licensee in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent.

**RULE.—I.** § 1. A rule is a regulation made by a Court of justice or public office with reference to the conduct of business therein. Most rules are made under the authority of an act of parliament, and then have the same effect as an enactment of the legislature; such are the supplemental rules of Court made by the judges under the Judicature Acts, and the rules issued under the Land Transfer Act. (See *Land Registries*, § 5.)

II. § 2. "Rule" also signifies an order or direction made by a Court of justice in an action or other proceeding. The term is confined to the Queen's Bench Division of the High Court, being borrowed from the practice of the old common law Courts.

§ 3. A rule is either—(1) absolute in the first instance, or (2) calling upon the opposite party to show cause why the rule applied for should not be granted; a rule of the latter kind is called a rule to show cause, or a rule nisi, because if no sufficient cause is shown, the rule is made absolute; otherwise it is discharged. On a motion for a new trial, the rule is in the first instance a rule nisi only. In certain cases, to save time, the party against whom the rule is applied for agrees, with the permission of the Court, to "show cause in the first instance:" that is, to argue against the granting of a rule absolute when the application is first made, instead of compelling the opposite party to obtain a rule nisi, and then showing cause or arguing against it.<sup>2</sup> (See *Absolute*; *Nisi*; *Order*, § 3.)

Absolute: to show cause.

§ 4. Rules of the kind above described are obtained on motion by counsel (see *Motion*); but there are some cases in which rules are obtained without any motion. Thus, a rule to make a submission to arbitration a rule of Court is granted upon the mere production of a motion paper signed by counsel. Other rules may be obtained without the assistance of counsel, generally by leaving at the proper office a *præcipe* or memorandum of the rule required. Formerly many rules of this kind were moved for by the attorneys at the side bar in Court, and were hence called side-bar rules. A rule that a sheriff return a writ, is an example of a side-bar rule. There are also certain rules which are obtained upon a judge's fiat.<sup>3</sup>

Side-bar rules.

III. § 5. "Rule" sometimes means a rule of law. Thus we speak of the rule against perpetuities, the rule in *Shelley's case*, &c. (See *Law*; *Perpetuity*; *Shelley's Case*.)

Rule of law.

<sup>1</sup> *Van Mining Co. v. Overseers of Llanidloes*, 1 Ex. D. 310.

<sup>2</sup> Archbold, Fr. 1254 *et seq.*

<sup>3</sup> Archbold, Pr. 534, 1268; *Angell v. Baddeley*, 3 Ex. D. 49.

**RULE OF COURT** generally means a rule of procedure. (See *Rule*, § 1.) Sometimes, however, it means an order made by a Court in a particular action or matter: thus, a submission to arbitration may provide that it may be made a rule of Court, and if so either party may obtain an order of the Court to that effect, the operation of which is that the award becomes enforceable by judicial means.<sup>1</sup> (See *Award*, § 4; *Rule*, § 2.)

**RULE OF THE ROAD** is the popular name for the regulations governing the navigation of vessels in public waters, with a view to preventing collisions. The regulations applying to the high seas are contained in an Order in Council of the 14th August, 1879, made under the 25th sect. of the Merchant Shipping Act, 1862.<sup>2</sup> Additional regulations were made on the 24th March, 1880, 17th September, 1880, and 14th December, 1880.<sup>3</sup> The regulations applying to the Thames are contained in the bye-laws made by the Thames Conservancy on the 5th February, 1872, 25th November, 1874, 17th March, 1875, 11th July, 1877, 11th November, 1879, and 18th March, 1880.<sup>4</sup>

**RUNNING DAYS.**—Where a charterparty contains a clause of demurrage, it may be a question whether the days allowed by it (lay days) are meant to be working days, that is, excluding Sundays, or running days, that is, including Sundays. By the custom of London, lay days are taken to mean working days, while, in the absence of custom, they mean running days.<sup>5</sup> (See *Demurrage*; *Lay Days*.)

**RUNNING WITH THE LAND—RUNNING WITH THE REVERSION.** See *Covenant*, § 5.

**RURAL DEANS** are very ancient officers of the Church, but their authority is almost grown out of use.<sup>6</sup> A rural deanery is a sub-division of an archdeaconry. The duties of a rural dean seem to consist in executing all processes (or writs) directed to him by the bishop, in inspecting and reporting to the bishop on the lives and manners of the clergy and people within his district,<sup>7</sup> and in examining candidates for confirmation.<sup>8</sup> (See *Dean*.)

## S.

**SACRILEGE.**—A person who breaks into a place of divine worship and commits any felony therein, or who being in a place of divine worship commits any felony therein and breaks out of it, is liable to imprisonment

<sup>1</sup> Common Law Proc. Act, 1854, s. 17; Archbold, Pr. 1314.

<sup>2</sup> They are set out in Coulson & Forbes on Waters, 403, and are printed in the Law Reports, 4 P. D. 241.

<sup>3</sup> 5 P. D. 269 *et seq.*

<sup>4</sup> Coulson & Forbes, 673.

<sup>5</sup> Smith's Merc. Law, 293; *Brown v. Johnson*, 10 M. & W. 331.

<sup>6</sup> Bl. Comm. i. 383.

<sup>7</sup> Phillimore, Eccl. Law, 251 *et seq.*

<sup>8</sup> Steph. Comm. ii. 679.

for two years or penal servitude for life (maximum).<sup>1</sup> And any person who unlawfully pulls down, defaces, or breaks any altar, crucifix or cross in any church, chapel or churchyard is liable, on summary conviction, to imprisonment for three months, or until he repents.<sup>2</sup> (See also *Arson*.)

**SALE.**—§ 1. A sale is a transmutation of property or of a right from one man to another, in consideration of a sum of money, as opposed to barter, exchanges and gifts (*q. v.*).<sup>3</sup> Almost any right may be transferred for a price, but the term "sale" is only applied to cases where the whole right of the vendor is transferred, not to cases where he creates a new or limited right in consideration of a money payment: thus a mortgage or lease is not a sale. § 2. Every sale includes (a) the agreement<sup>4</sup> or bargain, (b) the payment of the price, and (c) the delivery or conveyance of the property. Sometimes the three transactions take place simultaneously, as where I go into a shop, select an article, pay the price and take it away, and then the transaction is a simple sale. But either the payment of the price, or the delivery (or conveyance) of the property, or both, may be postponed to a future time, giving rise to a contract or agreement to do something in futuro.<sup>5</sup> § 3. In the case of chattels, such a postponement does not prevent the property or ownership from passing from the vendor to the vendee, provided that the thing sold is existent and ascertained, and that the contract of sale fulfils the legal requisites (see *Statute of Frauds*), and therefore the "sale" is complete as soon as the contract has been entered into: such a transaction is called a "bargain and sale" (*q. v.*) or an executed contract of sale,<sup>6</sup> although the contract has not been performed. § 4. But in the case of an agreement for the sale of land or of unascertained goods (*e. g.*, ten sheep to be selected from a given flock), the ownership does not pass, and therefore the sale is not complete until the land has been conveyed, or the goods ascertained: such a transaction is an executory contract of sale.<sup>6</sup> (See *Appropriation*, § 2.)

Simple sale.

Bargain and sale.

Executory sale.

§ 5. Ordinarily the person who sells is the owner of the property or his agent, but in some cases a person may sell property which does not belong to him, *e. g.*, a sheriff who has taken goods in execution. So a person may have a power of sale over property without having the ownership in it; as in the case of an ordinary mortgagee of land or a pledgee of chattels. (See *Mortgage*, § 8; *Power*, §§ 5, 6.) So when a person has a charge on property, he may take proceedings in the High Court to have it sold in satisfaction of the debt. This is sometimes called a judicial sale. (See *Hypothecation*, § 2.)

Sale by non-owner.

Judicial sale.

<sup>1</sup> Stat. 24 & 25 Vict. c. 96, s. 50; Russell on Crimes, ii. 55.

<sup>2</sup> Stat. 1 Mary (sess. 2), c. 3; Russell, i. 399.

<sup>3</sup> Chitty on Contracts, 346; Smith's Merc. Law, 479; Benjamin on Sales, 2.

<sup>4</sup> "Agreement" is here used in its simplest sense, as denoting the common intention of two persons, not in the sense of "contract." (See *Agreement*, § 1.)

<sup>5</sup> Benjamin on Sales, 3. When the vendor brings an action for the price of goods which have been delivered his claim is for "goods sold and delivered;" if the goods have not been delivered his claim is for "goods bargained and sold." See Rules of Court, App. A, part ii. sect. ii. form 1.

<sup>6</sup> Wms. Pers. P. 44; Benjamin, 3, 227.

Compulsory  
sale.

§ 6. Again, a sale is usually a voluntary act, but in some cases the owner of property may be compelled to sell it by the order of a Court: thus in an action for partition the Court may order a sale instead of a partition if the nature of the property makes that course preferable, and then even the non-assenting co-owners are ordered to join in the conveyance, or the conveyance is effected without their concurrence.<sup>1</sup> (See *Vesting Order*.) Railway and other companies are frequently empowered to purchase land, &c. from the owners against their will. (See *Power*, § 2.)

See *Bill of Sale*; *Contract*, § 14; *Resale*; *Vendors and Purchasers*; *Warranty*.

**SALFORD HUNDRED COURT OF RECORD** is an inferior and local Court of Record having jurisdiction in personal actions where the debt or damage sought to be recovered does not exceed 50*l.*, if the cause of action arise within the Hundred of Salford.<sup>2</sup> (See *Hundred*.)

**SALVAGE—SALVORS.**—I. § 1. Salvage is the compensation allowed to persons (salvors) by whose assistance a ship, or boat, or the cargo of a ship, or the lives of the persons belonging to her, are saved from danger or loss, in cases of shipwreck, dereliction, capture, or the like. The assistance must be voluntary, and not under any contract or duty, and must involve skill, enterprise and risk on the part of the salvors.<sup>3</sup> Salvors have a retaining lien for their remuneration on the property rescued.<sup>4</sup> (See *Lien*, §§ 4, 6.) In the absence of an agreement between the salvors and the owners of the property saved, the Court will assess the amount which ought to be paid to the salvors. In doing so the Court will have regard to the skill, enterprise and risk involved, and to the fact that if their efforts had been unsuccessful, they would not have been paid anything.<sup>5</sup> The Court will refuse to enforce an exorbitant salvage agreement.<sup>6</sup> (See *Towage*.)

§ 2. Claims for salvage are usually enforced in Courts having admiralty jurisdiction.<sup>7</sup> (See *Action*, §§ 11 *et seq.*; *Admiralty*.)

Equitable  
salvage.

II. § 3. By analogy, the term salvage is also used in cases which have nothing to do with maritime perils, but in which property has been preserved from loss by the last of several advances by different persons. In such a case, the person making the last advance is frequently entitled to priority over the others, on the ground that, without his advance, the property would have been lost altogether. This right, which is sometimes called that of equitable salvage, and is in the nature of a lien, is chiefly of importance with reference to payments made to prevent leases or policies of insurance from being forfeited, or to prevent mines and similar undertakings from being stopped or injured.<sup>8</sup>

<sup>1</sup> Dart, V. & P. 1190 *et seq.*

<sup>2</sup> Stat. 31 & 32 Vict. c. cxxx; *Oram v. Breary*, 2 Ex. D. 346.

<sup>3</sup> Maude & Pollock, Merch. Shipp. 477; Smith's Merc. Law, 331; Merch. Shipp. Act, 1854, part viii.; *The Cleopatra*, 3 P. D. 145.

<sup>4</sup> Maude & Pollock, 487.

<sup>5</sup> *Aitchison v. Lohre*, 4 App. Ca. 755.

<sup>6</sup> *The Silesia*, 5 P. D. 177.

<sup>7</sup> Williams & Bruce's Admiralty, 91 *et seq.*

<sup>8</sup> See Fisher on Mortgage, 149, ii. 620; *Ex parte Grissell*, 3 Ch. D. 411; *Shear-*

**SANCTION.**—In the original sense of the word a sanction is a penalty or punishment provided as a means of enforcing obedience to a law.<sup>1</sup> In jurisprudence a law is said to have a sanction when there is a State which will intervene if it is disobeyed or disregarded.<sup>2</sup> Therefore, international law has no legal sanction.

**SANITARY AUTHORITIES** are bodies having jurisdiction over their respective districts in regard to sewerage, drainage, scavenging, the supply of water, the prevention of nuisances and offensive trades, &c., all of which come under the head of "sanitary matters" in the special sense of the word. Sanitary authorities also have jurisdiction in matters coming under the head of "local government" (*q. v.*).<sup>3</sup> § 2. Urban sanitary authorities have jurisdiction in boroughs, towns, and other places having "known and defined boundaries."<sup>4</sup> Rural sanitary authorities have jurisdiction in poor law parishes and unions not being within an urban district.<sup>5</sup> A port sanitary authority is one having jurisdiction over a port.<sup>6</sup> London is subject to special acts called the Metropolis Local Management Acts.<sup>7</sup> (See *Local Boards of Health*; *Metropolitan Board of Works*; *Nuisance*; *Rate*.)

Urban.

Rural.

Port.

**SANS NOMBRE**, as applied to rights of common, means not a common for innumerable beasts, but for a number not certain,<sup>8</sup> the limit being fixed by some other standard than that of number. § 2. Common of pasture in gross sans nombre is a right to turn on the common so many cattle as the common will maintain beyond the cattle of the lord and those who have common appendant and appurtenant there.<sup>9</sup> § 3. As applied to common of pasture appurtenant, the term "sans nombre" can mean no more than that the measure of the right is levancy and couchancy (*q. v.*).<sup>10</sup>

**SATISFACTION** is the exhaustion of an obligation by performance (*q. v.*), or some act equivalent to performance. Thus, where a debt is due by one person to another, payment by the debtor or retainer by the creditor produces satisfaction of the debt. § 2. A judgment may be satisfied by payment or execution, and when this has been done the defendant is entitled to have satisfaction entered; to do this a satisfaction piece or slip of paper, showing that the judgment has been satisfied, is produced at the judgment office.<sup>11</sup>

Judgment.

Satisfaction piece,

§ 3. In equity, the doctrine of satisfaction is chiefly made use of in cases where satisfaction is implied from the ambiguous acts or language of testators or settlors. Thus, if a parent bequeaths a legacy to a child

Satisfaction in equity.

*man v. British, Empire Insurance Company, L. R., 14 Eq. 4; Saunders v. Dunman, 7 Ch. D. 825.*

<sup>1</sup> Just. Inst. ii. 1, 10.

<sup>2</sup> Holland, Jurisp. 60.

<sup>3</sup> Public Health Act, 1875, *passim*.

<sup>4</sup> See *Reg. v. Northowram, L. R., 1 Q. B. 110.*

<sup>5</sup> Public Health Act, 1875, part ii.

<sup>6</sup> *Ibid.* ss. 287 *et seq.*

<sup>7</sup> Especially stat. 18 & 19 Vict. c. 120.

<sup>8</sup> Per Babington, C. J., 11 Hen. 6, 22 B, cited Cooke, Incl. 26.

<sup>9</sup> Elton, Comm. 79; Cooke, Incl. 27.

<sup>10</sup> Elton, 193, 67.

<sup>11</sup> Chitty, Pr. 721; *Cattlin v. Kernot*, 3 C. B., N. S. 796. As to the entry of satisfaction in the case of registered judgments, lites pendentes, &c., see stats. 23 & 24 Vict. c. 115; 30 & 31 Vict. c. 47.

Satisfaction  
and ademp-  
tion.

by way of portion, and afterwards (*e. g.*, upon the marriage of the child) gives him a sum by way of portion, the latter sum operates as a satisfaction of the former, either completely or pro tanto; that is, the child cannot claim the legacy on the death of the parent. So if a testator gives a legacy to his creditor, it operates as a satisfaction of the debt, provided that the legacy is equal to or greater than the debt, and that no contrary intention appears.<sup>1</sup> § 4. Sometimes "satisfaction" is distinguished from "ademption," the former being applied to cases where a person has entered into an agreement or covenant to settle property on another, and afterwards gives that person an equal or greater benefit by his will, in such a manner that he must be presumed to have intended the gift to operate as a satisfaction of his agreement or covenant, and not to be an additional benefit; while "ademption" is the converse case of a person giving property by will and afterwards giving a similar benefit by deed impliedly in satisfaction of the former gift. The distinction lies in the difference between revocable and irrevocable instruments, and is of importance in this respect, that in cases of satisfaction the persons intended to be benefited by the covenant and the will must be the same, while in cases of ademption they may be different.<sup>2</sup>

See *Cumulative*; *Election*; *Performance*.

**SATISFIED TERM.** See *Term*.

**SAVIGNY.**—Friedrich Carl von Savigny, the greatest modern jurist, was born 21st February, 1779, at Frankfort-on-the-Main; became professor at Marburg, Landshut and Berlin, where he was made minister for the revision of the statutes; and died 25th October, 1861. He founded the historical school of jurisprudence. His principal works are:—*The Right of Possession* (translated into English by Sir Erskine Perry); *The Capacity of our Age for Legislation and Jurisprudence* (translated into English by A. Hayward, under the title of "*The Vocation of our Age, &c.*"); *History of Roman Law in the Middle Ages*; *System of Modern Roman Law*; and *the Law of Obligations*.<sup>3</sup>

**SAVINGS BANKS.**—Provision was made by various statutes from 9 Geo. 4, c. 92, to 23 & 24 Vict. c. 137, for the formation and regulation of savings banks. By the stat. 26 & 27 Vict. c. 87, these acts were repealed, and fresh provisions were made on the subject; but it was enacted that no new banks should be formed under the act unless approved by the Commissioners for the Reduction of the National Debt. The moneys of savings banks certified under the act are paid into the Bank of England to the credit of the commissioners, and interest is allowed on them. Purchases of government stocks may be made by depositors in savings banks.<sup>4</sup> Savings Banks have also been established

<sup>1</sup> Haynes's Eq. 323; Snell's Eq. 194; Watson's Comp. Eq. 846; White & Tudor's L. C. ii. 349.

<sup>2</sup> *Lord John Chichester v. Coventry*, L. R., 2 H. L. 71.

<sup>3</sup> Holtz. Encycl.

<sup>4</sup> Stat. 16 & 17 Vict. c. 45.



by government in connection with the Post Office under the acts 24 Vict. c. 14, and 26 Vict. c. 14.<sup>1</sup>

**SCANDAL—SCANDALOUS.**—In pleading, “scandal consists in the allegation of anything which is unbecoming the dignity of the Court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause: to which may be added, that any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous.”<sup>2</sup>

Scandalous matter in a pleading is liable to be struck out.<sup>3</sup>

**SCHEME.**—§ 1. A scheme is a document containing provisions for regulating the management or distribution of property, or for making an arrangement between persons having conflicting rights. Thus, in the practice of the Chancery Division, where the execution of a charitable trust in the manner directed by the founder is difficult or impracticable, or requires supervision, a scheme for the management of the charity will be settled by the Court.<sup>4</sup>

§ 2. By the Charitable Trusts Acts (*q. v.*), the Charity Commissioners are empowered to provisionally approve and certify schemes which cannot be carried into effect without the authority of parliament, and report them to parliament to be included in a general act.<sup>5</sup> (See *Cy-près*; *Enclosure Commissioners*.)

§ 3. By the Railway Companies Act, 1867, when a company is unable to meet its engagements with its creditors, the directors may prepare a scheme of arrangement between the company and the creditors, and file it in the Chancery Division; if it is assented to by three-fourths of each class of creditors and a majority of the shareholders, it may be confirmed by the Court and enrolled, and then has the force of an act of parliament.<sup>6</sup>

Scheme under Railway Companies Act, 1867.

**SCHOOL.** See *Education*.

**SCIENTER** is an allegation in a pleading that the defendant or accused person did a thing knowingly. Thus, in an indictment for receiving stolen goods, the allegation that the prisoner knew them to have been stolen is called the *scienter*.<sup>7</sup> So, where a person keeps an animal of a savage disposition, he is answerable for any injury it may do (even though he has done his best to keep it from doing harm), if reasonable ground can be shown for presuming that its ferocious character was known to him: this knowledge is technically called the *scienter*.<sup>8</sup> Proof of the *scienter* is not necessary in actions for injury by dogs to sheep or cattle.<sup>9</sup> (Latin, *scienter* = knowingly.<sup>10</sup>)

<sup>1</sup> For the other acts, see Chitty's Statutes, tit. *Savings Banks*.

<sup>2</sup> Daniell's Ch. Pr. 290.

<sup>3</sup> Rules of Court, xxvii. 1.

<sup>4</sup> Tudor's Char. Trusts, 257; Hunter's Suit, 248; Daniell's Ch. Pr. 1765.

<sup>5</sup> Watson's Comp. Eq. 58.

<sup>6</sup> Stat. 30 & 31 Vict. c. 127, ss. 6 *et seq.*; Daniell, Ch. Pr. 1888.

<sup>7</sup> Pritchard, Q. S. 325.

<sup>8</sup> Campbell on Negligence, 53; Underhill on Torts, 141.

<sup>9</sup> Stat. 28 & 29 Vict. c. 60.

<sup>10</sup> The form was “Quare quosdam canes

**SCINTILLA JURIS** (= "a spark or fragment of right"). If a conveyance of land is made to A. and his heirs to the use of B. and his heirs until the happening of a certain event and then to the use of C. and his heirs, the use is executed in B. and his heirs, so that A. has no seisin left in him. If then the event happens, who is seised to the use of C.? Formerly it was supposed that on the happening of the event the original seisin reverted back to B., so that he was seised to the use of C., and that meantime a possibility of seisin, or *scintilla juris*, remained in him.<sup>1</sup> This doctrine was always discountenanced by the best authorities,<sup>2</sup> and was formally abolished by the stat. 23 & 24 Vict. c. 38, s. 7.

**SCIRE FACIAS.**—I. § 1. In proceedings in the High Court of Justice, a *scire facias* is a writ founded upon some record, such as a judgment, recognizance, letters patent, &c., and directs the sheriff to make known to (*scire facias*) or warn the person against whom it is brought to show cause why the person bringing it should not have advantage of the record, or (as in the case of a *scire facias* to repeal letters patent) why the record should not be annulled and vacated. It is in all cases considered in law as an action, because the defendant may plead to it,<sup>3</sup> but in some cases it is an original writ, while in others it is rather a writ of execution.

§ 2. Formerly the writ always issued from the Court in which the record on which it was founded was supposed to remain,<sup>4</sup> so that a *scire facias* on a judgment in the Queen's Bench would be issued out of the Court of Queen's Bench. At the present day, therefore, it would seem that such a *scire facias* would be brought in the Queen's Bench Division.<sup>5</sup> Similarly a *scire facias* on a receiver's recognizance is issued out of the Petty Bag Office (*q. v.*).<sup>6</sup>

§ 3. If the sheriff executes the writ by warning the defendant, he returns *scire feci* ("I have caused to be warned"); if he does not warn him, he returns *nihil*. After the return the plaintiff enters a rule to appear (see *Rule*, § 2); if the defendant fails to appear, judgment goes against him by default. If, however, he appears, the plaintiff delivers a declaration praying execution, and the pleadings proceed as in an action at law under the old practice (see *Pleading*, § 11); every issue of fact on a *scire facias* is tried in the Queen's Bench Division.<sup>7</sup>

§ 4. A *scire facias* is an original action when it is issued to repeal letters patent: thus, if the Queen by her letters patent has granted one and the selfsame thing to several persons, the first patentee may sue out a *scire facias* to repeal the subsequent letters patent; or when the Queen has been deceived or mistaken she may by *scire facias* repeal her own grant.<sup>8</sup>

Scire facias to  
repeal letters  
patent.

ad mordendas oves consuetos apud B. scienter retinuit" (Reg. Brev. 110 b); thus justifying the decision that "every dog was entitled to at least one worry": *Fleming v. Orr*, 2 Macq. 14.

<sup>1</sup> Williams, R. P. 295.

<sup>2</sup> Hayes, Conv. i. 61 *et seq.*; Sugden on Powers, 19; Fleta, 273.

<sup>3</sup> Co. Litt. 290 b; Chitty, Pr. 1140;

Tidd, Pr. 1090; Foster on Scire Facias, 13; Wms. Saund. ii. 22, 71.

<sup>4</sup> Archbold, Pr. 935.

<sup>5</sup> Jud. Act, 1873, s. 34.

<sup>6</sup> Daniell, Ch. Pr. 1606.

<sup>7</sup> *Ibid.* 1069 *et seq.*

<sup>8</sup> For other instances, see Foster, 12, 228, 236. See also Bl. Comm. iii. 260; Chitty, Prer. 330.

§ 5. A scire facias is a judicial writ, but in the nature of an original proceeding, when it is issued by the conusee of a recognizance (*q. v.*) to have execution against the conusor for the debt.<sup>1</sup> The scire facias is in lieu of an ordinary action. On recognizance.

§ 6. A scire facias is sometimes a continuation of a former action, being merely an interlocutory proceeding and in the nature of process or execution, as in the case of a scire facias quare executionem non (*infra*, § 11); sometimes a proceeding after the action has terminated, as in the case of a scire facias ad rehabendam terram (*infra*, § 9).<sup>2</sup> § 7. The most important instance in which a scire facias of this kind is now brought is where it is required to enforce a judgment against the shareholders of a company. By stat. 7 Geo. 4, c. 46; 7 Will. 4 & 1 Vict. c. 73; 8 & 9 Vict. c. 16, and other acts, if execution has been issued against a company subject to one of those acts (*e. g.*, a railway company), and the property is insufficient, a scire facias may (with certain limitations as to past members, the amount for which each shareholder is liable, obtaining leave of the Court, &c.) be issued against any of the shareholders, requiring them to show cause why execution should not be awarded against their property.<sup>3</sup> Against shareholders.

§ 8. The other kinds of scire facias in the nature of process or execution are either obsolete or very rare. Thus a simple application to the Court has been substituted for the scire facias formerly required to revive a judgment, or to issue execution on a judgment of assets quando acciderint.<sup>4</sup> (See *Judgment*, § 12; *Revival*, § 4.) The following are the principal kinds of scire facias having distinctive names:—§ 9. A scire facias ad rehabendam terram lies to enable a judgment debtor to recover back his lands taken under an elegit when the judgment creditor has satisfied or been paid the amount of his judgment.<sup>5</sup> (See *Elegit*.) A scire facias in the nature of execution is sometimes required by the crown, *e. g.*, to have execution of a debt secured by recognizance, or to issue execution on an office found (*q. v.*);<sup>6</sup> if it is determined in favour of the crown an extent may be issued.<sup>7</sup> (See *Extent*.) § 10. Scire facias quare restitutionem non lies where execution on a judgment has been levied, but the money has not been paid over to the plaintiff, and the judgment is afterwards reversed in error or on appeal; in such a case a scire facias is necessary before a writ of restitution can issue.<sup>8</sup> Ad rehabendam terram.

§ 11. Scire facias ad audiendum errores and quare executionem non were writs used in proceedings in error, the first by the plaintiff, the second by the defendant in error, to compel the opposite party to plead: they are both obsolete.<sup>9</sup> By crown.

II. Scire facias is sometimes employed in proceedings in the Mayor's Court of London. Quare restitutionem non.

§ 12. In proceedings in foreign attachment (*q. v.*), when a certain period has elapsed after the attachment has been served, the plaintiff is at liberty to issue a scire facias, which is a warning to the garnishee to appear to show cause why the plaintiff should not have execution of the Ad audiendum errores. Quare exec. non.

<sup>1</sup> Foster, 229, 279, 327; Wms. Saund. ii. notes to *Underhill v. Devereux*; Chitty, 888, 1096.

<sup>2</sup> Chitty, 1140.

<sup>3</sup> *Ibid.* 1177—1196; Hodges on Railways, 80 *et seq.*; *Ilfracombe Rail. Co. v. Devon & Somerset Rail. Co.*, L. R., 2 C. P. 15; *Portal v. Emmens*, 1 C. P. D. 664; Smith's Action (11th ed.), 339; Foster, 106. It is stated in Archbold's Practice (p. 935), that an action of scire facias against share-

holders is commenced by writ of summons in the same way as an ordinary action and follows a similar course. This may be open to question.

<sup>4</sup> See Rules of Court, xlii. 7, 19; Smith's Action, 177, 202.

<sup>5</sup> Chitty, 692; Foster, 58.

<sup>6</sup> Foster, 233.

<sup>7</sup> Manning's Exchequer, 136 *et seq.*

<sup>8</sup> Chitty, 582; Foster, 64.

<sup>9</sup> Chitty, 1341 *et seq.*; Foster, 213.

money, &c. attached; the garnishee either appears or suffers judgment to go by default.<sup>1</sup> § 13. If in a suit in the Mayor's Court the defendant's property has been attached and execution issued against the garnishee, the defendant cannot appear to the plaint in the ordinary course, because the proceedings in attachment are founded on his fictitious default in appearing to the plaint; and therefore, if he wishes to dispute the plaintiff's claim, he must issue a writ of scire facias ad disprobandum debitum: when the plaintiff has appeared to the writ the defendant declares, and the action proceeds as in ordinary cases unless the plaintiff prays *stet billa*<sup>2</sup> (*q. v.*).

**SCIRE FIERI INQUIRY** is a writ issued against an executor against whom judgment has been obtained for a debt due by his testator when the property of the testator has been found insufficient (technically when the sheriff has returned *nulla bona* to a *fi. fa. de bonis testatoris*), and the executor is supposed to have committed a *devastavit*. It commands the sheriff that in case there shall be no goods of the testator remaining in the hands of the executor, he shall summon a jury to inquire if the defendant has wasted the goods of the testator; and if a *devastavit* be found, that he shall warn the defendant to show cause why the plaintiff should not have a *fieri facias de bonis propriis* against him. The name is compounded of the names of the three proceedings, *scire facias*, *fieri facias*, and inquiry, of which the process consists. It is seldom adopted in practice.<sup>3</sup> (See *Devastavit*; *Fieri facias*, § 3; *Judgment*, § 13.)

**SCRIP.**—§ 1. A scrip certificate (or shortly "scrip") is an acknowledgment by the projectors of a company or the issuers of a loan that the person named therein (or more commonly the holder for the time being of the certificate) is entitled to a certain specified number of shares, debentures, bonds, &c. It is usually given in exchange for the letter of allotment, and in its turn is given up for the shares, debentures or bonds which it represents.<sup>4</sup> Scrip is chiefly used in the case of bonds and shares which are payable by instalments, so that they cannot be issued until all the instalments are paid; therefore as soon as bonds or shares have been allotted to a subscriber or applicant, a scrip certificate, certifying that on due payment of the unpaid instalments the bearer will be entitled to receive bonds or shares to the amount of the certificate, is given to the allottee (see *Allot*, § 3). Scrip certificates are negotiable instruments.<sup>5</sup>

§ 2. It is said that there are companies (called scrip companies) in which the scrip is not required to be exchanged for shares, the scrip-holders being the shareholders.<sup>6</sup>

**ETYMOLOGY.**—"Scrip certificate" seems to be a contraction for "subscription certificate," that is, a certificate of the amount subscribed for by the applicant.

<sup>1</sup> Brandon, For. Att. 13.

<sup>2</sup> *Ibid.* 113.

<sup>3</sup> Smith's Action (11th edit.), 369; 1 Wms. Saund. 248.

<sup>4</sup> Lindley on Partn. 127; Stamp Act,

1870.

<sup>5</sup> *Goodwin v. Roberts*, L. R., 9 Exch. 337; 1 App. Cas. 476; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194.

<sup>6</sup> Lindley, 128.

**SCRIPT**, in probate practice, is a will, codicil, draft of will or codicil, or written instructions for the same.<sup>1</sup> If the will is destroyed, a copy or any paper embodying its contents becomes a script, even though not made under the direction of the testator.<sup>2</sup> (See *Affidavit*, § 7.)

**SCULPTURE.** See *Copyright*, § 5; *Registration of Designs*.

**SCUTAGE** = escuage (*q. v.*).

**SE DEFENDENDO.** See *Homicide*, § 3.

**SEA.** See *High Seas*; *King's Chambers*; *Navigation*; *Territorial Waters*. As to the sea-shore, see *Foreshore*: as to sea-walls, see *Frontage*, note (2).

**SEAL.**—§ 1. The formality of affixing a seal to a document is one of the oldest modes of expressing the intention to be bound by it, derived from the times when few persons could sign their own names.<sup>3</sup> It is still a solemn mode of expressing assent to a written instrument, and when done with that intention makes the instrument a deed: the intention is generally expressed by the additional formality of delivery (*q. v.*; and see *Deed*; *Execution*; *Sign*).

§ 2. Every corporation aggregate must have a common seal, for being an invisible body it cannot manifest its intention by any personal act or discourse, but only acts and speaks by its common seal,<sup>4</sup> except where it is represented by an officer, agent or attorney, and in a few cases where it would be inconvenient to require the seal, *e.g.*, in every-day matters of business.<sup>5</sup>

As to the seals of the crown, see *Great Seal*; *Privy Seal*: also *Sign Manual*; *Signet*.

**SEALING UP.**—Where a party to an action has been ordered to produce a document, part of which is either irrelevant to the matters in question or is privileged from production, he may, by leave of the Court, seal up that part, if he makes an affidavit stating that it is irrelevant or privileged.<sup>6</sup> The sealing up is generally done by fastening pieces of paper over the part with gum or wafers.

**SEAMEN.**—The principal statutory enactments for the protection of seamen are those requiring agreements for service on board ship to contain certain particulars,<sup>7</sup> and requiring vessels to carry proper provisions, water, lime or lemon juice, and medicines.<sup>8</sup> The enactments with regard to wages, advance notes, &c., are referred to under title *Allot*, § 4, and in

<sup>1</sup> Probate Rules, 1862; C. B. 31.

<sup>2</sup> Browne's Probate Pr. 280.

<sup>3</sup> Williams, R. P. 147.

<sup>4</sup> Bl. Comm. i. 475; Shepp. Touch. 56; Companies Act, 1862, ss. 41, 55. See also the Companies Seals Act, 1864.

<sup>5</sup> Pollock, Contract, 130.

<sup>6</sup> Daniell's Ch. Pr. 1681.

<sup>7</sup> Merchant Shipp. Act, 1854, ss. 149

et seq.

<sup>8</sup> *Ibid.* ss. 221 et seq.; 30 & 31 Vict. c. 124.

ADDENDA, titles *Advance Note* and *Allotment*; those with regard to unseaworthy ships are referred to under title *Seaworthiness*. As to overloading and defective loading of grain ships, &c., see *Merchant Shipping*.

**SEARCH.**—In international law, the right of search is the right on the part of ships of war to visit and search merchant vessels during war, in order to ascertain whether the ship or cargo is liable to seizure. Resistance to visitation and search by a neutral vessel makes the vessel and cargo liable to confiscation. Numerous treaties regulate the manner in which the right of search must be exercised.<sup>1</sup> (See *Contraband*.)

**SEARCHES.**—On a contract for the sale of real estate, it is usual for the purchaser, before the completion of the purchase, to examine certain records and registers for the purpose of seeing whether they contain notice of any fact affecting the title to the property. This is called searching for incumbrances. The searches generally made are for judgments, lites pendentes, and annuities charged on the land; also a general search in the land registry (if the land is registered), and in the customary court rolls (if the property is copyhold). Sometimes also the lists of bankrupts and insolvents, and the register of bills of sale, are searched, if any doubt exists as to the pecuniary circumstances of the vendor.<sup>2</sup> § 2. Similarly on the sale or mortgage of a ship, the register of ships is searched, to ascertain the condition of the title.<sup>3</sup> (See *Merchant Shipping*.)

See *Annuity*; *Judgment*, § 16; *Lis Pendens*; *Land Registry*; *Register*, §§ 3, 4, 8, 13, 19; *Vendors and Purchasers*.

**SEAWORTHINESS.**—§ 1. The question whether a ship is or was at a given time seaworthy is chiefly of importance with reference to the liability of the owner and the underwriters or insurers in the event of her loss. In this use of the term, "seaworthiness" means that the vessel is in a fit state, at the time of sailing,<sup>4</sup> as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured.<sup>5</sup> § 2. Where there is no agreement to the contrary, a shipowner who contracts for the conveyance of merchandise in his ship, or contracts for her insurance, impliedly warrants that she is seaworthy; that is to say, if she is lost, and it turns out that she was not seaworthy at the time of sailing, in the one case the owner is liable to the owner of the goods for their loss, and in the other case the insurers or underwriters are discharged from liability under the policy, notwithstanding the bona fides and honesty of the shipowner.<sup>6</sup>

§ 3. If it is alleged by one-fourth of the seamen belonging to a ship that by reason of unseaworthiness, overloading, defective equipment, or the like, she is not in a fit condition to go to sea, the Court having

Warrant of seaworthiness.

Survey of unseaworthy ships.

<sup>1</sup> Manning's Law of Nations, 433.

<sup>2</sup> Dart's Vendors & Purchasers, 454.

<sup>3</sup> As to official searches by the registrars of judgments, bills of sale, &c., see Rules of Court, lx. A. 8 (April, 1880).

<sup>4</sup> Not merely at the time of loading the cargo: *Cohn v. Davidson*, 2 Q. B. D. 455.

<sup>5</sup> Maude & Pollock's Merch. Shipp. 387.

<sup>6</sup> *Kopitoff v. Wilson*, 1 Q. B. D. 377; *Cohn v. Davidson*, 2 Q. B. D. 455; Maude & Pollock, 387; Smith, Merc. Law, 377.

cognizance of the case may have the ship surveyed. The Board of Trade may also order a survey if they receive a complaint, or have reason to believe that a ship is unfit to proceed to sea.<sup>1</sup>

§ 4. Provision is made by the Merchant Shipping Act, 1854, and by the Passengers Acts, 1855, 1863, and 1870, for the proper equipment and survey of ships in the interest of passengers.

§ 5. Every person who sends a ship to sea in an unseaworthy state, so as to endanger the life of any person on board, is guilty of a misdemeanor, unless he proves that he used all reasonable means to make her seaworthy.<sup>2</sup>

**SECK** is technically applied to certain services and obligations to signify that they create no tenure between the person from whom and the person to whom they are due, as opposed to those services of "homage, fealty, and escuage, which cannot become secke or dry, but make tenure whereunto distresses, escheats and other profits be incident."<sup>3</sup> At the present day the term is hardly ever used except in the phrase rent seck.<sup>4</sup> (See *Rent*, § 8.)

**SECOND DELIVERANCE.** See *Replevin*, § 3.

**SECONDARY.** See *Conveyance*, § 4; *Evidence*, § 9.

**SECRET TRUSTS.**—Where a testator gives property to a person, on a verbal promise by the legatee or devisee that he will hold it in trust for another person, this is called a secret trust. The rule is, that if the secret trust would have been valid as an express trust, it will be enforced against the legatee or devisee, while if it would have been invalid as an express trust, *e. g.*, by contravening the provisions of the Mortmain Act, the gift fails altogether, so that neither the devisee or legatee, nor the object of the trust, takes any benefit by it.<sup>5</sup>

**SECRETARY OF PRESENTATIONS.** See *Presentation Office*.

**SECTA** (from the Latin, *sequi*, to follow) literally means a following. The word is chiefly used to denote a service, due by custom or prescription, which obliges the inhabitants of a particular place to make use of a mill, oven, kiln or similar structure (*secta ad molendinum, ad furnum, ad torrale, &c.*). In such a case the owner of the mill, oven or kiln, may have an action against any inhabitant who "withdraws his suit," that is, goes to another mill, oven or kiln. The theory is that the mill or other structure was erected by the ancestors of the owner for the convenience of the inhabitants, on condition that they should use it to the exclusion of any other.<sup>6</sup>

§ 2. In the old common law practice, *secta* meant the followers or witnesses whom the plaintiff brought into Court with him to prove his case. The actual production of the *secta* has been disused since the reign of Edward III.; but the declaration in every action contained a fictitious statement on the subject, until comparatively modern times.<sup>7</sup>

<sup>1</sup> Stats. 34 & 35 Vict. c. 110; 36 & 37 Vict. c. 85; 39 & 40 Vict. c. 80.

<sup>2</sup> Stat. 39 & 40 Vict. c. 80.

<sup>3</sup> Co. Litt. 151 a.

<sup>4</sup> See also Co. Litt. 147 b and 151 b, and

Hargrave's note (5).

<sup>5</sup> Lewin on Trusts, 51; Watson's Comp. Eq. 54.

<sup>6</sup> Bl. Com. iii. 235.

<sup>7</sup> *Ibid.* 295, 344.

**SECURED CREDITOR.** See *Creditor*, §§ 2 *et seq.*

**SECURED DEBTS.** See *Debt*, § 8.

**SECURITY.**—I. § 1. A security is something which makes the enjoyment or enforcement of a right more secure or certain.

I. With reference to its nature, a security is either a personal security: or a security on property (called in jurisprudence a real security<sup>1</sup>): or a judicial security.

Personal.

(1) § 2. A personal security consists in a promise or obligation by the debtor or another person, in addition to the original liability or obligation intended to be secured. Sometimes the security consists of an instrument which facilitates the enforcement of the original obligation or extends its duration, as in the case of a bond, bill of exchange, promissory note, &c. given by a debtor for an existing debt, the liability on such instruments being easy of proof. When the security consists of a promise or obligation entered into by a third person it generally takes the form of a guarantie (*q. v.*), bond, promissory note, or the like (see *Surety*).

Security on property.

Active.

(2) § 3. A security on property is where a right over property exists, by virtue of which the enforcement of a liability or promise is facilitated or made more certain. This is of two kinds, active and passive. § 4. An active security is where the creditor (or promisee) has the right of selling the property for the purpose of satisfying his claim, as in the case of a pledge or a mortgage with a power of sale. A mortgage of a freehold interest in land is sometimes called "real security," as opposed to a security on leaseholds or other personalty.<sup>2</sup> (See *Investment*.) § 5. A passive security is where the creditor has the right of keeping the property until his claim is satisfied, but not of selling it; such are possessory liens.<sup>3</sup> § 6. Between these two classes stand certain rights which entitle the holder to take proceedings to have the property dealt with so as to satisfy his claim; such are charges in the restricted sense of that word. (See *Charge*, § 2; *Hypothecation*, § 2.) § 7. The important characteristic of a security on property is that in the event of the debtor being bankrupt, absconding or dying the right can nevertheless be enforced by means of the property. (See *Creditor*, §§ 2 *et seq.*)

Specific.

§ 8. Securities on property are also either specific or shifting. Thus, an ordinary mortgage on land is a security on specific property; the mortgagor can only deal with the land subject to the mortgage, and the mortgagee does not by his mortgage acquire any right to other property

<sup>1</sup> As to the ordinary meaning of "real security," see § 4.

<sup>2</sup> *Jones v. Chennell*, 8 Ch. D. 492; *In re Boyd's Settled Estates*, 14 Ch. D. 626.

<sup>3</sup> Mr. Justice Markby (Elements of Law, §§ 501, 510, 534) makes a distinction between a real security and a security consisting of a *jus in re*, the former being defined as "the means of getting satisfaction out of a specific thing, independently of the will or ability of the debtor," the essence of it being the power of sale, while

the latter seems to be a mere possessory lien. I cannot find any authority for this use of the term "real security." It is true that Kuntze (Cursus, § 549) draws a distinction between a security which operates as an inducement to the debtor to perform his obligation and one which enables the creditor to satisfy the debt independently; but he calls the latter "eine *unabhängige* sachliche Gewähr," in order to distinguish it (§ 556).



belonging to the mortgagor (except in the anomalous case of consolidation, *q. v.*). § 9. A shifting or floating security, on the other hand, is a security on all property which shall come under a certain description at the time when the rights of the parties have to be ascertained. Thus, a mortgage or bill of sale on fixtures, machinery or the like, in a given building, may be so framed as to cover articles of a like description placed in the building after the date of the security, with or without a clause empowering the mortgagor to take away any articles and replace them by others of equal value.<sup>1</sup> So a debenture may form a charge on the property for the time being of a company, including stock in trade, book debts, &c.; so that it may sell its stock in trade and buy new stock in trade, receive book debts and create new ones in such a way that, when the time comes for enforcing the security, the property then subject to it may be quite different from what it was when the security was given. As soon as proceedings are taken which necessitate an enforcement of the security (*e. g.*, if the company goes into liquidation), the security becomes fixed, and no further change is possible.<sup>2</sup>

Shifting or floating.

(3) § 10. A judicial security exists where a right is enforceable by Judicial means of the powers vested in a Court of law. Thus, a judgment is enforceable by execution against the property, and (in some cases) against the person of the defendant; and, therefore, a judgment creditor who has taken the proper steps to enforce his judgment is a secured creditor. (See *Creditor*, § 2; *Judgment*, § 16.) To this class may also be referred cognovits, warrants of attorney, garnishee orders, stop orders, charging orders, distringas notices (see the various titles).

II. § 11. With reference to its origin, a security is either created by agreement of the parties or by operation of law; a mortgage or bond is an instance of the former class—a retaining lien of the latter.

Agreement of parties or operation of law.

III. § 12. With reference to the purpose for which they are created, securities may be divided into (1) ordinary securities, namely, those created to secure the payment of a debt or the performance of an obligation between private persons; and (2) securities given in legal proceedings. Securities given in legal proceedings are of various kinds.

(i) § 13. In ordinary actions, security is in some cases required to be given to secure a right in question in the litigation: to this class belong stop orders, distringas, attachment of debts, payment of money and transfer of stock into Court, deposit of property in Court, and security given under Order XIV. of the Rules of Court. (See *Bail*, § 2; *Judgment*, § 9.) § 14. In criminal and summary proceedings the defendant or prisoner is sometimes allowed to go at large on giving bail or entering into his own recognizance, instead of being detained in custody. (See *Bail*, § 5.) A person may also be required to give security to keep the peace. (See *Articles of the Peace*; *Breach of the Peace*; *Recognizance*, § 4.)

<sup>1</sup> *Holroyd v. Marshall*, 10 H. L. C. 191; *Fisher on Mortgage*, 25 *et seq.*; *In re Colonial Trusts Corporation*, 15 Ch. D. 469.

<sup>2</sup> See *In re Panama, &c. Co.*, L. R., 5 Ch. App. 318; and as to debentures charged on the undertaking of a company, see *Debenture*, §§ 5 and 11; *Receiver*, § 5.

Security for costs.

(ii) § 15. Security is sometimes required to be given in relation to the proceedings themselves. Thus, in an ordinary action the plaintiff may, in certain cases (as where he permanently resides abroad), be compelled to give to the defendant security for the costs of the action,<sup>1</sup> generally either by entering into a bond with sureties, or by paying money into Court.<sup>2</sup> An appellant may also be required to give security for the costs of the appeal, *e.g.*, if he appears to be insolvent.<sup>3</sup> As to security on removing causes from inferior Courts, see *Removal*, §§ 3, 4. In criminal and summary proceedings the complainant or prosecutor is generally required to enter into a recognizance, by which he binds himself to prosecute the proceedings.

II. § 16. In a secondary sense, "security" denotes an instrument by which a security is created or evidenced, such as a bond, bill of exchange, debenture, scrip, &c.

**SECURITY FOR COSTS.** See *Security*, § 15.

**SECURITY FOR GOOD BEHAVIOUR.** See *Articles of the Peace*; *Breach of the Peace*; *Recognizance*, § 4; *Security*, § 14.

**SECUS** = otherwise.

**SEDITION—SEDITIONOUS.**—§ 1. Sedition is the offence of publishing verbally or otherwise any words or document with the intention of exciting disaffection, hatred, or contempt against the sovereign, or the government and constitution of the kingdom, or either House of Parliament, or the administration of justice, or of exciting her Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State, or of exciting feelings of ill-will and hostility between different classes of her Majesty's subjects.

§ 2. If the matter so published consists of words spoken the offence is called the speaking of seditious words. If it is contained in a document or the like, the offence is called a seditious libel.

Conspiracy.

§ 3. A seditious conspiracy is where two or more persons agree to do any act for the furtherance of any seditious intention.

All these offences are misdemeanors.<sup>4</sup>

See *Publish*.

**SEDUCTION** is where a man induces a woman to have connection with him by taking advantage of her affection for him, or by promising her marriage, or by some similar means. On the principle that *volenti non fit injuria*, seduction is no actionable wrong to the woman herself, but it is a

<sup>1</sup> Smith's Action, 99; Coe's Pr. 129; Daniell's Ch. Pr. ch. ii. sect. 4.

<sup>2</sup> Rules of Court, lv. (Feb. 1876, and April, 1880). As to security in County Court practice, see Pollock's C. C. P. 246 *et seq.*

<sup>3</sup> Rules of Court, xlviii. 15; *Wilson v.*

*Smith*, 2 Ch. D. 67; *Grant v. Banque Franco-Egyptienne*, 2 C. P. D. 430.

<sup>4</sup> Stephen's Crim. Dig. 55; Shortt on Copyright, 324. See also stat. 6 Anne, c. 7 (c. 41 in the Statutes of the Realm), which makes it high treason to impugn, by writing or printing, the Act of Settlement.

wrong to her parent or master if it causes him a loss of service (see *Service*, § 7), and in an action by a parent the jury may give exemplary damages.<sup>1</sup> (See *Damages*, § 4.)

**SEIGNORY.**—I. § 1. A seignory is the relation of a feudal lord to his tenant, and to the land held by him. Thus, if before the statute of *Quia Emptores*, A., a tenant in fee simple, conveyed his land to B. to hold of A. as his tenant, then A.'s rights against B. in respect of services, fealty, &c., and his interest in the land in the event of an escheat or forfeiture by B. or his successors in title, would constitute a seignory. Since the statute of *Quia Emptores* no seignory can be created. Owing to the feudal incidents of tenure (fealty, &c.) having now become obsolete, and to the rent services anciently reserved having become almost valueless, seignories in freehold land are seldom of any practical importance: in most cases indeed they cannot be traced. (See *Mortmain*, § 1.) Consequently almost the only seignories now in existence are those of lords of manors, for a manor does not exist unless there are at least two free tenants, that is, tenants of freehold land forming part of the manor who hold of the lord by a service of some kind.<sup>2</sup> Hence a manor is sometimes said to consist of demesnes and seignories.<sup>3</sup>

§ 2. A seignory is sometimes distinguished by the services incident to it, *e. g.*, a seignory by fealty and rent-service;<sup>4</sup> or by the position of the lord, *e. g.*, seignories paramount and mesne seignories. (See *Mesne*; *Paramount*.) A seignory may also be either appendant, that is, attached to a manor; or in gross, when it has been severed from the manor to which it originally belonged. On the conveyance of a manor the seignories appendant to it pass with it; a seignory in gross must be conveyed by a deed of grant, a seignory being an incorporeal hereditament.<sup>5</sup>

II. § 3. Seignory sometimes means the land or district over which the rights of the lord extend. (Compare *Franchise*, § 4; *Liberty*, § 2.)

ETYMOLOGY.]—Norman French, *seignur*; from Latin, *senior*.

**SEISED IN DEMESNE AS OF FEE.** See *Demesne*, §§, 2, 3.

**SEISIN.**—§ 1. Seisin is feudal possession; in other words, it is the relation in which a person stands to land or other hereditaments, when he has in them an estate of freehold in possession;<sup>6</sup> such a person is said to be seised of the land. "Seisin" is opposed (1) to "possession," which, in its technical sense, is only applied to leaseholds and other personal property;<sup>7</sup> and (2) to "occupation," which signifies actual possession. (See *Occupation*; *Possession*, § 17.)

<sup>1</sup> Stephen's Comm. iii. 441; Underhill on Torts, 152.

<sup>2</sup> Williams on Seisin, 9, 13; Warrick v. Queen's College, L. R., 6 Ch. 716.

<sup>3</sup> Burton's Comp. 326; and see Britton, 106 a.

<sup>4</sup> *Bevil's Case*, 4 Rep. 8 a.

<sup>5</sup> Williams, R. P. 307, 314. Originally

a seignory differed little from a reversion, as is shown by the manner in which escheated lands descend (see *Escheat*, § 3); Burton's Comp. 326.

<sup>6</sup> Williams on Seisin, 2; Butler's note to Co. Litt. 266 b.

<sup>7</sup> Co. Litt. 17 a, 200 b. It is true that Littleton (§ 567) speaks of a tenant for

In deed. With reference to its nature, seisin is either actual [in deed] or in law. § 2. Actual seisin, or seisin in deed, is where the freeholder is himself in possession or occupation of the land, or where it is occupied by a person claiming under him, and not having an estate of freehold in the land, *e. g.*, a lessee for years.<sup>1</sup>

In law. § 3. Seisin in law is that seisin which an heir has when his ancestor dies intestate seised of land, and neither the heir nor any other person has taken actual possession of the land. Thus, if a man has two farms, Blackacre and Whiteacre, the former of which he lets to a tenant for years, and the latter he occupies himself, then, on his death intestate, his heir has actual seisin of Blackacre from the moment of his death, because the possession of the tenant is looked upon as the possession of the freeholder; but of Whiteacre the heir has merely a seisin in law until he enters and takes possession, and then he has actual seisin of Whiteacre too.<sup>2</sup>

§ 4. Actual seisin of incorporeal hereditaments is obtained by exercising the rights of which they consist, *e. g.*, receiving a rent-charge or presenting to an advowson.<sup>3</sup>

§ 5. With reference to the nature of the property, a tenant in fee simple is said to be seised in his demesne as of fee "of such things whereof a man may have a manuell occupation, possession or receipt, as of lands, tenements, rents and such like. . . . But of such things which do not lie in such manuell occupation, &c., as of an advowson of a church and such like, there he shall say that he was seised as of fee and not in his demesne as of fee."<sup>4</sup> The distinction was only of importance under the old system of pleading. (See *Demesne*, § 3.)

§ 6. Since the abolition of the rules as to descent cast and "seisina facit stipitem" (*q. v.*), and the introduction of modern forms of conveyance, which do not require livery of seisin (*q. v.*), the doctrine of seisin has lost almost all its importance.<sup>5</sup>

Quasi-seisin. § 7. Quasi-seisin is the possession which a copyholder has of the land to which he has been admitted. The freehold in copyhold lands being in the lord, the copyholder cannot have seisin of them in the proper sense of the word, but he has a customary or quasi-seisin, analogous to that of a freeholder.<sup>6</sup>

years being seised; but this seems to be with reference to the effect of a grant of the reversion without livery of seisin, for in § 324 he says that "where one will plead a lease or grant made to him of a chattel real or personal, then he shall say by force of which he was possessed, &c." See a similar use of the word in Britton, 102 b. However, there is no doubt that at one time seisin and possession were convertible terms (*Co. Litt.* 17 a).

<sup>1</sup> *Co. Litt.* 15 a.

<sup>2</sup> Williams on Seisin, 5. The term "seisin in law" is sometimes applied to the interest of a reversioner or remainderman expectant on an estate of freehold, but inaccurately, because the seisin is in the tenant of the estate of freehold. (*Watkin on Descent*, 35.)

<sup>3</sup> *Litt.* §§ 235, 565; *Co. Litt.* 11 b, 15 b, 315 a; *Bevil's Case*, 4 *Co.* 8.

<sup>4</sup> *Litt.* § 10.

<sup>5</sup> See, however, *Leach v. Jay*, 6 Ch. D. 496; 9 Ch. D. 42.

Under the old law, when an heir obtained seisin of land on the death of his ancestor, and then himself died intestate, the land went to his heirs and not to the heirs of his ancestor. This was called a "mesne seisin," because it was intermediate between the two deaths, and the heir was called a "mesne heir" or "mesne person." (*Watkin on Descent*, 35; and see *Possessio Fratris*.)

Another kind of seisin is the "simple seisin" spoken of by Britton (178 b), namely, that nominal or formal possession which a lord was entitled to take on the death of a tenant in fee simple in order to assert his right of seignory, as opposed to the full or beneficial seisin of the tenant's heir. This has long been obsolete.

<sup>6</sup> Williams on Seisin, 126.

§ 8. Equitable seisin is analogous to legal seisin, that is, it is seisin of an equitable estate in land. Thus, a mortgagor is said to have equitable seisin of the land by receipt of the rents.<sup>1</sup> (See *Disseisin; Possession.*)

ETYMOLOGY.—The most probable derivation is from the old German word *bisazjan*; Anglo-Saxon, *bisettan*, to take possession of; modern English, *beset*. Hence the old French, *saisir*;<sup>2</sup> late Latin, *sacire* or *saisire*, to take possession of land;<sup>3</sup> Norman French, *seisine*, possession of land.<sup>4</sup> The late Latin, *saisiare*, seems to be a still later formation, made when *saisir* had acquired the popular meaning of *seize*: it is apparently only applied to moveables.<sup>5</sup>

**SEISINA FACIT STIPITEM** in the law of descent means “seisin makes the stock of descent.” The old rule used to be that when a person died intestate as to his land, it descended to the heir of the person who was last seised of it. Now descent is traced from the last purchaser.<sup>6</sup> (See *Descent.*)

**SEIZURE.**—§ 1. In the law of copyholds, seizure is where the lord of copyhold lands takes possession of them in default of a tenant. It is either seizure quousque, or absolute seizure. § 2. When a copyhold tenant dies intestate, his heir is bound to come to the lord for admittance within a certain time, and pay the fine on admittance; if he does not appear, the lord may seize the land *quousque* (*i. e.*, “until” he does appear), and enjoy the rents and profits in the meantime. Seizure quousque is rather in the nature of a process for recovering the fine than in the nature of a forfeiture, but in some manors there are customs that, after neglect or refusal to appear within a certain time, the land shall be absolutely forfeited.<sup>7</sup>

§ 3. Where the lord seizes land for a forfeiture, escheat, &c., this is an absolute seizure.<sup>8</sup> § 4. The lord may also take heriots by seizure, and the same remedy is given for things which lie in franchise, as waifs, wreck, estrays, &c.<sup>9</sup>

§ 5. In the law of procedure, seizure is sometimes a species of execution. Thus, a sheriff executes a writ of *fi. fa.* by taking possession of the chattels of the debtor.<sup>10</sup> (See *Fieri facias.*) § 6. Seizure also takes place when goods are confiscated as a punishment for smuggling or carrying contraband of war.

**SELDEN.**—John Selden was born in 1584, and died in 1654. He wrote *Mare Clausum*; *Dissertatio historica ad Fletam*; *Notes on Fortescue*; and numerous other works on tithes, titles of honour, &c.

<sup>1</sup> *Chomley v. Clinton*, 2 Mer. 171; 2 Jac. & W. 190. “Actual possession clothed with the receipt of the rents and profits is the highest instance of an equitable seisin:” *Casborne v. Scarfe*, 1 Atk. 603.

<sup>2</sup> *Diez*, Etym. Wörtl. s. v. *Sagire*.

<sup>3</sup> “*Qui . . . terram alterius saisibat*,” extract from Domesday Book in Stubbs’s *Charters*, 84.

<sup>4</sup> Britton, 101 b.

<sup>5</sup> See the extracts in Stubbs, 138, 266.

<sup>6</sup> Williams, R. P. 101.

<sup>7</sup> Elton, Copyh. 140; *Doe v. Trueman*, 1 B. & A. 736.

<sup>8</sup> See *Doe v. Hellier*, 3 T. R. 162.

<sup>9</sup> Steph. Comm. iii. 258.

<sup>10</sup> See *Bissicks v. Bath Colliery Co.*, 3 Exch. D. 174.

**SELECT COMMITTEE.** See *Committee*, § 2.

**SELF-DEFENCE.** See *Homicide*, § 3.

**SEMBLE** = "it appears." Used in quoting a dictum (*q. v.*), or a case which only indirectly bears on a point.

**Ecclesiastical.** **SENTENCE**, in ecclesiastical procedure, is analogous to judgment (*q. v.*) in an ordinary action. A definitive sentence is one which puts an end to the suit, and regards the principal matter in question. An interlocutory sentence determines only some incidental matter in the proceedings.<sup>1</sup>

**Criminal.** § 2. "Sentence" is commonly used to signify the judgment in a criminal proceeding. (See *Judgment*, § 23.)

See *Decree*, § 4.

**SEPARATE ESTATE—SEPARATE USE.**—§ 1. Separate estate, or property belonging to a woman to her separate use, is property which belongs to a married woman as if she were a feme sole. The doctrine of separate estate, which was formerly recognized only in equity, may be described generally as giving a married woman the power of acting with respect to her separate property as if she were a feme sole; thus she is entitled to the income of it, and may dispose of it by deed or will, and mortgage or charge it without the concurrence or consent of her husband, unless she is restrained from anticipation or alienation. (See *Anticipation; Restraint on Alienation.*) Her separate estate is liable for all engagements contracted by her with reference to and on the credit of it.<sup>2</sup> (See *Engagement.*)

§ 2. Property may become the separate estate of a married woman either by provision of the party or under a statute. It may be settled upon her, or devised, bequeathed or otherwise given to her to her separate use, whether by a stranger or by her husband, and whether it is given to trustees for her or not, and whether it is given to her absolutely or subject only to a power of appointment by her. Where the legal estate in the property is vested in the husband, he is a trustee for her. Property becomes the separate estate of a married woman by statute (i) under the Married Women's Property Acts; (ii) under a decree of judicial separation (*q. v.*); (iii) under a protection order (*q. v.*); or (iv) under a separation order (*q. v.*).

§ 3. Where property is given to a married woman to her separate use absolutely (that is, without a limitation over after her death), and she dies without having disposed of it, her husband takes it *jure mariti*. (See *Jus Mariti*, § 2.)

<sup>1</sup> Phill. Eccl. Law, 1260.

<sup>2</sup> *Hulme v. Tenant*, 1 Bro. C. C. 16; *Tullett v. Armstrong*, 1 Beav. 1; *Shattock v. Shattock*, L. R., 2 Eq. 182; *White & Tudor*, L. C. i. 521; *Pollock on Contract*, 62; *Macqueen's Husb. & Wife*, 316; *Maine's Early*

*Inst.*; *Haynes's Equity*, 200; *Snell's Eq.* 278; *London Chartered Bank of Australia v. Lemprière*, L. R., 4 P. C. 572; *In re Harvey's Estate*, 13 Ch. D. 216; *Matthewman's Case*, L. R., 3 Eq. 781.

As to the separate estate of partners, see *Joint*, § 7.

See *Married Women's Property Act; Protection; Coverture; Engagement; Use; Administration*, note (1), p. 28.

**SEPARATION.**—§ 1. A provision or agreement for the future separation of a husband and wife is void, being in derogation of the marriage contract. (See *Derogation*, § 2.)

§ 2. An agreement for immediate separation is valid, because it is made to meet a state of things which, however undesirable in itself, has in fact become inevitable.<sup>1</sup> An agreement of this kind generally takes the form of a deed.

**SEPARATION DEEDS.**—Owing to the rule that a wife cannot in general contract with her husband,<sup>2</sup> the deed is made between the husband and a trustee for the wife,<sup>3</sup> and generally contains provisions for the allowance by the husband of an annuity for the wife, for his indemnification by the trustee against the wife's debts, for the custody and education of the children, &c.<sup>4</sup> It follows from the nature of a separation deed, that it is avoided by subsequent reconciliation and cohabitation,<sup>4</sup> but while it remains in force, it is a bar to a suit for restitution of conjugal rights.<sup>5</sup>

**SEPARATION ORDER.**—Where a husband is convicted of an aggravated assault upon his wife, the Court or magistrate may order that the wife shall be no longer bound to cohabit with him; such an order has the same effect as a decree of judicial separation on the ground of cruelty: it may also provide for the payment of a weekly sum by the husband to the wife and for the custody of the children.<sup>6</sup>

**SEQUESTRARI FACIAS** is a writ issued for the purpose of enforcing a judgment against a beneficed clergyman, when a fi. fa. has been issued and returned *nulla bona*. It commands the bishop of the diocese to enter into the benefice and sequester the rents, tithes, and profits until the debt is satisfied. The bishop executes the writ by issuing a sequestration<sup>7</sup> (*q. v.*, § 3; see *Levari facias; Writ.*)

**SEQUESTRATION—SEQUESTRATOR.**—§ 1. A sequestration is where, by some judicial or quasi-judicial process, property is temporarily placed in the hands of one or more persons called sequestrators, who manage it and receive the rents and profits.<sup>8</sup>

§ 2. In the procedure of the High Court of Justice, a sequestration is a means of enforcing obedience to a judgment or order requiring a person

Writ of sequestration.

<sup>1</sup> Pollock on Contract, 249.

<sup>2</sup> Macqueen's Husb. & Wife, 367; Pollock on Contract, 60.

<sup>3</sup> *Ibid.*; Davidson, Conv. v. (2) 668; Browne on Divorce, 135 *et seq.*; Hunt v. Hunt, 4 D. F. & J. 221.

<sup>4</sup> Chitty on Contracts, 618.

<sup>5</sup> *Marshall v. Marshall*, 5 P. D. 19.

<sup>6</sup> Matrimonial Causes Act, 1878, s. 4.

<sup>7</sup> Chitty's Pr. 1284; Daniell, Ch. Pr. 927; Smith's Action (11th edit.), 397.

<sup>8</sup> See *In re Australian, &c. Co.*, L. R., 20 Eq. 326.

to do an act (*e. g.*, pay money into Court, deliver up a chattel, &c.).<sup>1</sup> It is a writ or commission directed to certain persons (usually four in number) nominated by the person prosecuting the judgment, and empowers them to enter upon the real estate of the disobedient person, and receive the rents and profits thereof, and take his chattels, and keep them in their hands, until he performs the act required.<sup>2</sup> The sequestrators are officers of the Court, and are bound to account for what they receive. (See *Writ of Assistance*.)

By bishop.

§ 3. When a *fi. fa. de bonis ecclesiasticis* or a *sequestrari facias* (see those titles) is directed to a bishop, he issues a sequestration, which is in the nature of a warrant addressed to the churchwardens, requiring them to levy the debt out of the tithes and other profits of the debtor's benefice.<sup>3</sup>

Mayor's Court.

§ 4. In the Mayor's Court of London, "a sequestration is an attachment of the property of a person in a warehouse or other place belonging to and abandoned by him. It has the same object as the ordinary attachment, viz. to compel the appearance of the defendant to an action,"<sup>4</sup> and in default to satisfy the plaintiff's debt by appraisal and execution. (See *Foreign Attachment*.) The practice is rarely resorted to.

Of benefice.

§ 5. In ecclesiastical law, where a benefice becomes vacant, a sequestration is usually granted by the bishop to the churchwardens, who manage all the profits and expenses of the benefice, plough and sow the glebe, receive tithes, and provide for the necessary cure of souls. They are bound to account for the profits to the new incumbent.<sup>5</sup> Sequestration is also usually granted in a cause of spoliation<sup>6</sup> (*q. v.*), or as a punishment (*e. g.*, for non-residence), or as a mode of compelling payment of money for dilapidations, or the like.<sup>7</sup>

**SERJEANTS-AT-ARMS** are officers of the crown, whose duty is nominally to attend the person of the sovereign, to arrest traitors, to attend the Lord High Steward (*q. v.*) when sitting in judgment on traitors, and the like. "Two of them, by the king's allowance, do attend on the two Houses of Parliament, whose office in the House of Commons is the keeping of the doors and (as of late it hath been used) the execution of such commands, especially touching the apprehension of any offender, as that House shall enjoin him. Another of them attends on the Lord Chancellor or Lord Keeper, in the Chancery, and one on the Lord Treasurer of England."<sup>8</sup> § 2. The Serjeant-at-Arms attending on the Lord Chancellor<sup>9</sup> is now an officer of the Supreme Court.<sup>10</sup> His principal duty is to arrest persons guilty of contempt of Court in proceedings in the Chancery Division when so ordered: thus, when a writ of attachment

<sup>1</sup> Rules of Court, xlii., xlvii. But not, apparently, of enforcing a simple judgment for a debt or an order for the payment of money: *Ex parte Nelson*, 14 Ch. D. 41.

<sup>2</sup> Daniell's Ch. Pr. 912. As to sequestration for costs, see Rules of Court, xlvii. 2 (April, 1880).

<sup>3</sup> Chitty's Pr. 1283; Smith's Action (11th edit.), 396.

<sup>4</sup> Brandon, For. Attach. 145.

<sup>5</sup> Phillimore, Eccl. Law, 497.

<sup>6</sup> *Ibid.* 516.

<sup>7</sup> *Ibid.* 1378; Bankruptcy Act, 1869, s. 88; Sequestration Act, 1871.

<sup>8</sup> Blunt, Law Dict. s. v.; Staunf. Pl. Cor. 152 a.

<sup>9</sup> The office is generally held by the same person as the Serjeant-at-Arms of the House of Lords.

<sup>10</sup> Judicature Act, 1873, s. 77.



has been issued against a person for disobedience to an order of the Court, and the sheriff returns *non est inventus*, the Serjeant-at-Arms may be ordered to arrest the contemnor.<sup>1</sup>

**SERJEANTS-AT-LAW** are barristers of superior degree, to which they are called by writ under the Great Seal. They form an inn called Serjeants' Inn.<sup>2</sup> Formerly they were supposed to serve the crown (hence their name, serjeants or servientes ad legem); but in more modern times the degree was conferred on eminent counsel as a distinction, without reference to their services to the crown. Serjeants have precedence over junior barristers. They formerly had a right of exclusive audience in the Court of Common Pleas, which was abolished in 1846.<sup>3</sup> When a serjeant was appointed, it was customary for him to present gold rings, bearing a motto, to the other serjeants; this was called "giving rings." Of late years the degree of Queen's Counsel (*q. v.*) has gradually supplanted that of serjeant, and now the abolition of the rule requiring every judge of the superior courts of common law to be a serjeant<sup>4</sup> has made the extinction of the order of serjeants merely a question of time.<sup>5</sup>

See *Inns of Court*; *Barrister*.

**SERJEANTY** (Norman-French, *serjantie*, from Latin, *serviens*, a servant) literally means service. See *Grand Serjeanty*; *Petty Serjeanty*.

**SERVICE.**—I. § 1. In the law of tenure, a service is a duty due from a tenant to his lord. Services are or were of various kinds.<sup>6</sup>

§ 2. Divine or spiritual services are services of a religious nature, either certain, as in the case of tenure by divine service (*q. v.*), or uncertain, as in the case of frankalmoign (*q. v.*). § 3. Temporal services are services which can be performed by a secular person, and were formerly either (1) free, namely such as were not unbecoming the character of a soldier or a freeman to perform, as to serve under his lord in the wars, to pay him rent, &c. (see *Rent*); or (2) base or villein services, namely such as were fit only for peasants or persons of a servile rank, as to plough the lord's land, to make his hedges, &c. § 4. Certain services were such as were fixed in quantity, as to pay a certain rent, or to plough a field for three days every year; examples of uncertain services were, to do military service, or to plough the lord's land when called upon. § 5. Accidental or casual services are wardship, relief, heriots and other things, more commonly called incidents (*q. v.*).<sup>7</sup> § 5a. In the tenure of knight-service, some services due by the tenant were called foreign, *servitia forinseca*, because they were due to the king and not to the lord: such was the

Spiritual.  
Temporal.  
Free.  
Base.  
Certain.  
Uncertain.  
Casual.  
Foreign.

<sup>1</sup> Daniell, Ch. Pr. 910; Consolidated Orders, xxix; Orders of the Court of Chancery made under the Debtors Act, 1869.

<sup>2</sup> The buildings and property of the inn have recently been sold and the proceeds divided among the members.

<sup>3</sup> Stat. 9 & 10 Vict. c. 54.

<sup>4</sup> Judicature Act, 1873, s. 8.

S.

<sup>5</sup> As to the history of serjeants, see Manning's *Serviens ad Legem*; Fortescue, ch. 1.; Stephen's Comm. i. 17; iii. 272.

<sup>6</sup> See Bl. Comm. ii. 60; Co. Litt. 64 a *et seq.*, 95 a.

<sup>7</sup> 4 Rep. 8; Co. Copyh. §§ 5, 18 *et seq.*, where numerous other divisions of services are given.

military service in the field due by a tenant by knight's service.<sup>1</sup> (See *Foreign*.)

Customary. § 6. Customary services arise by immemorial custom, as where the inhabitants of a place have from time immemorial been accustomed to grind their corn at a certain mill: such a custom gives rise to the obligation on the part of the mill-owner to maintain the mill and all provisions for grinding (servants, &c.), and on the part of the residents to take their corn to be ground there and not elsewhere.<sup>2</sup> (See *Secta*; *Subtraction*.)

Contract of service. II. § 7. In the law of contract, service is the relation between master and servant. A contract by which one person binds himself to serve another is called a contract of service. As to the rights and duties arising from such a contract, see *Master and Servant*.

In order to support claims for damages against seducers and abductors, the definition of "service" has been somewhat strained; thus, if a daughter lives with her father, this is a sufficient service to support an action by the father against a man who seduces her.<sup>3</sup> (See *Seduction*.)

Service of process, &c. III. § 8. In procedure, service is the operation of bringing the contents or effect of a document to the knowledge of the persons concerned. It is of two kinds. § 9. Writs of summons, orders for disobedience to which process of contempt may be issued, and some other judicial

Direct, documents, require either direct or substituted service. Direct service is effected by actually bringing the document to the person or thing to be served. In the case of a person such service is called personal. Thus, in an ordinary action, personal service of the writ of summons is effected by showing the original writ to the defendant, and tendering him a copy.<sup>4</sup>

Action in rem. § 10. An example of direct service on a thing (which might be called real service) occurs in an ordinary admiralty action in rem against a ship; here service of the writ of summons is effected by nailing the original writ for a short time to the mast of the vessel, and taking it off, leaving a copy nailed in its place.<sup>5</sup> Analogous to this is the mode of serving a writ for the recovery of land in the case of vacant possession; here a copy of the writ is posted on some conspicuous part of the property;<sup>6</sup> this mode of service also partakes of the nature of substituted service.

Substituted. § 11. The object of substituted service is to provide the best means available under the circumstances for bringing the effect of the document to the knowledge of the party, when he is keeping out of the way, or his whereabouts is not known.<sup>7</sup> The usual mode of effecting substituted service is by directly serving the document on some person likely to bring it to the knowledge of the party (*e. g.*, his wife, agent, &c.), or by advertising notice of it,<sup>8</sup> or by sending a copy by post to the party's address.<sup>9</sup> (See *Notice*; *Notice of Writ*.)

Accepting service. § 12. Analogous to substituted service is the practice called "accepting

<sup>1</sup> Co. Litt. 75 b.

<sup>2</sup> *Harbin v. Green*, Hob. 189; *Drake v. Wigglesworth*, Willes, 654; Steph. Comm. iii. 410.

<sup>3</sup> *Underhill on Torts*, 152; Steph. Comm. iii. 442.

<sup>4</sup> Day's C. L. P. Acts, 40; Daniell's Ch. Pr. 367 *et seq.*; Rules of Court, ix. 2.

<sup>5</sup> Rules of Court, December, 1875, r. 6.

<sup>6</sup> Rules of Court, ix. 8.

<sup>7</sup> *Bland v. Bland*, L. R., 3 P. & D. 233.

<sup>8</sup> *Lely & Foulkes' Jud. Acts*, 115; Daniell, 370 *et seq.*

service," which is done by the solicitor for the party to be served giving a personal undertaking (generally written on the original writ) that he will enter an appearance for him, in order to save his client from the annoyance of being personally served.<sup>1</sup>

§ 13. Certain documents which are merely the foundation for other proceedings do not require direct or substituted service, but are left at the address of the person for whom the document is intended, or of his solicitor, if he is represented by a solicitor. (See *Address for Service*.) Summonses, notices of motion, petitions, and certain other documents, are served in this manner; if served after 6 o'clock P.M. on ordinary days (or after 2 P.M. on Saturdays), the service counts from the following day (or Monday).<sup>2</sup> As to pleadings, see *Delivery*, § 4.

Ordinary service.

**SERVIENT TENEMENT.** See *Easement*.

**SESSION OF THE PEACE** is a sitting of justices of the peace for the exercise of their powers. There are four kinds, petty, special, quarter and general sessions<sup>3</sup> (see those titles).

**SET.** See *Bill of Exchange*, § 10.

**SET-OFF.**—§ 1. In an action to recover money, a set-off is a cross claim for money by the defendant, for which he might maintain an action against the plaintiff, and which has the effect of extinguishing the plaintiff's claim pro tanto, so that he can only recover against the defendant the balance of his claim, after deducting what is due by him to the defendant.<sup>4</sup> Thus, if A. sues B. for 100*l.*, while he owes B. 75*l.*, a set-off would have the effect of reducing A.'s claim to 25*l.* The object of this is to prevent cross-actions. (See *Circuity of Action*.)

§ 2. The right of set-off was introduced by stats. 2 Geo. 2, c. 22, and 8 Geo. 2, c. 24; but was restricted to mutual debts.<sup>5</sup> Under the Judicature Acts mutual claims of any kind, whether for debts or damages, can be set off against one another; but in practice the term "set-off" is generally applied to mutual debts or claims for liquidated amounts, so that one can be deducted from the other: while cross claims in respect of damages, which are unliquidated, are distinguished as "counter-claims" (*q. v.*).<sup>6</sup>

Debts.

Damages.

As to the limitation of a set-off or counter-claim, see *Limitation*, § 6.

§ 3. In the practice of the old common law Courts, where there were cross judgments in the same or different actions, in the same or different Courts, between parties substantially the same, whether for debt (or damages) and costs, or for costs alone, either party might set off the amount of his judgment against that of the other by obtaining a rule or order to enter satisfaction in both actions for the amount of the smaller debt.<sup>7</sup> This

Judgments.

<sup>1</sup> Rules of Court, ix. 1, xii. 14.

<sup>2</sup> Rules of Court, lviii. 8 (April, 1880).

<sup>3</sup> Pritchard's Quarter Sessions, 1.

<sup>4</sup> See Chitty on Contracts, 772; Rules of Court, xix. 3.

<sup>5</sup> Leake on Contracts, 545.

<sup>6</sup> See *Newell v. National, &c. Bank*, 1 C. P. D. 496.

<sup>7</sup> Chitty, Pr. 723.

practice seems to have been made obsolete by the full powers of set-off given by the Judicature Acts.

As to set-off in bankruptcy, see *Mutual Credits*.

Property.

**SETTLE.**—I. § 1. To settle property is to limit it, or the income of it, to several persons in succession, so that the person for the time being in the possession or enjoyment of it has no power to deprive the others of their right of future enjoyment. (See *Settlement*, § 1.)

Poor.

II. § 2. The term “settle” is also applied to paupers. (See *Settlement*, § 8.)

Document.

III. § 3. To settle a document is to make it right in form and in substance. Documents of difficulty or complexity, such as mining leases, settlements by will or deed, partnership agreements, &c., are generally settled by counsel. (See *Conveyancer*.) § 4. In some cases a document requires to be settled by a judge or judicial officer; thus, when issues are directed to be prepared in an action, and the parties cannot agree on them, they are settled by the judge.<sup>1</sup> In chancery practice every order (except orders for time and a few others) is settled by the registrar in the presence of the parties, unless they agree as to its form, in which case the “settling” consists in their signing the draft as approved. (See *Minutes*, § 3; *Pass*; *Registrar*, § 7.)

**SETTLED ACCOUNT.** See *Account*, § 3.

**SETTLED ESTATES ACT**, now in force, is the Settled Estates Act, 1877, which repeals the old acts 19 & 20 Vict. c. 120 (The Leases and Sales of Settled Estates Act, 1856); 21 & 22 Vict. c. 77; 27 & 28 c. 45; 37 & 38 Vict. c. 33, and 39 & 40 Vict. c. 30. It enables the tenant for life of settled land (that is, of land limited to or in trust for any persons by way of succession<sup>2</sup>) to grant leases not exceeding twenty-one years (subject to certain restrictions as to the amount of rent, &c.), so as to make them binding on the reversioner.<sup>3</sup> It also empowers the Chancery Division of the High Court—(1) to authorize long leases of settled land;<sup>4</sup> (2) to order sales of settled land, or of timber on settled land,<sup>5</sup> and (3) to direct any part of a settled estate to be laid out for streets, gardens, sewers, &c.<sup>6</sup> Provision is made for giving notice to the persons interested of any application to the Court under the act.<sup>7</sup>

PROPERTY.

**SETTLEMENT.**—I. § 1. A settlement is an instrument by which property, or the enjoyment of property, is limited to several persons in succession. (See *Settle*, § 1.) Generally, the word “settlement” implies a deed or an instrument equivalent to a deed (such as articles or agree-

<sup>1</sup> Rules of Court, xxvi.

<sup>2</sup> Sect. 2.

<sup>3</sup> Sects. 46, 47.

<sup>4</sup> Sects. 4 *et seq.*

<sup>5</sup> Sects. 16 *et seq.*

<sup>6</sup> Sects. 20 *et seq.*

<sup>7</sup> Sects. 24 *et seq.* As to the practice, see the Orders under the act (issued December, 1878); for the practice under the repealed acts, see Daniell's Ch. Pr. 1832 *et seq.*; also Charley's Real Property Statutes.

ment for a settlement); but a settlement may be and often is made by will, and occasionally by private act of parliament.<sup>1</sup>

The most important kinds of settlements are: marriage, or ante-nuptial settlements, post-nuptial and voluntary settlements, and family settlements, more usually called re-settlements (*q. v.*). Settlements are also sometimes directed by a Court to be entered into by the parties to a proceeding.<sup>2</sup>

§ 2. A marriage, or ante-nuptial settlement, as its name implies, is an instrument executed before a marriage, and wholly or partly in consideration of it, for the purpose of regulating the enjoyment and devolution of real or personal property. Such settlements are sometimes distinguished as real and personal settlements, a real settlement being one in which the property is throughout treated as land, so that if a person entitled, under it dies, his share goes to his heir or devisee, while a personal settlement is one in which the property is either personalty, or realty directed to be turned into money, and therefore treated as personalty.<sup>3</sup> (See *Conversion.*)

Marriage settlements.

§ 3. An ordinary settlement of personalty or realty directed to be sold (the object of which is to make an equal provision for all the children) consists of a conveyance of (or agreement to convey) the property to trustees, to be held by them in trust for the settlor until the marriage takes place (which generally is a few hours after the execution of the settlement); followed by a declaration of the trusts on which it is to be held after the marriage, namely, to pay the income to the husband for life (assuming that the property is brought into trust by him), and after his death to the wife for life, and after the death of the survivor to hold the property in trust for the issue of the marriage in such shares as the husband and wife jointly, or the survivor of them, shall have appointed, or in default of and subject to any appointment upon trust for all the issue who attain twenty-one, or (being daughters) marry, in equal shares, with an ultimate trust, by which, if there is no issue of the marriage, the property reverts to the husband or settlor.<sup>4</sup> If the property is brought into settlement by the wife, the income is first given to the wife for her life for her separate use, generally with a restraint on anticipation (*q. v.*). In addition to these, the fundamental clauses, there are provisions as to the securities in which the trustees are to be at liberty to invest the settled property; covenants to settle after-acquired property (*infra*, § 5); hotch-pot, maintenance, advancement and accumulation clauses; and provisions for the appointment of new trustees<sup>5</sup> (see the various titles).

Personal.

§ 4. A marriage settlement of real property, where the object is to retain the estate in the family (hence sometimes called a family settle-

Strict settlements.

<sup>1</sup> See the definition of "settlement" in the Fines and Recoveries Act, s. 1.

<sup>2</sup> For instance, by a ward of Court on his or her marriage, whether under the act 18 & 19 Vict. c. 43, or not (*Daniell*, Ch. Pr. 1206). As to the power of the Court to modify settlements in cases of divorce, see stats. 22 & 23 Vict. c. 61, s. 5; 41 & 42

Vict. c. 19, s. 3; *Browne on Divorce*, 185 *et seq.*; *Burton v. Sturgeon*, 2 Ch. D. 318.

<sup>3</sup> *Williams on Settlements*, 123. As to settlements generally, see *Dauids*. Conv. iii. *passim*.

<sup>4</sup> *Williams on Settlements*, 124 *et seq.*

<sup>5</sup> *Elphinstone's Conv.* 266 *et seq.*; *Watson's Comp. Eq.* 567 *et seq.*

ment,<sup>1</sup> or, more commonly, a strict settlement, has, in the most simple case, where the intended husband is seised in fee of the property, the following principal objects:—"First, to make provision for the wife: this is effected by securing the payment to her of two annuities; the one, payable during her husband's lifetime, called 'pin-money;' the other, payable after his death, called a 'jointure.' *Second*, to provide for the payment of gross sums of money, called 'portions,' to such of the younger children of the marriage as attain majority. *Third*, to provide that the property charged with these provisions for the wife and younger children should go as a whole to the eldest son."<sup>2</sup> These objects are effected by limiting a long term to trustees to secure the pin-money, followed by another long term to other trustees to secure the jointure; followed by another long term to secure the portions; subject to these terms, the land is limited to the husband for life, with remainder to the sons of the marriage successively in tail; failing sons and their issue, it is limited to the daughters as tenants in common in tail, and failing daughters and their issue, it is limited to the settlor in fee. Incidental clauses are those giving tenants for life in possession, or the trustees, power of granting leases and of effecting sales and exchanges of the settled land; and covenants for title by the settlor.<sup>3</sup>

Covenant to settle after-acquired property.

§ 5. A settlement often contains a covenant by the husband or wife to settle all property exceeding a certain amount in value which shall be acquired by him or her after the marriage. Such a covenant generally binds the covenantor to settle not only property in which he (or she) has no interest at the time of the marriage, but also interests which were contingent, and, in some cases, even vested at the time of the marriage, such as reversions.<sup>4</sup>

Voluntary settlements (post-nuptial, &c.).

§ 6. Voluntary settlements are settlements made otherwise than for valuable consideration. (See *Voluntary*.) A post-nuptial settlement (*i.e.*, one made by a husband on his wife or family after the marriage without some new consideration) is a voluntary settlement. § 7. A voluntary settlement of land may be defeated by a subsequent conveyance by the settlor to a purchaser for value<sup>5</sup> (see *Voluntary*); and a voluntary settlement of any property made by a trader is void if the settlor becomes bankrupt within two years from its date; it is also void if he becomes bankrupt within ten years from its date, unless it is proved that at the time of making it he was able to pay all his debts without the aid of the property comprised in it.<sup>6</sup> A voluntary settlement is also void if it falls within the purview of the stat. 13 Eliz. c. 5; as to which see *Fraudulent Conveyance*, § 1.

PAUPER.

II. § 8. A pauper is said to be settled in a parish (or union) when he has acquired a right to permanent relief there, as opposed to casual and irremovable paupers.<sup>7</sup> (See *Poor Law*; *Irremovability*.) A settlement is either original or derivative. § 9. An original settlement is one

Original:

<sup>1</sup> Williams, 212.

<sup>2</sup> Elphinstone, 322; Watson, 577; Williams, 212.

<sup>3</sup> Elphinstone, 328.

<sup>4</sup> *Ibid.* 273; Watson, 602. As to the effect of bankruptcy on such a covenant

by a trader, see Bankruptcy Act, 1869, s. 91.

<sup>5</sup> Stat. 27 Eliz. c. 4.

<sup>6</sup> Bankruptcy Act, 1869, s. 91; Williams, 354 *et seq.*

<sup>7</sup> Steph. Comm. iii. 52 *et seq.*

acquired by the pauper without reference to other persons, and that (a) by birth in the parish, unless he has some other settlement, original or derivative; (b) by renting a tenement of the value of 10*l.* a year at least for one whole year, and residing in the parish for forty days; (c) in the case of an apprentice, by inhabiting in the parish for forty days; (d) by having an estate in the parish of any nature or value, and inhabiting within 10 miles thereof; (e) by paying parochial rates and taxes in respect of a tenement within the parish of the yearly value of 10*l.* a year at least; (f) by residing in the parish for three years.<sup>1</sup> (See *Residence*, § 2.) § 10. A derivative settlement is one derived from some other person, and is either (a) by parentage, the rule being that every child under the age of sixteen takes the settlement of its father or widowed mother (or, if illegitimate, of its mother) until it acquires the age of sixteen, and retains that settlement until it acquires another, unless its parent had a derivative settlement, in which case the child's settlement is ascertained without reference to the parent; (b) by marriage, a female pauper always taking the settlement of her husband.<sup>2</sup>

by birth;  
by renting a tenement;  
by inhabiting as apprentice;  
by estate;  
by rates and taxes;  
by residence.  
*Derivative:*  
by parentage;  
  
by marriage.

**SEVER—SEVERABLE—SEVERANCE.**—§ 1. To sever is to divide, and severable is that which is divisible. Thus a joint tenancy is severed when one of two joint tenants conveys his interest to a stranger, because the other tenant and the stranger are then tenants in common.<sup>3</sup> (See *Joint Tenancy*, § 7.)

§ 2. Again, when a claim is composed of several parts, some of them may be put forward or enforced without the others, the latter are said to be severable, and the act of severing them is called severance; as where A. having brought an action in an inferior Court for causes which were partly within and partly without the jurisdiction of the Court, he was allowed to sever them by abandoning the latter part of his case, so as to keep the action in the inferior Court.<sup>4</sup> And when two or more defendants to an action put in separate defences, instead of joining in one defence, they are said to sever. (See *Entire; Apportionment*, §§ 3 *et seq.*; *Sever*; *Severalty*.)

§ 3. Severance is also the act of removing fixtures, growing crops, or minerals from land.<sup>5</sup> A tenant who is entitled to remove fixtures must sever them during his term, or he loses his right.<sup>6</sup> As to the effect of severance on growing crops and minerals, see those titles.

Fixtures,  
crops, &c.

**SEVERAL** is opposed to "joint." Thus tenants in common of land are said to be seised by several titles, so that if they are disseised each has a separate right of action, while joint tenants are seised by a joint title, and therefore if they are disseised they ought to bring one action to recover the land.<sup>7</sup>

As to a several fishery, see *Fishery*, § 4; as to several hereditaments

<sup>1</sup> Stat. 39 & 40 Vict. c. 61, s. 34.

<sup>2</sup> *Ibid.* s. 35; *Great Yarmouth v. City of London*, 3 Q. B. D. 232; *Westbury-on-Severn v. Barrow-in-Furness*, 3 Ex. D. 88.

<sup>3</sup> Co. Litt. 191 a. As to severable hereditaments and chattels, see Co. Litt. 164b,

200a.

<sup>4</sup> *Ellis v. Fleming*, 1 C. P. D. 237. To "sever in action" is to bring several, that is, separate actions. Co. Litt. 195 b.

<sup>5</sup> Chitty on Contracts, 326 *et seq.*

<sup>6</sup> Litt. § 314.

and inheritances, see *Heredity*, § 7; *Inheritance*, § 5; as to a several pasture, see *Pasture*, § 3.

See *Severalty*.

**SEVERALTY.**—§ 1. Property is said to belong to persons in severalty when the share of each is ascertained, so that he can exclude the others from it, as opposed to joint ownership, ownership in common, and coparcenary, where the owners hold in undivided shares<sup>1</sup> (see *Estate*, § 11). § 2. Usually when land is held in severalty, it is divided so that each of the owners has a part to himself, but they may agree that one shall have the land for one part of the year, another for another, and so on, and in this case also they are said to hold in severalty<sup>2</sup> (see *Inheritance*, § 5). § 3. The term severalty is especially applied to the case of adjoining meadows undivided from each other, but belonging, either permanently or in what are called shifting severalties (*infra*, § 4), to separate owners, and held in severalty until the crops have been carried, when the whole is thrown open as pasture for the cattle of all the owners, and in some cases for the cattle of other persons as well: each owner is called a severalty owner, and his rights of pasture are called severalty rights, as opposed to the rights of persons not owners.<sup>3</sup> (See *Common*, §§ 4, 7; *Commonable*, § 2; *Dole*; *Lammas Lands*; *Open Fields*; *Shack*.)

Shifting  
severalities.

§ 4. When a number of persons are the owners of land, and an exclusive share is allotted to each for a certain time, at the expiration of which the shares are again distributed, so that the occupation varies or shifts from time to time, they are said to hold by shifting severalties.<sup>4</sup> The most usual instance of shifting severalties occurs in the case of open fields and other commonable lands (see *Commonable*, § 2; *Dole*; *Lot-Mead*; *Shack*), where the severalty holding of each owner varies sometimes by rotation, sometimes by lot, while in some places the choice is awarded to the best runner or wrestler, or determined by other fantastic methods.<sup>5</sup>

Commis-  
sioners of  
Sewers.

**SEWER.**—I. § 1. "Sewer" originally meant an open trench or channel, made for carrying off surplus water from land near the sea or a river, or from marshy ground. Commissioners of Sewers are officials appointed by the crown, formerly by prerogative, but subsequently under various acts of parliament (especially 23 Hen. 8), to survey, repair and keep in order sewers, streams, sluices and embankments within their district; they form courts of record and have power to make orders and assess rates.<sup>6</sup>

II. § 2. In its modern and more usual sense, a sewer means an underground or covered channel used for the drainage of two or more separate buildings, as opposed to a "drain," which is a channel used for carrying off the drainage of one building or set of buildings in one

<sup>1</sup> Litt. §§ 243 *et seq.*

<sup>2</sup> Co. Litt. 4 a, 167 a, 180 a.

<sup>3</sup> Cooke, Incl. 47, 163, n.

<sup>4</sup> See Co. Litt. 4 a.

<sup>5</sup> Elton, Comm. 31; Cooke, Incl. 48.

<sup>6</sup> Callis on Sewers; Steph. Comm. iii. 296.



curtilage.<sup>1</sup> (See *Drain.*) In London the main sewers are vested in the Metropolitan Board of Works, and the local or branch sewers in the local authorities, namely the vestries and district boards.<sup>2</sup> Sewers in the country are, as a rule, vested in the local sanitary authority.<sup>3</sup>

§ 3. The Metropolitan Commissioners of Sewers were created by stat. 11 & 12 Vict. c. 112; they were abolished by stat. 18 & 19 Vict. c. 120; and their functions transferred partly to the metropolitan vestries and district boards, and partly to the Metropolitan Board of Works (*q. v.*).

ETYMOLOGY.]—Old French, *essuer*, *essuier*; Latin, *exsuccare*, to dry.<sup>4</sup>

**SHACK.**—It sometimes happens that a number of adjacent fields, though held in severalty, that is, by separate owners, and cultivated separately, are, after the crop on each parcel has been carried in, thrown open as pasture to the cattle of all the owners. “Arable lands cultivated on this plan are called ‘shack fields,’ and the right of each owner of a part to feed cattle over the whole during the autumn and winter is known in law as common of shack, a right which is distinct in its nature from common because of vicinage, though sometimes said to be nearly identical with it.”<sup>5</sup> It is also known as “shackage” and “common of shacker,”<sup>6</sup> and the shack lands are sometimes called “the known lands,” to distinguish them from an ordinary common, in which there is no distinction of property, and more frequently “half-year lands,” from the period during which they are open to pasture.<sup>7</sup>

Common of pasture in open meadows (*q. v.*) is of very much the same nature as common of shack.<sup>8</sup>

ETYMOLOGY.]—“‘Shack,’ in the dialect of Norfolk, signifies to ramble or go at large,<sup>9</sup> and the name has been adopted in speaking of half-year lands in other counties, probably because the leading case on the subject (7 Co. 5) was concerned with lands in Norfolk.”<sup>10</sup>

**SHARE.**—§ 1. In the law of companies, a share is a definite portion of the capital of a company. With very few exceptions, shares in companies are personal estate, whatever the nature of the company's property or business may be.<sup>11</sup> The ownership of a share entitles the holder to receive a proportionate part of the profits of the company, and to take part in the management of its business, in accordance with the articles of association or other regulations of the company, which also regulate the mode in which shares may be transferred. (See *Meeting*; *Resolution*; *Shareholder.*) § 2. When the amount of a share has been paid to the company, it is said to be fully paid up. And if the company is a limited one, the liability of the holder of the share is then at an end. (See *Company*, §§ 4 *et seq.*) Shares may be issued by a company as fully paid up (*e. g.*, in consideration of services or works rendered to the company by the person to whom they are issued), but in the case of a company formed

<sup>1</sup> Public Health Act, 1875, ss. 4, 19; Metropolitan Local Man. Act, 1855, ss. 250, 72; *Swanston v. Twickenham Board*, 11 Ch. D. 838.

<sup>2</sup> Met. Local Man. Act, 1855, ss. 68, 135.

<sup>3</sup> Public Health Act, 1875, s. 13.

<sup>4</sup> Littré, s. v. *Essuyer*.

<sup>5</sup> Elton, Comm. 30.

<sup>6</sup> *Ibid.* 30, n.

<sup>7</sup> *Ibid.* 29.

<sup>8</sup> *Ibid.* 31.

<sup>9</sup> Marshall's *Rur. Ec.* s. v.

<sup>10</sup> Elton, Comm. 31, n.

<sup>11</sup> Lindley on Partnership, 661 *et seq.*; Companies Act, 1862, s. 22.

Conversion  
into stock.  
Share-certi-  
cate.

Share-  
warrant.

under the Companies Acts, the agreement under which they are so taken must be made in writing and filed with the registrar at or before the issue of the shares.<sup>1</sup> § 3. A company formed under the Companies Acts (*q. v.*) may at any time convert its fully paid shares into stock (*q. v.*).<sup>2</sup> § 4. A share-certificate is an instrument under the seal of the company, certifying that the person therein named is entitled to a certain number of shares: it is *prima facie* evidence of his title thereto<sup>3</sup> (see *Scrip*). § 5. A share-warrant to bearer is a warrant or certificate under the seal of the company, stating that the bearer of the warrant is entitled to a certain number or amount of fully paid-up shares or stock; coupons for payment of dividends may be annexed to it; delivery of the share-warrant operates as a transfer of the shares or stock.<sup>4</sup>

As to shares in ships, see *Ship*.

**SHAREHOLDER.**—In the strict sense of the term, a shareholder is a person who has agreed to become a member of a company, and with respect to whom all the required formalities have been gone through (*e. g.*, signing of deed of settlement, registration, or the like). A shareholder by estoppel is a person who has acted and been treated as a shareholder, and consequently has the same liabilities as if he were an ordinary shareholder.<sup>5</sup> Thus, a person who has acted as a shareholder may be liable for the debts of the company, although he has never been registered as a shareholder, and is therefore not a shareholder in the full sense of the word.<sup>6</sup>

**SHEEP-HEAVES** are small plots of pasture, often in the middle of the waste of a manor, of which the soil may or may not be in the lord, but the pasture is private property and leased or sold as such. They principally occur in the northern counties,<sup>7</sup> and seem to be corporeal hereditaments,<sup>8</sup> although they are sometimes classed with rights of common, but erroneously, the right being an exclusive right of pasture. (See *Pasture*, § 3.)

**SHEEPWALK.**—A right of sheepwalk is the same thing as a fold-course (*q. v.*).<sup>9</sup>

**SHELLEY'S CASE.**—If land is given to A. for his life, or for any estate of freehold, and by the same gift or conveyance the land is limited either mediately or immediately to his heirs in fee (or in tail), the result

<sup>1</sup> Companies Act, 1867, s. 25.

<sup>2</sup> Companies Act, 1862, ss. 12, 28, 29.

<sup>3</sup> *Ibid.* s. 31; Lindley, 150, 1187. Share certificates are not negotiable instruments; see *Shropshire Union Rail. Co. v. Reg.*, L. R., 7 H. L. 496.

<sup>4</sup> Comp. Act, 1867, ss. 27 *et seq.* It does not seem to have been decided whether share-warrants are negotiable instruments in the full sense, namely, so as to enable a holder with a defective title to give a good title to a *bonâ fide* transferee for value. No doubt they are within the doctrine of

*Goodwin v. Roberts* (1 App. Ca. 476), so that if the owner of a warrant allowed it to remain in another person's possession, he could not recover it from anyone who acquired it *bonâ fide* for value from that person.

<sup>5</sup> Lindley on Part. 130.

<sup>6</sup> *Portal v. Emmens*, 1 C. P. D. 201.

<sup>7</sup> Cooke, Incl. 44.

<sup>8</sup> Elton, Comm. 35.

<sup>9</sup> *Ibid.* 44; Cooke, Incl.; *Jones v. Richards*, 6 A. & E. 530.

is that A. takes an estate in fee (or in tail), and not merely the particular estate first limited to him. Thus, if land is given "to A. for his life, and after his death to his heirs," or "to A. for his life, and after his death to B. for his life, and after his death to the heirs of A.," in either of these cases A. takes an estate in fee simple: in the first case an estate in fee simple in possession, and in the second case an estate for life in possession, followed by an estate in fee simple in remainder expectant on the death of B. A.'s heirs take nothing, unless he dies intestate and allows the land to go by descent. In technical language, the word "heirs" is here a word of limitation, and not a word of purchase. This rule is called the rule in *Shelley's Case*, a case<sup>1</sup> in which the subject was much discussed, although the rule itself is of much more ancient date.<sup>2</sup>

**SHERIFF** is the chief officer of the crown in every county in England, appointed by the crown every year. He must hold some land within the county. The duties of sheriffs are very various, including the charge of parliamentary elections, the execution of process issuing from the High Court and the Criminal Courts, the summoning of jurors and the seizing of escheated lands.<sup>3</sup> Most of his ordinary duties are performed by the under-sheriff and deputy.<sup>4</sup>

§ 2. Formerly the sheriff had judicial duties to perform as judge of the Sheriff's County Court; but these are practically obsolete. (See *County Court*, § 8; *Outlawry*.) He also held a court of record called the Sheriff's Tourn twice every year, which had the same functions and jurisdiction as the Court Leet (*q. v.*): it also has fallen into desuetude.<sup>5</sup>

See *Bailiff*; *Bailiwick*; *Pricking for Sheriffs*, p. 649.

**SHEW CAUSE.**—When an order, rule, decree or the like, has been made *nisi*, the person who appears before the Court and contends that it should not be allowed to take effect, is said to shew cause against it. (See *Absolute*; *Decree*, § 2; *Nisi*; *Rule*, § 3.)

**SHEWER.**—In the practice of the High Court, when a view by a jury is ordered, persons are named by the Court to shew the property to be viewed, and are hence called shewers. There is usually a shewer on behalf of each party.<sup>6</sup> (See *View*.)

**SHIFTING CLAUSE**, in a settlement, is a clause by which some other mode of devolution is substituted for that primarily prescribed. Examples of shifting clauses are—the ordinary name and arms clause (*q. v.*)—and the clause of less frequent occurrence by which a settled estate is destined as the foundation of a second family, in the event of the elder branch becoming otherwise enriched.<sup>7</sup> These shifting clauses take effect under the Statute of Uses. (See *Use*.)

<sup>1</sup> 1 Rep. 94.

<sup>2</sup> Williams, R. P. 255; Jarman on Wills, ii. 332.

<sup>3</sup> Co. Litt. 168 a; Steph. Comm. ii. 623; stats. 13 & 14 Car. 2, c. 21; 3 & 4 Will. 4,

c. 99.

<sup>4</sup> Steph. 632.

<sup>5</sup> *Ibid.* iv. 321.

<sup>6</sup> Archbold, Pr. 339 *et seq.*

<sup>7</sup> Davids. Conv. iii., 273.

SHIFTING USE. See *Use*.

**SHIP.**—Under the Merchant Shipping Act, a vessel cannot be registered as a British ship unless she belongs wholly to British subjects, or to a corporation formed under and subject to the laws of, and having its principal place of business in, the British empire.<sup>1</sup> A British ship is personal property, but, so long as she is on the high seas, she is deemed to be part of the soil of England:<sup>2</sup> thus, persons born on board a British ship are natural-born British subjects, and the British Courts have jurisdiction in respect of crimes committed on the high seas on board British vessels.<sup>3</sup>

§ 2. The ownership of every registered ship is divided into sixty-four shares, all of which may belong to one person, or they may be divided among several persons; but not more than thirty-two persons can be registered as part-owners of any one ship.<sup>4</sup> (See *Part-Owner*.) Any part-owner can transfer or mortgage any or all of the shares held by him; but to do so he must comply with the statutory provisions on these heads (as to which, see *Bill of Sale*, § 3; *Mortgage*, § 17), as ships are not within the ordinary rules governing the assignment and hypothecation of chattels.

As to the hypothecation of ships, see *Bottomry*; *Hypothecation*; *Necessaries*, § 4; *Respondentia*.

As to the employment of ships, see *Affreightment*; *Bill of Lading*; *Charter-Party*; *Demurrage*; *Freight*; *Insurance*, § 3; *Lay Days*; *Loss*; *Managing Owner*; *Merchant Shipping*; *Pilotage*; *Policy of Assurance*; *Running Days*; *Seamen*; *Seaworthiness*; *Ship's Husband*; *Transire*.

For other matters relating to ships, see *Action*, §§ 11 *et seq.*; *Admiral*; *Admiralty*; *Average*; *Collision*; *Limitation of Liability*, §§ 2, 3; *Salvage*; *Wreck*.

**SHIP'S HUSBAND** is a person to whom the owner or part owners of a ship delegate the management of her while she is in the home port. He is usually the general agent of the owners in regard to all affairs of the ship in the home port, such as repairs, equipment, hiring officers and crew, affreightment, &c., but not insurance; sometimes his authority is limited to specific things.<sup>5</sup> (See *Agent*; *Managing Owner*.)

**SHOOTING.**—I. § 1. The right of shooting over land is a variety of the right of sporting (*q. v.*).

II. § 2. In criminal law, shooting, or attempting to shoot, a person with intent to commit murder, or to maim, disfigure, or do grievous bodily harm to him, or to prevent the lawful apprehension or detainer of any person, is felony, punishable with penal servitude for life (maximum).<sup>6</sup> Shooting at vessels or boats belonging to the navy or in the service of the

<sup>1</sup> Merchant Shipp. Act, 1854, s. 18.

<sup>2</sup> Westlake, *Int. Law* (2nd edit.), 174.

<sup>3</sup> See *Regina v. Keyn*, L. R., 2 Ex. D. 63.

<sup>4</sup> *Ibid.* s. 37.

<sup>5</sup> Foard on Merch. Shipp. 47.

<sup>6</sup> Stat. 24 & 25 Vict. c. 100, ss. 14, 18.

revenue, or at any officer employed in the prevention of smuggling, is felony punishable with penal servitude for any term not less than five years, or imprisonment not exceeding three years.<sup>1</sup>

**SHORT CAUSE.**—In the Chancery Division, when the hearing of an action (whether on motion for judgment, further consideration, or otherwise) involves no question of difficulty, and is not likely to take up much time in argument, or is such that the subject-matter of it would authorize the Court to make an order as of course, or is one in which all parties consent to the order or judgment, it may, on a certificate by the plaintiff's counsel that it is fit to be heard as a short cause, be marked as "short" in the registrar's cause book,<sup>2</sup> instead of being set down in the ordinary cause list. One day in each week is appointed for hearing short causes, and as each is disposed of in from five minutes to a quarter of an hour, an action which has been marked "short" may be brought to a hearing with great despatch.

**SHORTHAND-WRITERS' NOTES** of the evidence or arguments on the trial or hearing of an action are frequently taken for future use on a motion for new trial or an appeal. As a general rule, the party taking them has to bear the expense himself.<sup>3</sup> But in a special case (as where the evidence is exceptionally voluminous), the costs will be allowed.<sup>4</sup>

**SIC UTERE TUO UT ALIENUM NON LÆDAS** ("So use your own property as not to injure that of other persons") is a maxim indicating the chief limitation on the enjoyment of an absolute owner, as to which see *Ownership*, § 3.

**SIDE-BAR RULE.** See *Rule*, § 4.

**SIGN—SIGNATURE.**—§ 1. In the primary sense of the word, a person signs a document when he writes or marks something on it in token of his intention to be bound by its contents. In the case of an ordinary person, signature is commonly performed by his subscribing his name to the document, and hence "signature" is frequently used as equivalent to "subscription;" but any mark is sufficient if it shows an intention to be bound by the document: illiterate people commonly sign by making a cross.<sup>5</sup> (See *Marksman*.) The provisions of the 17th section of the Statute of Frauds (which requires a contract for the sale of goods in certain cases to be signed by the party to be bound) have been held to be satisfied where the party writes the memorandum forming the contract on a piece of paper on which his name is printed.<sup>6</sup>

§ 2. The only signature which a corporation aggregate can make is by its

<sup>1</sup> Customs Laws Consolidation Act, 1876, s. 193.

<sup>2</sup> Daniell's Ch. Pr. 836.

<sup>3</sup> *Kelly v. Byles*, 13 Ch. D. 682; *Duchess*

*of Westminster Ore Co.*, 10 Ch. D. 307.

<sup>4</sup> *Bigsby v. Dickenson*, 4 Ch. D. 24.

<sup>5</sup> *Baker v. Denning*, 8 A. & E. 94.

<sup>6</sup> *Chitty on Contracts*, 362.

seal.<sup>1</sup> In practice ordinary contracts by a trading company are generally signed by an agent or officer of the company on its behalf.<sup>2</sup> (See *Seal*.)

ETYMOLOGY.]—*Signare* in Roman law meant both to seal and (although more rarely) to subscribe.<sup>3</sup>

**SIGN MANUAL** is the signature or “royal hand” of the Queen. It is called the “sign manual” because it is the actual signature of the crown, as distinguished from the operation of signing documents by the signet (*q. v.*)<sup>4</sup> Warrants for passing grants under the Great Seal are signed with the sign manual as an authority to the Secretary of State to affix the Privy Seal to the warrant.<sup>5</sup> (See *Great Seal*; *Privy Seal*; *Warrant*.)

**SIGNET** is a seal with which certain documents are sealed by the principal Secretary of State on behalf of the Queen. Formerly, every bill for letters patent, after being signed with the sign manual (*q. v.*), was sealed with the signet, as a warrant or authority to the proper officer to affix the privy seal or great seal (as the case might be) to the grant. But the necessity of affixing the signet in such cases has been abolished,<sup>6</sup> and the use of the signet seems practically to have ceased. Coke says, however, that a writ of ne exeat regno may be issued under the signet, “for this is but a signification of the king’s commandment, and nothing passeth from him.”<sup>7</sup>

**SIGNIFICAVIT** is used in two senses: (i) to denote the bishop’s certificate on which a writ *de excommunicato* or *contumace capiendo* is issued, and (ii) the writ itself.<sup>8</sup> The former seems to be the original and proper use of the word. The certificate is directed to the Queen in Chancery, and specifies the offence for which it is desired to imprison the offender.<sup>9</sup> (See *De Contumace capiendo*.)

**SIGNING JUDGMENT.**—In the Queen’s Bench Division, when judgment is given in an action after the trial, the successful party draws up two forms of judgment in accordance with the certificate of the associate (see *Certificate*, § 2), and takes them to the proper officer, who signs one form of judgment and files it; after stamping the other with the seal of the Court, he returns it to the party. Hence the process is called “signing judgment,” though the proper term is “entering.”<sup>10</sup> (See *Enter*.) The process of signing judgment under an order, or on default, is similar.

**SILK GOWN.** See *Queen’s Counsel*.

<sup>1</sup> See *Gooch v. Goodman*, 2 Ad. & E. 580; *Re General Estates Co.*, L. R., 3 Ch. 758; *Re Imperial Land Co.*, L. R., 11 Eq. 478; *Crouch v. Crédit Foncier*, L. R., 8 Q. B. 374.

<sup>2</sup> Pollock on Contract (2nd edit.), 130 *et seq.*; Companies Act, 1867, s. 37.

<sup>3</sup> Dirksen, Man. Lat. s. v.

<sup>4</sup> Second Inst. 555.

<sup>5</sup> Stat. 14 & 15 Vict. c. 82.

<sup>6</sup> Stat. 14 & 15 Vict. c. 83.

<sup>7</sup> Second Inst. 556.

<sup>8</sup> Phillimore, Eccl. Law, 1404; *Hudson v. Tooth*, 2 P. D. 125.

<sup>9</sup> See stat. 53 Geo. 3, c. 127.

<sup>10</sup> Rules of Court, xli.; Archbold, Pr. 462.

**SIMONIACAL—SIMONY.**—"Simony, according to the canonists, is defined to be a deliberate act, or a premeditated will and desire of selling such things as are spiritual, or of anything annexed unto spirituals, by giving something of a temporal nature for the purchase thereof."<sup>1</sup> Thus it is simony for anyone to purchase the next presentation to a living when it is vacant; and it is simony for a clergyman to purchase a next presentation even when the church is full; but, with these exceptions, the buying and selling of advowsons and next presentations is not simoniacal.<sup>2</sup>

All simoniacal contracts, presentations, collations, &c., are void; and the persons guilty of the offence are subject to penalties.<sup>3</sup>

See *Next Presentation*; *Resignation Bonds*.

**SIMPLE.** See *Contract*; *Homage*, § 3; *Larceny*; *Sale*, § 2.

**SINECURE.**—In former times the rector of an advowson had power, with the proper consent, to entitle (that is, appoint) a vicar to officiate under him, so that two persons were instituted to the same church. By degrees, the rectors got themselves excused from residence, and devolved the whole spiritual cure upon the vicars. In such a case the rectory became merely nominal, without cure of souls (*sine curâ*), and was hence called a sinecure.

Provision for the suppression of sinecure rectories is contained in the stat. 3 & 4 Vict. c. 113.<sup>4</sup>

**SITTINGS.**—§ 1. A Court is said to sit when its members are present for the transaction of business. In the High Court the sittings are designated either according to the nature of the business, or the period at which the sittings are held. Thus, in the practice of the Queen's Bench Division, we speak of the sittings for trials, or at nisi prius, or in banc, or at the assizes, &c. (see the various titles).

With reference to the period at which they are held, the sittings of the Supreme Court of Judicature are four in number, namely, the Hilary Sittings, from January 11 to the Wednesday before Easter; the Easter Sittings, from the Tuesday after Easter Week to the Friday before Whit Sunday; the Trinity Sittings, from the Tuesday after Whitsun Week to August 8; and the Michaelmas Sittings, from November 2 to December 21.<sup>5</sup> Formerly the sittings of the Courts of Chancery and Common Law were regulated by the terms (*q. v.*), and hence were distinguished as sittings in and sittings after term.

**SIX CLERKS.**—§ 1. "In the time of Richard II., the Master of the Rolls had six clerks to assist him in keeping the records, and in making the requisite entries. They had an office . . . called the Six Clerks' Office, in which all bills, answers, and other pleadings and depositions taken by commission, were filed; and . . . all decrees, dis-

<sup>1</sup> Ayliffe, cited Phillimore, Eccl. Law, 1107.

<sup>2</sup> Steph. Comm. ii. 721.

<sup>3</sup> See Phill. 1102 *et seq.*; stats. 31 Eliz.

c. 6; 1 W. & M. c. 16; 13 Anne, c. 11.

<sup>4</sup> Phillimore, Eccl. Law, 504; Steph. Comm. ii. 683.

<sup>5</sup> Rules of Court, lxi. 1.

missions and other records were there kept.”<sup>1</sup> Each clerk was called a Six Clerk. The office was practically a sinecure. The Six Clerks were abolished by stat. 5 & 6 Vict. c. 103, and their duties transferred to the Records and Writs Clerks, and Clerk of Enrolments<sup>2</sup> (*q. v.*).

**SLANDER.**—§ 1. A false and malicious statement concerning a person made by word of mouth is a slander, giving rise to a right of action for damages: (i) if it imputes to the plaintiff the commission of a crime for which a corporal punishment may be inflicted, or the having some contagious disorder which may exclude him from society, or has reference to his trade, office, or profession, and is calculated to injure him therein; or (ii) if it has caused him special damage. The first kind is called slander *per se*, and the latter kind is called slander by reason of special damage. Thus, if one man falsely and maliciously says of another that he is a thief or a swindler, or a leper, or that, being a lawyer, he is a rogue, this is slander *per se*; if, on the other hand, a man imputes unchastity to a woman, this is not actionable, unless it produces special damage, namely, an injury to the material interests of the person slandered. Mere words of abuse are not actionable. § 2. In the class of slander on a person with reference to his occupation may also be included what is called slander of quality of goods, namely, a false and malicious statement throwing discredit on the commodity in which the party deals; as where a man said of a trader: “He hath nothing but rotten goods in his shop.”<sup>3</sup>

Slander *per se*:

by reason of special damage.

Slander of quality of goods.

Slander of title.

§ 3. A statement in itself defamatory is not actionable if it is privileged.<sup>4</sup> (See *Privilege*: also *Apology*; *Defamation*; *Justification*; *Libel*; *Malice*.)

§ 4. Slander of title is a false and malicious statement, whether by word of mouth or in writing, with reference to a person's title to some right or property belonging to him, as where a person alleges that the plaintiff has a defective title to land, or to a patent.<sup>5</sup> It seems that slander of title is not actionable unless special damage results from it.<sup>6</sup>

A written slander of title is sometimes called a “libel in the nature of slander of title.”<sup>7</sup>

**SLAUGHTER-HOUSES.**—Provisions for the registration, licensing and regulation of slaughter-houses are contained in the stats. 7 & 8 Vict. c. 87; 12 & 13 Vict. c. 92; 25 & 26 Vict. c. 102 (ss. 93, 94), 37 & 38 Vict. c. 87 (applying to the metropolis), and the sections of the Towns Improvement Clauses Act, 1847, incorporated in the Public Health Act, 1875.

**SLAVE TRADING** is a felony, punishable with penal servitude for fourteen years, or imprisonment with hard labour for five years.

<sup>1</sup> Spence's Equity, 366.

<sup>2</sup> Second Rep. Legal Dep. Comm. 43.

<sup>3</sup> Folkard, 125, citing Cro. Car. 570.

<sup>4</sup> Broom's Comm. C. L. 759; Folkard on Slander and Libel; Flood on Libel and Slander, *passim*; *Riding v. Smith*, 1 Ex.

D. 91.

<sup>5</sup> Broom, *ubi supra*; Flood, 224 *et seq.*

<sup>6</sup> See *Haddan v. Lott*, 15 C. B. 411; *Wren v. Weild*, L. R., 4 Q. B. 730.

<sup>7</sup> *Hart v. Hall*, 2 C. P. D. 146.



§ 2. Piratical slave trading is the offence ("piracy, felony and robbery") of carrying away or assisting in carrying away any person from any part of her Majesty's dominions, for the purpose of his being dealt with as a slave. It is punishable with penal servitude for life.<sup>1</sup>

**SLIP.**—In negotiations for a policy of insurance the agreement is in practice concluded between the parties by a memorandum called the slip, containing the terms of the proposed insurance, and initialed by the underwriters.<sup>2</sup> Although by 30 Vict. c. 23, s. 7, which requires every contract of marine insurance to be expressed in a policy, the slip is not itself enforceable, it is for many other purposes of legal effect; thus, where a slip has been initialed, the assured need not communicate to the insurer facts which afterwards come to his knowledge material to the risk insured against, and the non-disclosure of those facts will not vitiate the policy afterwards executed, although it would do so if there were no slip.<sup>3</sup>

**SMUGGLING** is the offence of importing or exporting prohibited goods, or of importing or exporting goods without paying the duties imposed on them. Goods so imported are liable to confiscation, and the offenders are liable to forfeit treble the value of the goods, or the penalty of 100*l.* Persons assembling together for the purpose of smuggling are liable to imprisonment.<sup>4</sup> (See *Shooting*, § 2.)

**SOCAGE** is a kind of tenure, distinguished from the tenure of frank-almoign (*q. v.*) by its services being certain and of a temporal nature, and from the tenure of knight's service (*q. v.*), by its services having been originally agricultural. (See *Service*, §§ 3 *et seq.*; *Tenure*.)

§ 2. Socage was originally of two kinds, free socage and villein socage, according as the services were free or base. Thus, where a man held land by fealty and a fixed rent, the tenure was free socage.<sup>5</sup> Free socage was of two kinds, socage in capite and common socage,<sup>6</sup> but the former has been abolished.<sup>7</sup> (See *In Capite*.) Common free socage is the modern ordinary freehold tenure. (See *Freehold*, § 4.) It has in theory the incidents of fealty, relief and wardship; but in practice they rarely occur. (See *Incident*.) The tenures of petty serjeanty, burgage and gavelkind (*q. v.*) are varieties of free socage. § 3. Villein socage is now represented by tenure in ancient demesne (*q. v.*). It differed from ordinary villenage in its services being certain. (See *Villenage*.)

**ETYMOLOGY.**—Norman-French: *socage*, from *sokeman*, a freeman holding land in villenage as part of the ancient demesnes of the crown, with the *privilege* (Anglo-Saxon, *sōcn*) of his services being certain, and of his not being ousted from the land so long as he

<sup>1</sup> Stephen's Crim. Dig. 68; Russell on Crimes, 338; stat. 5 Geo. 4, c. 113.

<sup>2</sup> A specimen of a slip is given in *Fisher v. Liverpool Marine Insurance Co.*, L. R., 9 Q. B. at p. 420.

<sup>3</sup> *Cory v. Patton*, L. R., 7 Q. B. 304; 9 Q. B. 577; Pollock on Contract, 562.

<sup>4</sup> Steph. Comm. iv. 262; Customs Consolidation Act, 1876, ss. 169 *et seq.*; Stephen's Crim. Dig. 44.

<sup>5</sup> Litt. § 117.

<sup>6</sup> Co. Litt. 77 a.

<sup>7</sup> Stat. 12 Car. 2, c. 24.

performed them;<sup>1</sup> afterwards socage came to mean any tenure with certain services.<sup>2</sup> Bracton, Littleton, and other old writers, derive socage from the French *soc*, a plough-share, because much land was anciently held by the service of ploughing the lord's land for so many days in the year.<sup>3</sup> Some modern writers, on the other hand, incline to the derivation from the Anglo-Saxon *soc*, or rather *sōcn*, in the sense of "jurisdiction," because tenants in socage were the free suitors of the lord's Courts.<sup>4</sup>

**SOLICITOR** is a person employed to conduct the prosecution or defence of an action or other legal proceeding on behalf of another, or to advise him on legal questions, or to frame documents intended to have a legal operation, or generally to assist him in matters affecting his legal position. To enable a person to practise as a solicitor, he must serve a term as an articled clerk (*q. v.*), pass certain examinations (see *Examination*, § 6), be admitted and enrolled as a solicitor of the Supreme Court of Judicature (see *Rolls*, § 5), and take out a yearly certificate (granted by the Commissioners of Inland Revenue) authorizing him to practise.<sup>5</sup>

§ 2. Solicitors are not only bound to use reasonable diligence and skill in transacting the business of their clients, but they also occupy a fiduciary position towards their clients, so that a dealing (such as a purchase of property) between a solicitor and his client, is always liable to be impugned unless the client was able to protect himself, or had independent advice. (See *Fiduciary*; *Fraud*, § 8; *Undue Influence*.) On the other hand, a solicitor is entitled to remuneration for his services, which he may recover not only by action (subject to the provisions of the Solicitors Acts, see *Taxation*, § 8), but also by a lien on the property of his client to the extent of his costs, or by obtaining a declaration of charge on it. (See *Charge*, § 5; *Lien*, § 4.) § 3. Solicitors are also considered as officers of the Courts in which they practise, and consequently the Courts have always exercised summary jurisdiction over them. Thus, if a solicitor is guilty of gross professional misconduct, the Court will order his name to be struck off the roll of practising solicitors; and if a solicitor institutes frivolous or vexatious proceedings in the name of a client, he may be ordered to pay the costs of them personally.<sup>6</sup> § 4. Solicitors are subject to special provisions as to the delivery and taxation of their bills of costs against their clients. As to which, see *Taxation*, § 8.<sup>7</sup>

**SOLICITOR-GENERAL** is one of the principal counsel of the crown. (See *Queen's Counsel*.) His functions, however, are political as well as legal, for he is almost invariably a member of the House of Commons, where he acts as the deputy or assistant of the Attorney-General (*q. v.*).

**SON ASSAULT DEMESNE** (= "his own assault") is the name given to that plea or defence by which a person charged with an assault

<sup>1</sup> Britton, 212b compared with 165a; Fitz. N. B. 14B; Spelman, Gl. s. v. *Socmannus*; Schmid, Ges. gl. s. v. *Sōcx*; Bl. Comm. ii. 80.

<sup>2</sup> Nichols' Britton, ii. 5, note (a).

<sup>3</sup> Litt. § 119; Co. Litt. 86a.

<sup>4</sup> Williams on Seisin, 20.

<sup>5</sup> Steph. Comm. iii. 215; stats. 6 & 7 Vict. c. 73; 23 & 24 Vict. c. 127; 33 &

34 Vict. c. 28; 34 Vict. c. 18; 35 & 36 Vict. c. 81; Solicitors Act, 1875; Solicitors Act, 1877.

<sup>6</sup> Daniell, Ch. Pr. 1713.

<sup>7</sup> *Ibid.* 1726. As to agreements for future remuneration, see the Attorneys and Solicitors Act, 1870, and the Solicitors' Remuneration Act, 1881; *Ward v. Eyre*, 15 Ch. D. 130.

justifies himself by saying that the plaintiff or prosecutor assaulted him first, and that the assault complained of was committed in self-defence.<sup>1</sup>

**SOUND.**—An action which is brought to recover damages is said to “sound in damages,” as opposed to an action for debt.<sup>2</sup>

**SPECIAL.** See *Acceptance*, § 4; *Agent*, § 6; *Authority*, § 3; *Bail*, § 10; *Damage*, §§ 3, 4; *Defence*, § 5; *Examiner*, § 2; *Indorsement*, § 3; *Judgment*, § 13; *Jury*, §§ 2, 8; *Licence*, § 4; *Occupancy*, § 4; *Paper*, § 2; *Plea*, § 7; *Power*, § 5; *Referee*; *Resolution*; *Verdict*; *Writ of Summons*.

**SPECIAL ALLOWANCES.**—In taxing the costs of an action as between party and party, the master is, in certain cases, empowered to make special allowances, that is, to allow the party costs which the ordinary scale does not warrant.<sup>3</sup>

**SPECIAL CASE**, in procedure, is a mode of obtaining a judicial decision on a statement of facts submitted to the Court by the parties without the aid of pleadings (*q. v.*). The parties to an action may, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the Court.<sup>4</sup> But independently of the agreement of the parties, if it appears from the pleadings or otherwise in an action that there is a question of law which it would be convenient to have decided before any other proceedings are taken, the Court may direct it to be raised by special case.<sup>5</sup>

By consent.

By order of the Court.

As to a verdict subject to a special case, see *Verdict*.

A special case is set down for hearing, and argued in Court, after which judgment is given according to the rights of the parties. The Court has power to draw inferences of fact, that is, to assume the existence of facts not expressly stated.

See *Demurrer*; *Questions of Law*.

**SPECIAL SESSIONS** is a meeting of two or more justices of the peace held for a special purpose (such as the licensing of ale-houses), either as required by statute, or when specially convoked, and can only be convened after notice to all the other magistrates of the division, to give them an opportunity of attending.<sup>6</sup> (See *Petty Sessions*; *Quarter Sessions*.)

**SPECIFIC PERFORMANCE.**—The doctrine of specific performance is that where damages would be an inadequate compensation for the breach of an agreement, the contractor will be compelled to perform

<sup>1</sup> Underhill on Torts, 121; Russell on Crimes, i. 963.

<sup>2</sup> Steph. Comm. iii. 570.

<sup>3</sup> Order in Council as to costs (August, 1875), schedule.

<sup>4</sup> Rules of Court, xxxiv. 1, 7 (Rules of April, 1880), abolishing the practice of

stating special cases without pending action, under stat. 13 & 14 Vict. c. 35, as to which see Daniell's Ch. Pr. 1701 *et seq.*

<sup>5</sup> Rules of Court, xxxiv. 2; *Met. Board of Works v. New River Co.*, 1 Q. B. D. 727; 2 Q. B. D. 67.

<sup>6</sup> Stone's Justice of the Peace, 52, 55.

specifically what he has agreed to do. The principal instances of the jurisdiction occur in contracts for the sale, purchase or lease of land, or for the recovery of unique chattels, of which the *Pusey Horn* is a well-known example.<sup>1</sup> In such cases the Court (*e.g.*, the High Court, in an action instituted in the Chancery Division<sup>2</sup>) will order the defendant to carry out the sale, purchase, or lease, or deliver up the chattel, and will imprison him until he does so. But the Court will not order specific performance of a personal contract, such as a contract to sing, or paint a picture.<sup>3</sup> (See *Contract*, § 11.)

See *Cairns's Act*.

**SPECIFICATIO**, in Roman law, was a mode by which one person could acquire property belonging to another by making it into something different; as where a man made wine out of another's grapes: but the specificator was liable to make compensation to the original owner.<sup>4</sup> *Specificatio* does not exist in our law, although included by Blackstone and others as a variety of accession (*q. v.*, § 2).

Provisional.

**SPECIFICATION**.—When a person applies for a patent (see *Patent Right*), he must leave with his petition a statement in writing describing the nature of his invention, and called the provisional specification. This is referred to the proper law officer (in England the Attorney- or Solicitor-General), and if he certifies that it describes the nature of the invention, the applicant may use and publish the invention during the next six months without losing his right to obtain letters patent, if on investigation he determines to go on with his application. When the letters patent are granted, the inventor must, within six months from their date, file a complete specification, "particularly describing and ascertaining the nature of the said invention, and in what manner the same is to be performed," unless he elects to file a complete specification in the first instance, in lieu of a provisional one.<sup>5</sup> Specifications require to be framed with great care, neither covering more than is the proper subject of the patent, nor omitting anything necessary to make the description intelligible.<sup>6</sup> (See *Disclaimer*, § 2; *Memorandum of Alteration*.)

Complete.

**SPIRITUAL—SPIRITUALITIES**. See *Corporation*, § 5; *Guardian of the Spiritualities*; *Service*, § 2; *Temporalities*.

**SPOLIATION** is a suit in a spiritual Court by which an incumbent of a benefice suggests that his adversary has wasted (*spoliavit*) the fruits of the benefice, or received them to his prejudice. Such a suit lies by

<sup>1</sup> *Dart*, V. & P. 981; *Snell's Eq.* 423; *Pusey v. Pusey*, 1 Vern. 273; *White & Tudor's L. C.* i. 735; but not for the transfer of ordinary personal property, *e.g.*, *South Sea Stock*; *Cuddee v. Rutter*, 5 Vin. Abr. 538; *White & Tudor's L. C.* i. 709.

<sup>2</sup> *Judicature Act*, 1873, s. 34.

<sup>3</sup> *Lumley v. Wagner*, 5 De G. & Sm.

485.

<sup>4</sup> *Just. Inst.* ii. 1, 25; *Hunter's Roman Law*, 134.

<sup>5</sup> *Patent Law Am. Act*, 1852, ss. 6 *et seq.*, 27 *et seq.*; *Stoner v. Todd*, 4 Ch. D. 58.

<sup>6</sup> *Williams*, P.P. 283; *Stephen's Comm.* ii. 30.

one incumbent against another to try which of them is the rightful incumbent where they both claim by one patron, and where the right of patronage does not come in question: *e.g.*, where a patron, erroneously believing his clerk to be dead, presents another; there the first incumbent may have a spoliation against the other.<sup>1</sup>

**SPORTING.**—§ 1. As to the right of sporting, that is, of killing and taking game, on a man's own land, see *Game*. The right of sporting on another man's land is a profit à prendre, and, therefore, an incorporeal hereditament;<sup>2</sup> it can only be conveyed by deed of grant.<sup>3</sup> It is generally an exclusive or several right, that is, excluding the owner of the land from its exercise; but it may be a right of common. (See *Common*, §§ 1, 16.)

§ 2. The Rating Act, 1874, makes the right of sporting, when severed from the occupation of the land, a rateable hereditament.<sup>4</sup> (See *Rate*.)

See *Chase*; *Forest*; *Park*; *Warren*.

**SPRINGING USE.** See *Use*.

**STAGE-RIGHT** is a word which it has been attempted to introduce as a substitute for "the right of representation and performance" (*q. v.*), but it can hardly be said to be an accepted term of English law.<sup>5</sup>

**STAKEHOLDER** primarily means a person with whom money is deposited pending the decision of a bet or wager (*q. v.*); but it is more often used to mean a person who holds money or property which is claimed by rival claimants, but in which he himself claims no interest. (See *Interpleader*.)

**STALLAGE** is a payment due to the owner of a market in respect of the exclusive occupation of a portion of the soil within the market.<sup>6</sup> (See *Market*.)

**STAMPS.**—§ 1. Stamps are used for two purposes; first, as a convenient mode of collecting fees payable in Courts of justice (*e. g.*, on filing documents, issuing writs and summonses, &c.); and secondly, as a mode of raising taxes on written instruments, such as receipts, conveyances, leases, &c., by virtue of various enactments known as the Stamp Acts.<sup>7</sup> (See *Commissioners of Inland Revenue*.) § 2. Stamps of the latter kind are either fixed in amount, or ad valorem, that is, proportionate to the value of the property dealt with by the instrument. Thus, the stamp on every receipt, cheque, and power of attorney, is fixed; while the stamps on bills

Fixed and  
ad valorem  
stamps.

<sup>1</sup> Phillimore, *Eccl. Law*, 515.

<sup>2</sup> Williams on Commons, 18. As to the reservation of rights of sporting under the Inclosure Acts, see *ibid.* 240; *Musgrave v. Forster*, L. R., 6 Q. B. 590.

<sup>3</sup> Williams on Seisin, 122. Such a grant does not prevent the owner of the land from cutting down trees, &c. *Gearns v. Baker*, 10 Ch. App. 355.

<sup>4</sup> Sect. 3; and see *Eyton v. Overseers of*

*Mold*, 6 Q. B. D. 13.

<sup>5</sup> Coryton on Stage-Right; *Reade v. Conquest*, 11 C. B. (N. S.), p. 485.

<sup>6</sup> Shelford, R. P. Stat. 35; *Mayor of Penryn v. Best*, 3 Ex. D. 292.

<sup>7</sup> The existing acts are those of 1870 and 1871, varied by stat. 39 Vict. c. 6, and 44 Vict. c. 12. For a history of the whole subject see Dowell, *Stamp Duties*; Steph. Comm. ii. 571.

Progressive  
duty.  
Adhesive  
stamps.  
Impressed  
stamps.  
Spoiled  
stamps.

Appropriated  
stamps.

Adjudication  
stamp.

Denoting  
stamp.

Unstamped  
instruments.

of exchange, conveyances, leases, &c., vary with the amount of money or value of property which they deal with. Formerly deeds were liable to a progressive stamp of a fixed sum for every skin of parchment beyond the first, but this no longer exists. § 3. Adhesive stamps are sold separately, and are affixed and cancelled by the person whose duty it is to have the instrument stamped. Others are impressed with a die on the parchment or paper on which the instrument is written. § 4. Provision is made by the Stamp Acts for the allowance (or repayment of the amount) of a stamp which has been "spoiled," that is, where, by some accident or mistake, the stamp itself has been rendered unfit for use, or the instrument on which it has been affixed or impressed has become useless before it came into operation; and in certain other cases.<sup>1</sup> § 5. Appropriated stamps are stamps which can only be used for instruments of a particular description, *e. g.*, bills of lading.<sup>2</sup> § 6. An adjudication stamp is used to signify that the instrument has been submitted to the Commissioners of Inland Revenue, and that they are of opinion (if it is unstamped) that it is not chargeable with duty, or (if it is stamped) that it is duly stamped; and no question as to the proper stamp can then arise.<sup>3</sup> § 7. Where the stamp duty on an instrument depends upon the stamp on another instrument, the fact that the latter stamp duty has been paid may be evidenced by a stamp impressed for that purpose on the first instrument. This is called a denoting stamp.<sup>4</sup> § 8. No instrument executed in the United Kingdom, or relating to any property situate, or to anything done or to be done, in the United Kingdom, can be given in evidence or made use of, unless duly stamped.<sup>5</sup> In the case of the following documents—bills of exchange, promissory notes, cheques and other drafts, bills of lading and proxies—they cannot be stamped after execution; and charterparties, attested copies, receipts, and policies of marine insurance,<sup>6</sup> can only be stamped after execution within a limited time, or on payment of a special penalty. In the case of all other documents, the stamp may be affixed at any time after execution on payment of the unpaid duty, a penalty of 10*l.*, and interest on the duty at five per cent. per annum, so that the interest does not exceed the amount of the duty. But any instrument executed out of the United Kingdom may be stamped within two months from its arrival in this country, without payment of any penalty. The Commissioners are also empowered to stamp any instrument, without payment of a penalty, within twelve months after its execution. Under this provision, the practice of the Commissioners is to stamp simple agreements, &c. within a fortnight, and deeds and instruments bearing an *ad valorem* duty within two months after execution, without penalty, as a matter of course. § 9. Where a document unstamped or insufficiently stamped is produced in a judicial proceeding, it may be received in evidence on payment to the officer of the Court of the unpaid duty, the penalty, and a further sum of 1*l.*<sup>7</sup>

<sup>1</sup> Stamp Duties Management Act, 1870, s. 14.

<sup>2</sup> Stamp Act, 1870, s. 9. For a list of such stamps, see Dowell, 344.

<sup>3</sup> Stamp Act, 1870, s. 18.

<sup>4</sup> *Ibid.* s. 14.

<sup>5</sup> *Ibid.* s. 17.

<sup>6</sup> Stats. 30 Vict. c. 23; 39 Vict. c. 6; 44 Vict. c. 12, s. 44.

<sup>7</sup> Stamp Act, 1870, ss. 15, 16.

**STANDING ORDERS** are rules and forms regulating the procedure of the two Houses of Parliament, each having its own. They are of equal force in every parliament, except so far as they are altered or suspended from time to time.<sup>1</sup>

**STANNARIES** are a district which includes all parts of Devon and Cornwall where some tin work is situate and in actual operation. The tin-miners of the stannaries have certain peculiar customs and privileges, some of which are referred to under the head of *Tin-bounding*. Civil actions in respect of matters arising within the stannaries may be brought in the Stannary Court, which is a court of record held before a judge called the Vice-Warden of the Stannaries: it also has power to wind up cost-book mining companies.<sup>2</sup> Formerly an appeal lay to the Lord Warden of the Stannaries, and from him to the Privy Council, but this jurisdiction has been transferred to the Court of Appeal.<sup>3</sup>

The Stannaries Act, 1869, contains provisions relating to the regulation of mining partnerships working mines in the stannaries. The procedure of the Court is regulated by various statutes from 4 & 5 Will. 4, c. 42, to 18 & 19 Vict. c. 32, and by the General Orders of 1876.<sup>4</sup>

**STAR-CHAMBER** was a Court which originally had jurisdiction "in cases where the ordinary course of justice was so much obstructed by one party, through writs, combination of maintenance or overawing influence, that no inferior Court would find its process obeyed."<sup>5</sup> The Court consisted of the privy council, the common law judges and (it seems) all peers of parliament. In the reigns of Henry VIII. and his successors the jurisdiction of the Court was illegally extended to such a degree (especially in punishing disobedience to the king's arbitrary proclamations) that it became odious to the nation, and was abolished by stat. 16 Car. 1, c. 10.<sup>6</sup>

**STATE.**—I. § 1. A state is a collection of persons occupying a certain territory, and having a legislative and executive organization free from the control of any other human power. The name "state" is sometimes given to bodies which are really only parts of a state, such as the separate organizations which collectively make up the United States of America, or to governments, such as those of Monaco, San Marino and Andorra, which are under the protection or control of other states; hence a "state," in the ordinary and proper sense of the word, is described as an independent or sovereign state.<sup>7</sup>

§ 2. Every state consists of two parts, the sovereign part (which in England is the crown and houses of parliament) and the subject part.

<sup>1</sup> Homersham Cox, Eng. Gov. 136; May, Parl. Pr. 185.

<sup>2</sup> Bainbridge on Mines, 571; Steph. Comm. iii. 298.

<sup>3</sup> Judicature Act, 1873, s. 18.

<sup>4</sup> Procedure in the Court of the Vice-Warden of the Stannaries.

<sup>5</sup> Hallam, Const. Hist. i. 51.

<sup>6</sup> *Ibid.* ii. 97; Steph. Comm. iv. 310.

<sup>7</sup> As to the criteria of a state, see Fisher's Digest, ii. 4093 *et seq.*

"State" =  
"executive  
power."

In its external relations or dealings with other states the sovereign part, or a branch of it (in England the crown), represents the state. The relations between independent states are governed by what is called international law (*q. v.*). In its internal relations, that part of the sovereign government of a state which is entrusted with the executive power enforces the law dealing with the relations between it and the subject members of the state. It is, therefore, considered as representing the whole state, and hence the term "state" is frequently used in the sense of "executive power in a state," as when we say that public law deals (among other things) with the relations between the state and the private members of the community. (See *Law*, § 6.) As the state has the power of enforcing the law, it cannot be subject to legal duties, for otherwise it would have to enforce the law against itself.<sup>1</sup> (See *Act of State*; *Petition of Right*.)

Claims against  
foreign states.

§ 3. It has been already mentioned that the relations between independent states are governed by international law, the nature of which is explained under that title. As one state cannot enforce a claim against another by legal procedure, it follows that no member of any state can enforce a claim against another state by legal proceedings in any Court of justice external to the latter state. Therefore, if a foreign state borrows money from an English subject, or commits what in the case of a private individual would be a tort against an English subject, no proceedings can be taken in the English Courts to enforce the claim thus arising, even although the foreign state may have property within the jurisdiction of the English Courts.<sup>2</sup> This rule is subject to two apparent exceptions: (1) that if proceedings are taken by A. against B. in the English Courts in respect of property in which a foreign state claims or is believed to have an interest, it may be made a party to those proceedings as defendant to enable it to come forward and sustain its claim; here, however, it is obvious that the foreign state, though in form a defendant, is really a plaintiff: (2) that if a foreign state takes proceedings in an English Court against a private individual, the defendant can institute a cross-action or set up a set-off or counter-claim against the plaintiff as if the foreign state were a private person.<sup>3</sup>

"State" =  
"estate."

II. § 4. "State" in the old books sometimes stands for "estate."<sup>4</sup>

**STATE OF FACTS AND PROPOSAL.**—In lunacy practice, when a person has been found a lunatic, the next step is to submit to the master a scheme, called a "State of Facts and Proposal," showing what is the position in life, property and income of the lunatic, who are his next of kin and heir-at-law, who are proposed as his committees, and what annual sum is proposed to be allowed for his maintenance, &c. From the state of facts and the evidence adduced in support of it, the

<sup>1</sup> As to the subject of states generally, see Austin's and Holland's works on Jurisprudence, *passim*.

<sup>2</sup> *The Parlement Belge*, 5 P. D. 197; *Vavasseur v. Krupp*, 9 Ch. D. 351;

*Twycross v. Dreyfus*, 5 Ch. D. 605.

<sup>3</sup> *Vavasseur v. Krupp*, 9 Ch. D. 351; *United States of America v. Wagner*, L. R., 3 Eq. 724, and the cases therein cited.

<sup>4</sup> Co. Litt. 206 b.



Master frames his report.<sup>1</sup> (See *Report*, § 2.) A similar practice formerly prevailed in Chancery.

**STATED ACCOUNT.** See *Account*, § 2.

**STATEMENT.** See *Answer*, § 5; *Bill of Complaint*, § 1.

**STATEMENT OF AFFAIRS.**—In bankruptcy practice, a bankrupt or debtor who has presented a petition for liquidation or composition must produce at the first meeting of creditors a statement of his affairs, giving a list of his creditors, secured and unsecured, with the value of the securities, a list of bills discounted, and a statement of his property.<sup>2</sup>

Making a material omission in a statement of affairs is a misdemeanor, punishable with imprisonment for two years.<sup>3</sup>

**STATEMENT OF CLAIM** is a written or printed statement by the plaintiff in an action in the High Court, showing the facts on which he relies to support his claim against the defendant, and the relief which he claims. It is delivered to the defendant or his solicitor. The delivery of the statement of claim is usually the next step after appearance (*q. v.*), and is the commencement of the pleadings (*q. v.*).

The next step in the action is the statement of defence (*q. v.*).

§ 2. If the writ is specially endorsed, the plaintiff may, in lieu of delivering a statement of claim, deliver a notice to the effect that his claim is that which appears by the indorsement; but he may be ordered to deliver a further statement.<sup>4</sup> If the defendant in appearing states that he does not require the delivery of a statement of claim, the plaintiff need not deliver one, but he may if he likes, at his own risk as to costs.<sup>5</sup> A statement of claim also becomes unnecessary if the parties agree to a special case (*q. v.*), or if the plaintiff obtains judgment under Order XIV. (See *Judgment*, § 9.)

Notice in  
lieu of state-  
ment of claim.

§ 3. If the defendant does not enter an appearance, and the action is one in which the plaintiff cannot sign judgment for default of appearance (as where it is an action for an account, redemption or the like), the plaintiff must file the statement of claim with the proper officer of the Court and set down the action on motion for judgment.<sup>6</sup> (See *Action; Joinder*, § 1; *Relief; Writ of Summons*.)

**STATEMENT OF DEFENCE.**—§ 1. In the practice of the High Court, where the defendant in an action does not demur to the whole of the plaintiff's claim, he delivers a pleading called a statement of defence. The statement of defence deals with the allegations contained in the statement of claim (or the indorsement on the writ if there is no statement of claim), admitting or denying them, and, if necessary, stating fresh facts in explanation or avoidance of those alleged by the plaintiff.

<sup>1</sup> Elmer, Lunacy Pr. 22; Pope on Lunacy, 79.

<sup>2</sup> Bank. Act, 1869, s. 19; Rules of 1870, rr. 91, 92, 274, form 39.

<sup>3</sup> Debtors Act, 1869, s. 11.

<sup>4</sup> Rules of Court, xxi. 4.

<sup>5</sup> *Ibid.* xix. 2; xxi. 1.

<sup>6</sup> *Ibid.* xiii. 9; xix. 6; xxix. 10.

Defence and counter-claim.

Defence and demurrer.

§ 2. If the defendant wishes to set up a counter-claim (*q. v.*), he adds it to his defence,<sup>1</sup> and the pleading is then called a statement of defence and counter-claim. If he desires to demur to part of the statement of claim, and put in a defence as to the rest, he combines the defence and demurrer in one pleading.<sup>2</sup> (See *Pleading*.)

**STATEMENT OF PARTICULARS.**—When the plaintiff in an action claims a debt or liquidated demand, but has not indorsed the writ specially (*i. e.*, indorsed on it the particulars of his claim under Order III. r. 6), and the defendant fails to appear, the plaintiff may file a statement of the particulars of his claim, and after eight days enter judgment for the amount, as if the writ had been specially indorsed.<sup>3</sup> (See *Writ of Summons*.)

**STATUS.**—§ 1. The status of a person is his legal position or condition; thus, when we say that the status of a woman after a decree nisi for the dissolution of her marriage with her husband has been made, but before it has been made absolute, is that of a married woman, we mean that she has the same legal rights, liabilities, and disabilities as an ordinary married woman.<sup>4</sup> The term is chiefly applied to persons under disability (*q. v.*), or persons who have some peculiar condition which prevents the general law from applying to them in the same way as it does to ordinary persons.

§ 2. The question of status is of importance in jurisprudence, because it is generally treated as a basis for the classification of law, according as it applies to ordinary persons (general law, normal law, law of things), or to persons having a status, that is, a disability or peculiar legal condition, such as infants, married women, lunatics, convicts, bankrupts, aliens, public officers, &c. (particular law, abnormal law, law of persons).<sup>5</sup>

§ 3. "Status" is sometimes applied by analogy to things, as where we speak of a house having acquired the status of an ancient building.<sup>6</sup>

See *Ancient Messuage*.

**STATUTABLE** or **STATUTORY** is that which is introduced or governed by statute law, as opposed to the common law or equity. Thus, a Court is said to have statutory jurisdiction when jurisdiction is given to it in certain matters by act of parliament. (See *Petition*, § 4.) For other examples, see *Conveyance*, §§ 5, 8; *Declaration*, § 6; *Mortgage*, § 17.

**STATUTE.**—I. § 1. A statute is technically the same thing as an act of parliament (*q. v.*), though in practice the term is usually confined to public acts.<sup>7</sup> In this sense statutes are of the following kinds:

Declaratory;

§ 2. A statute is said to be *declaratory*, when it does not profess to make any alteration in the existing law, but merely to declare or explain

<sup>1</sup> Rules of Court, xix. 2, 3; xxii.

<sup>2</sup> *Ibid.* xxviii. 4.

<sup>3</sup> *Ibid.* xiii. 5.

<sup>4</sup> *Norman v. Villars*, 2 Exch. D. 359.

<sup>5</sup> See Holland's Jurisp. 83 *et seq.*, where the opinions of other writers are referred to and criticized. See also Kuntze; Excuse, 369.

<sup>6</sup> *Angus v. Dalton*, 3 Q. B. D. at p. 100.

<sup>7</sup> H. Cox, Instit. 19.

what it is; *remedial*, when it alters the common law;<sup>1</sup> *amending*, when it remedial; alters the statute law; *consolidating*, when it consolidates or throws amending; together, into one statute, several previous statutes relating to the same consolidating; subject-matter, with or without alterations of substance;<sup>2</sup> *disabling* or disabling; *restraining*, when it restrains the alienation of property, and *enabling*, when enabling; it removes a restriction or disability;<sup>3</sup> *penal*, when it imposes a penalty or penal. forfeiture,<sup>4</sup> as in the case of the statutes relating to game, smuggling, the profanation of the Lord's day, &c. (See *Action*, § 8; *Informer*; *Penalty*; *Sunday*.)

§ 3. Collections of the public general statutes, called the Statutes at Large, have been published by various editors, the most well known being that by Ruffhead. An edition of the statutes from Magna Charta to the end of Queen Anne's reign has been printed by the Record Commissioners from the original records, under the title of the Statutes of the Realm; and an edition of the statutes, prepared by the Statute Law Committee, with all repealed acts and parts of acts omitted, has been published by government under the title of the Statutes Revised, as a preparation towards an authoritative consolidation of the whole statute law.

As to statute law, see *Law*, § 4.

The principal works on statutes and their interpretation are: Coke's Second Inst.; Barrington on the Statutes; Dwaris on Statutes; Maxwell on the Interpretation of Statutes; and Hardcastle on Statutory Law.

II. § 4. "Statute," also, sometimes means a kind of bond or obligation of record, being an abbreviation for "statute-merchant" or "statute-staple" (*q. v.*).

**STATUTE MERCHANT—STATUTE STAPLE.**—A statute merchant is a bond acknowledged before the chief magistrate of some trading town pursuant to the statute *De mercatoribus*, 13 Edw. 1 (whence the name). A statute staple is a bond acknowledged pursuant to 27 Edw. 3, c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns. They were both originally intended to encourage trade by providing a speedy remedy for recovering debts. Every statute is required by the act to be sealed with the seal of the debtor and of the king, and enrolled. It is therefore a bond of record (see *Record*; *Rolls*), and the addition of the king's seal made it of so high a nature that on failure of payment by the debtor at the day assigned, execution might be awarded without any preliminary proceedings, whereby not only the body of the debtor might be imprisoned and his goods seized in satisfaction of the debt, but also his lands might be delivered to the creditor till out of the rents and profits the debt was satisfied; during that time the creditor was called tenant by statute merchant or statute staple, and had a chattel interest in the lands.<sup>5</sup> (See *Estate*, § 5.) Statutes merchant and statutes staple formerly charged the land of the debtor; but this privilege has been abolished.<sup>6</sup> (See *Judgment*, § 16.) It seems that statutes merchant and staple are still payable, on the death of the debtor, in priority to his ordinary debts. (See *Administration*, § 2 and note (3)). Statutes merchant and statutes staple are, however, now quite obsolete.<sup>7</sup> (See *Recognizance*.)

<sup>1</sup> Bl. Comm. i. 86.

<sup>2</sup> For an instance, see the Settled Estates Act, 1877.

<sup>3</sup> These terms are especially applied to the statutes relating to leases by bishops, colleges, vicars, tenants in tail, &c. Co. Litt. 44 a; Bl. Comm. ii. 318 *et seq.*;

Steph. Comm. ii. 734 *et seq.*; Phill. Eccl. Law, 1645; Woodfall, L. & T. 20.

<sup>4</sup> Bl. Comm. iii. 161.

<sup>5</sup> See Bl. Comm. ii. 160; Wms. Saund. ii. 216; Shepp. Touch. 353.

<sup>6</sup> Stat. 27 & 28 Vict. c. 112.

<sup>7</sup> Williams, P. P. 130; R. P. 90.

- STATUTE OF FRAUDS** is the stat. 29 Car. 2, c. 3, passed "for the prevention of frauds and perjuries." With this object it enacts (sects. 1 and 2) that leases of lands, tenements or hereditaments (except leases not exceeding three years, reserving a rent of at least two-thirds the value of the land) shall have the force of leases at will only, unless they are put in writing and signed by the parties or their agents. Sect. 3 requires assignments and surrenders of leases and interests in land (not being copyholds, &c.) to be in writing. Sect. 4 enacts that no action shall be brought upon any special promise by an executor or administrator to answer damages out of his own estate, or upon a guarantee, or upon an agreement made in consideration of marriage, or upon any contract or sale of lands, &c., or any interest in or concerning them, or upon any agreement that is not to be performed within a year, unless the agreement is in writing and signed by the party to be charged, or his agent. Sects. 5 and 6, and 19 to 23, as to wills, &c. are no longer in force (see *Will*). Sects. 7 and 9 require declarations or creations of trusts of lands, &c. and all assignments of trusts, to be in writing, signed by the party. Sect. 8 exempts trusts arising by implication of law. Sects. 10 and 11 made the lands of a cestui que trust liable to his judgments and obligations. Sect. 12 enacts that estates pur auter vie shall be devisable and liable to the owner's debts, and if not otherwise disposed of shall go to his personal representatives. Sect. 16 enacts that no writ of execution against goods shall bind the property therein until the writ is delivered to the sheriff to be executed. Sect. 17 enacts that no contract for the sale of any goods, wares and merchandizes for the price of 10*l.* or upwards shall be good unless the buyer accept and receive part of the goods so sold, or give something in earnest or part payment, or unless some note or memorandum of the contract be made and signed by the parties to be charged, or their agents. The remaining sections are unimportant.
- Sects. 1, 2 and 3 must be read in connection with stat. 8 & 9 Vict. c. 106, which enacts that all leases required to be in writing, and all assignments of chattel interests in land (not being copyhold, &c.), must be made by deed. Sect. 4 must be read in connection with stat. 19 & 20 Vict. c. 97, which makes it unnecessary that the consideration for a guarantee should appear in writing. Sect. 12 was supplemented by stat. 14 Geo. 2, c. 20, s. 9, and superseded by sects. 3 and 6 of the Wills Act, 1837 (see *Occupancy*, § 3). The 16th section has been modified by stat. 19 & 20 Vict. c. 97, so as to protect bonâ fide purchasers of goods not actually seized under an execution. The 17th sect. has been supplemented by Lord Tenterden's Act (9 Geo. 4, c. 14), which declares that its provisions shall extend to all contracts for the sale of goods of the value of 10*l.* and upwards, notwithstanding the goods are to be delivered, or made, procured and delivered, at a future time.<sup>1</sup> Part of sect. 10, and sect. 18 (17 in the Revised Statutes) have been repealed by the Statute Law Revision Act, 1881.
- Leases.**
- Assignments of leases, &c.**
- Sect. 4.**
- Trusts.**
- Estates pur auter vie.**
- Execution against goods.**
- Sales of goods.**
- Subsequent legislation.**

<sup>1</sup> As to the statute generally, see Agnew on the Statute of Frauds. As to the sections relating to contracts, see Smith on Contracts and Chitty on Contracts, *passim*.

**STATUTE OF USES.** See *Use*.

**STATUTES OF DISTRIBUTION.** See *Advancement*, § 3; *Distribution*; *Next of Kin*, § 2.

**STATUTES OF LIMITATION.** See *Limitation of Actions*.

**STAY.**—§ 1. A stay of proceedings in an action is a suspension of them: thus, if the plaintiff is ordered to do something and fails to do it, the proceedings may be ordered to be stayed until he complies with the order.<sup>1</sup> So the Court may order execution to be stayed until an appeal is decided.<sup>2</sup> A stay of proceedings is sometimes produced ipso facto, without an express order to that effect, as where a party obtains a rule nisi for a new trial.<sup>3</sup> Stay of execution.

§ 2. "Stay of proceedings" also sometimes means a total discontinuance of the action: thus, if an action in the Queen's Bench is compromised, an order staying the proceedings is generally obtained.<sup>4</sup> In the Chancery Division the term is also so used, but in strictness it is only accurate when a decree or judgment has been given, for in such a case the suit or action cannot be dismissed, because the Court has adjudicated on it, and therefore all that can be done is to stay proceedings under the decree or judgment. Before decree or judgment the proper way of disposing of an action is either by discontinuance (*q. v.*), or by an order dismissing the action. Permanent stay of proceedings.

**STEALING.** See *Larceny*; *Embezzlement*; *Robbery*.

**STET BILLA.**—If the plaintiff in a plaint in the Mayor's Court of London has attached property belonging to the defendant and obtained execution against the garnishee, the defendant, if he wishes to contest the plaintiff's claim, and obtain restoration of his property, must issue a *scire facias ad disprobandum debitum* (see *Scire Facias*, § 13); if the only question to be tried is the plaintiff's debt, the plaintiff in appearing to the scire facias prays *stet billa*, "that his bill original," *i. e.*, his original plaint, "may stand, and that the defendant may plead thereto;" the action then proceeds in the usual way as if the proceedings in attachment (which are founded on a fictitious default of the defendant in appearing to the plaint) had not taken place.<sup>5</sup> (See *Foreign Attachment*.)

**STET PROCESSUS**, in the practice of the old common law Courts, was an entry on the record in an action whereby it was ordered, with the consent of the parties, that all further proceedings in the action be stayed. It could only be made with the consent of both parties, and

<sup>1</sup> Rules of Court, vii.

<sup>2</sup> *Ibid.* lviii. 16.

<sup>3</sup> *Ibid.* xxxix. 5.

<sup>4</sup> See Archbold's Pr. 1100 *et seq.*

<sup>5</sup> Brandon, For. Attach. 115 and forms.

apparently could only be entered as to the whole record.<sup>1</sup> As there is now, under the new practice, no record in an action, it is difficult to see how a stet processus can be entered, though it is believed that orders to that effect have been made since the Judicature Acts; they would, no doubt, take effect as an ordinary stay of proceedings.

**STEWARD** was formerly used to denote an officer of the crown, or of a feudal lord, who acted as keeper of a Court of justice;<sup>2</sup> as, for example, the Lord High Steward (*q. v.*). At the present day the only important example of the office occurs in the case of manors, for every manor has a steward, appointed by the lord, who theoretically acts as judge of the Customary Court Baron and the Court Leet, and as registrar of the freeholders' Court Baron. Practically, however, his duties are rather ministerial than judicial, for his chief function is to receive surrenders and grant admittances to the copyhold lands of the manor, and keep the Court roll.<sup>3</sup> (See *Copyhold*; *Court Baron*; *Court Leet*; *Manor*.)

**STIFLING A PROSECUTION** is agreeing, in consideration of receiving a pecuniary or other advantage, to abstain from prosecuting a person for an offence not giving rise to a civil remedy, *e. g.*, perjury. As a general rule such an agreement invalidates any transaction of which it forms part.<sup>4</sup> (See *Compound*, § 3; *Misprision*, §§ 2, 3.)

Stinted common.

**STINT.**—I. § 1. A stint is a limit, and therefore a stinted right of common of pasture is one where the number of beasts allowed to be put on the common by each commoner is limited, as opposed to common sans nombre. (See *Sans Nombre*.) A right of pasture may also be stinted in respect of time.<sup>5</sup> (See *View and Delivery*.)

Stinted pasture.

II. § 2. Stint is also used in a special sense to denote the right of pasture of one of several persons who are tenants in common of land which they use as a common pasture ground for their cattle. Stinted pastures are grazing lands in moors, downs and wastes, which produce no crop, and which are open to each person who has a share in the pasture for a stinted or limited number of cattle. They are usually closed at certain seasons of the year for the better growth of the pasture, but are never held in severalty. The right of each joint owner of the herbage is known as a stint or cattle-gate.<sup>6</sup>

§ 3. A stint is not a common, but a corporeal hereditament, and may be held for either freehold or customary estates.<sup>7</sup> (See *Common*; *Hereditament*, § 2.)

§ 4. Sometimes the lord of a manor has a "stint" or limited right of pasture on the waste, during a certain part of the year.<sup>8</sup> (See *Sheepwalk*.)

<sup>1</sup> Archbold's Pr. (3rd edit.), 413; *Quar- rington v. Arthur*, 11 M. & W. 491.

<sup>2</sup> Co. Litt. 61 a; Co. Copyh. § 45.

<sup>3</sup> Elton, Copyh. 254.

<sup>4</sup> *Keir v. Leeman*, 6 Q. B. 308; *Wallace v. Hardacre*, 1 Camp. 45; *Williams v.*

*Bayley*, L. R., 1 H. L. 200.

<sup>5</sup> Wool. Comm. 25.

<sup>6</sup> Elton, Comm. 33—35.

<sup>7</sup> *Ibid.* 35.

<sup>8</sup> *Ibid.* 40.

**STIRPES.** See *Per Stirpes*.

**STOCK.**—I. § 1. "Stock" primarily means a common fund belonging to a partnership or trading company, and used to enable it to carry on its business.<sup>1</sup> (See *Fund*.) Thus what is now generally called the capital of a company was formerly called its "joint-stock," meaning the common or joint fund contributed by the members. (See *Joint Stock Company*.) The capital of a company is generally divided into shares (*q. v.*), so that "shares" and "stock" are in one sense the same thing:<sup>2</sup> at the present day, however, "stock" is generally used in its secondary sense (*infra*, § 2) as opposed to "shares."

II. § 2. In its secondary sense, "stock" signifies a fund or capital which is capable of being divided into and held in any irregular amount. Thus, the ordinary government funds (Consols, New Threes, &c.) are called stocks, because a person can buy them in any amount (such as 99*l.* 19*s.* 11*d.* as well as 100*l.*). A share or debenture, on the other hand, is of a fixed amount (such as 10*l.*, 50*l.*, 100*l.*), and is incapable of subdivision or consolidation. Many companies, however, have the power of converting paid-up shares into stock,<sup>3</sup> and of converting debentures into debenture stock. (See *Debenture Stock*.)

**STOCK EXCHANGE.**—The London Stock Exchange is a private society, and its rules are therefore only binding on its members and persons dealing with them subject to those rules.<sup>4</sup>

As to the legality of "time bargains" and "differences," see *Wager*.

**STOLEN GOODS.** See *Possession*, § 4; *Receiving Stolen Goods*.

**STOP ORDER.**—In chancery practice, when a fund (in cash, stock or other securities) is in Court in a cause or proceeding, any person claiming an interest in it may apply to the Court for an order to prevent it from being paid out or otherwise dealt with, without notice to the applicant. The application is generally made by summons, and (if opposed) must be supported by an affidavit showing the applicant's interest in the fund. Stop orders differ from restraining orders and distringas notices (*q. v.*) in being applicable only to funds in Court. Stop orders are also applicable to documents deposited with an officer of the Court.<sup>5</sup> (See *Payment into Court*.)

**STOPPAGE IN TRANSITU** is the right which an unpaid vendor has to resume the possession of goods sold upon credit, where the vendee has become bankrupt or insolvent before they come into his

<sup>1</sup> See a form of partnership deed in the Compleat Clerk, 845.

<sup>2</sup> See *Morrice v. Ayler*, L. R., 7 H. L. 717.

<sup>3</sup> Companies Act, 1862, s. 12; Companies Clauses Act, 1845, s. 61.

<sup>4</sup> *Ex parte Saffery*, 4 Ch. 555; 3 App. Ca. 213. See Melsheimer and Lawrence on the Stock Exchange.

<sup>5</sup> Daniell, Ch. Pr. 1543; Fisher on Mortgage, 117.

possession. Thus if A. orders goods of B., and B. despatches them by carrier to A.'s address, but before they have been actually delivered he hears that A. has stopped payment, then B. is allowed to countermand delivery before or at the place of destination, and to resume the possession of the goods, according to that equitable principle in the law of contract, by which one party may withhold performance, on the other becoming unable to fulfil his part of the contract. But it is not an unlimited right; for the vendor cannot exercise it if he has parted with documents sufficient to transfer the property, and the vendee, upon the strength of them, has sold the goods to a *bonâ fide* purchaser without notice.<sup>1</sup> The vendor's right ceases as soon as the transitus is determined, whether by the goods arriving at their destination, or by being delivered to a person on behalf of the vendee, or by the carrier agreeing, between himself and the vendee, to hold the goods for him, not as carrier, but as his agent.<sup>2</sup>

§ 2. There is also a so-called right of stoppage in transitu in cases where there is no transit, as where goods are sold whilst in the possession of a warehouseman, and some act remains to be done for the completion of the sale.<sup>3</sup> (*Sec Delivery Order; Dock Warrant.*)

**STORY.**—Joseph Story was born in 1779 at Marblehead near Boston, in the United States of America, became member of Congress in 1809, judge of the Supreme Court in 1811, professor at Harvard in 1829, and died 10 September, 1845. His principal works are: *Equity Jurisprudence*; *Law of Bailments*; *Agency*; *Bills of Exchange*; *Promissory Notes*; *Partnership*; and *the Conflict of Laws*.<sup>4</sup>

**STRANDING.**—Under the memorandum (*q. v.*) in an ordinary policy of marine insurance, the underwriters are not liable for damage sustained by certain perishable articles, unless in consequence of a general average, or a stranding of the ship. "Stranding" does not occur when a vessel takes the ground in the ordinary and usual course of navigation, in a tideway or harbour, upon the ebbing of the tide or the like, so that she will float again on the flow of the tide; but it occurs if the vessel takes the ground by reason of some unusual or accidental occurrence, *e. g.*, in consequence of an unknown and unusual obstruction in the harbour.<sup>5</sup>

**STRANGER.**—In law a person is said to be a stranger to a transaction when he takes no part in it, or no part producing any legal effect. Thus a person who is not a party to a deed, contract, &c. is said to be a stranger to it. (*See Part; Privy.*) So when a promise is made to a person, but he has neither taken any trouble or charge upon himself,

<sup>1</sup> *Houston on Stoppage in Transitu*, 1; *Lickbarrow v. Mason*, 2 T. R. 63; 1 H. Bl. 357; 6 East, 21; *Smith's L. C.* i. 756; *Smith's Merc. Law*, 548 *et seq.*; *Maude & Pollock, Merch. Shipp.* 309 *et seq.*

<sup>2</sup> *Ex parte Cooper*, 11 Ch. D. at p. 78.

<sup>3</sup> *Maude & Pollock*, 314.

<sup>4</sup> *Holtz. Encycl.*

<sup>5</sup> *Wells v. Hopwood*, 3 B. & Ad. 20; *Letchford v. Oldham*, 5 Q. B. D. 538.



nor conferred any benefit on the promisor, but the trouble has been sustained or benefit conferred by another, the promisee is said to be a stranger to the consideration.<sup>1</sup> (See *Consideration*, § 1.)

**STRIKING.**—§ 1. Striking a jury is what is more commonly known *Jury*. as nominating and reducing (*q. v.*).<sup>2</sup>

§ 2. Striking out a pleading or part of a pleading takes place when the *Pleading*. Court makes an order to that effect, either for the purpose of amendment (*q. v.*) or to compel one of the parties to do some act. Thus if a defendant fails to comply with an order for discovery, he is liable to have his defence struck out, and to be placed in the same position as if he had not defended the action.<sup>3</sup>

**STUFF GOWN** is the robe worn in Court by utter barristers. (See *Queen's Counsel*.)

**SUB-AGENT — SUB-CONTRACTOR.** — § 1. When an agent employs a person as his agent, to assist him in transacting the affairs of his principal, the person so employed is called a sub-agent. In the absence of an agreement to the contrary, there is no privity between the principal and the sub-agent; therefore, the principal is not liable to the sub-agent for his remuneration, and he cannot sue the sub-agent for negligence or misconduct; he must sue the agent.<sup>4</sup> But if the agent has an express or implied authority to employ a sub-agent, privity of contract arises between the principal and the sub-agent, and the principal may sue the sub-agent for misconduct.<sup>5</sup>

§ 2. Similarly, when a contractor makes a contract with a sub-contractor to carry out his contract, or part of it, there is no privity between the principal contractee and the sub-contractor.<sup>6</sup>

**SUBDUCT.** — In probate practice, to subduct a caveat is to withdraw it.<sup>7</sup>

**SUBINFEUDATION**, while it was allowed, was what took place when a tenant in fee simple of land granted the whole or part of it to another person in fee simple, to hold of him as his tenant, so that the relation of tenure, with its incidents of fealty, services, &c., was created between them. The practice of subinfeudation being found to decrease the power and wealth of the great landholders (the barons), it was abolished in Edward the First's reign by the statute known as *Quia Emptores (q. v.)*.<sup>8</sup> Therefore, at the present day, if A. holds land of B. in fee simple, and wishes to grant it to C., he can only do so on the term that C. shall hold it of B., and not of himself (A.). (See *Feudal System; Seignory; Tenure*.)

<sup>1</sup> Chitty on Contracts, 53.

<sup>2</sup> Lee, Dict. Pr. 887.

<sup>3</sup> Rules of Court, xxxi. 20.

<sup>4</sup> See Russell's Merc. Agency, 210.

<sup>5</sup> *De Bussche v. Alt*, 8 Ch. D. 287.

<sup>6</sup> *Goslin v. Agricultural Hall Co.*, 1 C. P. D. 482. As to the relations between a

contractor and his servants, and between the latter and the contractor's principal, see *Woolley v. Metr. D. Ry. Co.*, 2 Ex. D. 384; *Pearson v. Cox*, 2 C. P. D. 369.

<sup>7</sup> Browne's Probate Pr. 265.

<sup>8</sup> Williams on Seisin, 8, 21.

**SUBJACENT.** See *Support*.

**SUB-LEASE.** See *Lease*, § 3.

General;  
particular.

**SUBMISSION.**—A submission to arbitration is an instrument by which a dispute or question is referred to arbitration. (See *Arbitration*.) When the reference is made by the order of a Court or judge, the order itself is sometimes called a submission; but, more generally, that word denotes an agreement between the parties. Such an agreement may be either general (that is, an agreement to refer to arbitration all future disputes arising out of a specified matter), or a particular submission (that is, an agreement to refer to arbitration a dispute which has already arisen). A general submission is commonly contained in articles of partnership and other agreements extending over a long period. A particular submission may be revoked by either party, unless there is an agreement to make the submission a rule of Court. A general submission cannot be revoked in any case.<sup>1</sup> (See *Rule of Court*.)

**SUB-MORTGAGE.** See *Mortgage*, § 11.

**SUBORNATION OF PERJURY** is the offence of procuring a person to commit perjury, provided he actually commits it.<sup>2</sup> The offence is a misdemeanor, punishable in the same way as perjury (*q. v.*).

Ad test.

Duces tecum.

Old Chancery  
practice.

**SUBPŒNA** is a writ issued in an action or suit requiring the person to whom it is directed to be present at a specified place and time, and for a specified purpose, under a penalty (*sub pœnâ*) of 100*l.* The varieties of subpœna now in use are: (i) the subpœna ad testificandum, used for the purpose of compelling a witness to attend and give evidence, either in Court or before an examiner or referee: and (ii) the subpœna duces tecum, used to compel a witness to attend in Court or before an examiner or referee, to give evidence and also bring with him certain documents in his possession specified in the subpœna.<sup>3</sup>

§ 2. Under the old Chancery practice, every suit was commenced by a writ of subpœna requiring the defendant to appear; hence in the old books "subpœna" is equivalent to "suit in equity" or "bill of complaint." Under the more modern practice the subpœna was endorsed on the bill of complaint. Now every action is commenced by writ of summons. § 3. The subpœna to hear judgment was another kind used in Chancery practice: it was issued by the party setting down a cause for hearing and served on the opposite party. If the party served did not appear at the hearing, the Court might make a decree against him.<sup>4</sup>

**SUBROGATION** in its general sense is the substitution of one person or thing for another, so that the same rights and duties which attached to the original person or thing attach to the substituted one.

<sup>1</sup> *Piercy v. Young*, 14 Ch. D. 200.

<sup>2</sup> Russell on Crimes, iii. 1; Stephen's Crim. Dig. 84.

<sup>3</sup> See the forms, Rules of Court, April,

1880.

<sup>4</sup> Daniell's Ch. Pr. 831 *et seq.* As to the subpœna for costs, abolished by Rules of Court, xlvii. 2; see *ibid.* 1319.

Thus, if a person insures a ship which is lost by a collision caused by the negligence of another ship, he may recover the value of the ship from the underwriters, and then they are subrogated to his rights so as to be able to bring an action against the persons who caused the collision.<sup>1</sup> (See *Insurance*, § 4.)

ETYMOLOGY.]—Latin, *subrogare*, to choose in place of another.<sup>2</sup> As to the meaning of subrogation in French law, see Dalloz, Dict. s. v.; Saint-Bonnet, Dict. s. v.; Pothier de la Communauté, § 197.

**SUBSCRIBE—SUBSCRIPTION.**—To subscribe is literally to “write under,” and is sometimes opposed to “sign,” because a signature is not necessarily placed at the end or bottom of an instrument. (See *Sign*; *Will*.) A subscribing witness is the same thing as an attesting witness.<sup>3</sup> (See *Attest*.)

**SUBSTITUTED SERVICE.** See *Service*, § 11.

**SUBSTITUTION—SUBSTITUTIONAL—SUBSTITUTIONARY.**—Where a will contains a gift of property to a class of persons with a clause providing that on the death of a member of the class before the period of distribution his share is to go to his issue (if any), so as to substitute them for him, the gift to the issue is said to be substitutional or substitutionary. A bequest to such of the children of A. as shall be living at the testator’s death, with a direction that the issue of such as shall have died shall take the shares which their parents would have taken, if living at the testator’s death, is an example. Under such a gift the issue of children dead at the date of the will cannot take anything.<sup>4</sup>

**SUBTRACTION** is where a person refuses or neglects to perform a duty. The term is chiefly used in connection with services and tithes. § 2. In the law of real property, subtraction is where a person who owes any suit, duty, custom or other service to another, withdraws or neglects to perform it; the principal services which are the subject of subtraction are fealty, suit of court, rent, and customary services. (See *Secta*.) In the case of fealty, suit of court, and rent, the remedy is by distress; an action also lies for rent and for subtraction of customary services.<sup>5</sup> (See *Service*, § 6.) In practice, however, the wrong of subtraction is not of common occurrence.

§ 3. In ecclesiastical law, subtraction is the injury of withholding tithes from the rector or vicar. For this injury, a suit lies in the Ecclesiastical Courts, unless the tithes only amount to 50*l.* or under, or unless there is a dispute whether they are payable. But now almost all tithes have

<sup>1</sup> See per Mellish, L.J., *North British, &c. Co. v. London, &c. Co.*, 5 Ch. D. at pp. 583, 584.

<sup>2</sup> Dirksen’s Man. Lat., s. v.

<sup>3</sup> Best on Ev. 306.

<sup>4</sup> Watson’s Comp. Equity, 1260; Jarman on Wills, ii. 771 *et seq.*: *In re Potter’s Trust*, L. R., 8 Eq. 52.

<sup>5</sup> Steph. Comm. iii. 409; Elton, Copyh. 178.

been commuted into rent-charges, for recovering which a special mode of proceeding by distress has been provided, so that suits of subtraction are now quite obsolete.<sup>1</sup> (See *Tithes*.)

Corporation  
sole.

**SUCCESSION—SUCCESSOR.—I.** § 1. In the primary meaning of the word, succession is where property passes on the death of a corporation sole to his successor; “for as the heire doth inherit to the ancestor, so the successor doth succeed to the predecessor.”<sup>2</sup> Therefore, in a conveyance of land to a bishop, parson, or any other sole corporation, the limitation must be to him “and his successors;” otherwise he will take an estate for life only.<sup>3</sup> (See *Fee*, § 3; *Heir*, § 9; *Words of Limitation*.) In some cases a corporation sole can also take personal property by succession.<sup>4</sup> (See *Churchwarden*; *Corporation*.)

Succession by  
statute.

§ 2. There are also statutory modes of succession: thus, where land is conveyed to trustees for persons associated together for religious, educational, literary, scientific or artistic purposes, it passes to their successors in office without conveyance.<sup>5</sup>

Succession of  
the crown.

§ 3. The succession of the crown (the sovereign being a corporation sole) resembles the descent of land, except (i) that in the case of a sovereign dying and leaving no son but several daughters, the crown descends to the eldest alone; and (ii) that it can only descend to Protestants.<sup>6</sup> (See *Demise*.)

Succession  
Duty Act.

**II.** § 4. A succession takes place, within the meaning of the Succession Duty Act, 1853, where a person becomes beneficially entitled to or interested in property upon the death of another. The person so becoming entitled is called “the successor,” and the person from whom he derives his title or interest is called “the predecessor.” Thus, if A. by deed settles property on B. for life, and after his death on C., then on B.’s death a succession takes place, C. being the successor and A. the predecessor. So, if A. dies intestate and entitled to land, a succession to his heir-at-law takes place. § 5. Where a person exercises a general power of appointment which he has become entitled to on the death of another person, he is deemed to be entitled to the property so appointed as a succession derived from the donor of the power. If, therefore, he exercises it by will, two successions take place on his death, one from the donor to the donee (appointor), and another from the appointor to the appointee. But where a person exercises a limited power which he has become entitled to on the death of another person, the appointee (and not the appointor) is deemed to take the property as a succession derived from the donor of the power.<sup>7</sup> The object of the act being to impose a duty on all dispositions and devolutions of property not chargeable under the Legacy Duty Acts, the terms “succession,” “successor” and “predecessor” are in effect applicable only to successions arising from settle-

<sup>1</sup> Steph. Comm. iii. 309.

<sup>2</sup> Co. Litt. 8 b; 250 a.

<sup>3</sup> *Ibid.* 94 b.

<sup>4</sup> Bl. Comm. ii. 430.

<sup>5</sup> Stats. 13 & 14 Vict. c. 28, s. 1; 17 &

18 Vict. c. 112, s. 12; 32 & 33 Vict. c. 26.

<sup>6</sup> Bl. Comm. i. 191; Steph. Comm. ii.

413.

<sup>7</sup> Stat. 16 & 17 Vict. c. 51, s. 4, and see s. 33.

ments inter vivos of real and personal property, and from descents or testamentary dispositions of real and leasehold estates. (See *Leaseholds*.) Where a testator directs real estate to be sold, the proceeds are chargeable with legacy, and not with succession, duty.<sup>1</sup> (See *Succession Duty*; *Legacy Duty*.)

**SUCCESSION DUTY** is a tax imposed since the 19th May, 1853, on every "succession," that is, on the beneficial interest in property to which a person becomes entitled on the death of another, unless it is subject to legacy duty. As to the meaning of "successor" and "predecessor," see *Succession*, § 4.

§ 2. The rates of succession duty are as follows: where the successor is the lineal issue or lineal ancestor of the predecessor, the duty is one per cent. on the value of the succession; if a brother or sister, or descendant of a brother or sister, three per cent.; if a brother or sister of the father or mother of the predecessor, or a descendant of such brother or sister, five per cent.; if a brother or sister of the grandfather or grandmother of the predecessor, or a descendant of such brother or sister, six per cent.; in any other case the duty is ten per cent.<sup>2</sup>

§ 3. The value of a succession to real property is calculated as that of an annuity, equal to the annual value of the property, during the successor's life, or for any less period during which he may be entitled, in accordance with the tables in the schedule to the act. The duty is paid by eight equal half-yearly instalments, commencing at the end of twelve months after the successor first becomes entitled to the beneficial enjoyment of the property.<sup>3</sup> In the case of personal property, if the succession vests the whole beneficial interest immediately in the successor, the duty is chargeable upon the full amount or value of the succession, and is payable at once; if the succession consists of an annuity, the value of the annuity is calculated, and the duty is paid by four annual instalments.<sup>4</sup>

§ 4. Succession duty is not payable (i) on an estate under 100l.: (ii) on any succession under 20l.: (iii) on any succession which, if it were a legacy bequeathed by the predecessor to the successor, would be exempt from legacy duty:<sup>5</sup> (iv) any succession on which probate duty has been paid under the Customs and Inland Revenue Act, 1881, is exempt from duty at one per cent.<sup>6</sup>

**SUE.**—I. § 1. To sue a person is to bring an action, suit, or other civil proceeding against him.

II. § 2. As to the meaning of "sue" in the suing and labouring clause in a policy of insurance, see *Suing and Labouring*.

<sup>1</sup> Stat. 45 Geo. 3, c. 28.

<sup>2</sup> Stat. 16 & 17 Vict. c. 51; Williams, R. P. 288; Thring's Succ. Duty Act; Hanson's Legacy and Succ. Duty Acts. As to the recovery of succession duties, see the Crown Suits Act, 1865.

<sup>3</sup> Sect. 21.

<sup>4</sup> Sects. 20, 32, incorporating ss. 8, 10—13, and 23 of the Legacy Duty Act, 1796.

<sup>5</sup> Sect. 18.

<sup>6</sup> Customs and I. R. Act, 1881, s. 41. The only kind of property to which this exemption can apply seems to be leaseholds.

**SUFFERANCE.** See *Tenant at Sufferance*.

**SUFFRAGAN.** See *Bishop*, § 4.

**SUGGESTIO FALSI** is an active misrepresentation, as opposed to a *suppressio veri*, or passive misrepresentation. (See *Misrepresentation*.)

**SUGGESTION.**—§ 1. In the practice of the Queen's Bench Division of the High Court, facts may in certain cases be brought before the Court by entering a suggestion (that is, an allegation) of them on the roll or record of proceedings in an action. Under the practice of the former common law Courts, the roll was made up, and the suggestion entered thereon, and a copy of it delivered to the other side. Under the new practice no roll is made up in an ordinary action (see *Rolls*, § 6), but it seems that where it is necessary to enter a suggestion, the roll would have to be made up as under the old practice.<sup>1</sup> Probably the only instance of importance in which this practice is followed at the present day, is in an action for breaches of a covenant or of the condition of a bond. (See *Breach*, § 5.) Formerly changes of the parties to an action could be entered on the roll by suggestion,<sup>2</sup> but the new practice as to revivor (*q. v.* §§ 3, 4) seems to have abolished this mode of proceeding.

Roman law.

**SUI JURIS.**—§ 1. In Roman law, persons were divided into two classes, according as they were *sui* or *alieni juris*. Persons subject to the *potesas* of a father, or the *manus* of a husband, or the *mancipium* of a master, were said to be *alieni juris*; the class, therefore, included all persons having a father or other ascendant living (unless they had been emancipated or otherwise freed from the *patria potestas*); all married women who had been married with certain formalities; and all slaves. All other persons were *sui juris*, so that a child of a few years old, if he had no father or other ascendant living, and had not been adopted by any one, was *sui juris*, although he was under disability.<sup>3</sup>

English law.

§ 2. In English law, the term "*sui juris*" (though taken from the Roman law) is used in quite a different sense. A person is said to be *sui juris* if he is not subject to any general disability. Therefore, infants, married women, lunatics, convicts and a few other persons, are not *sui juris*, because they cannot enter into contracts or dispose of their property with the same freedom as ordinary persons. (See *Disability*; *Coverture*; *Guardian*; *Infant*; *Next Friend*; *Curator*.)

**SUICIDE** is where a person kills himself. Deliberate suicide by a sane person is a felony, formerly punishable by forfeiture of the offender's goods and chattels to the crown, and by an ignominious burial in the highway with a stake driven through his body, and without Christian rites of sepulture; but now the only consequences are burial in a churchyard or other burying ground between 9 and 12 at night without Christian

<sup>1</sup> Archbold's Pr. 1242 *et seq.*

<sup>2</sup> See Archbold, 926, n. (*h*), 1245, notes.

<sup>3</sup> Hunter's Roman Law, 48.

rites.<sup>1</sup> And in practice very slight evidence is sufficient to induce a coroner's jury to return a verdict of temporary insanity, which makes the suicide no crime. (See *Inquest* ; *Felo de se.*)

**SUING AND LABOURING CLAUSE** is a clause in a policy of marine insurance, generally in the following form : "In case of any loss or misfortune, it shall be lawful to the assured, their factors, servants and assigns, to sue, labour and travel for, in, and about the defence, safeguard and recovery of the" property insured, "without prejudice to this insurance ; to the charges whereof we the assurers will contribute."<sup>2</sup> The object of the clause is to encourage the assured to exert themselves in preserving the property from loss.<sup>3</sup>

**SUIT** is a generic term, and denotes any legal proceeding of a civil kind brought by one person against another.<sup>4</sup> The term is, however, used in opposition to "action." Formerly the most important kinds of suit in this sense were those brought by bill of complaint (*q. v.*) and information (*q. v.*) in the Court of Chancery, now abolished.<sup>5</sup> A proceeding for nullity or dissolution of marriage, &c. in the Probate, Divorce and Admiralty Division of the High Court is called a suit.

§ 2. In the technical sense of the word, a bond or recognizance given to a public officer as security is said to be put in suit when proceedings are taken to enforce it. Thus, in the practice of the Chancery Division a bond which has been entered into in the name of one of the Record and Writ Clerks as security for costs is put in suit by leave of the Court, when the occasion arises, by the person whose costs were intended to be secured.<sup>6</sup>

As to suit in the sense of a service, see *Secta* ; *Suit of Court*.

**SUIT OF COURT** is a service theoretically due from every tenant of land forming part of, or held of, a manor, and consists in the duty of attending the Courts held by the lord. Free tenants or tenants of freehold land are bound (either personally or by attorney) to attend their lord's Court Baron (*q. v.*), while copyhold tenants are bound to attend personally at the Customary Court. These Courts are still held in some manors.<sup>7</sup> (See *Secta* ; *Service* ; *Subtraction*.)

**SUITORS' DEPOSIT ACCOUNT**.—Formerly suitors in the Court of Chancery derived no income from their cash paid into Court, unless it was invested at their request and risk ; now, however, it is provided by the Court of Chancery (Funds) Act, 1872, that all money paid into Court, and not required by the suitor to be invested, shall be placed

<sup>1</sup> Steph. Comm. iv. 62 ; stats. 4 Geo. 4, c. 52 ; 33 & 34 Vict. c. 23.

<sup>2</sup> Maude & Pollock, Mer. Shipp. 335.

<sup>3</sup> *Booth v. Gair*, 15 C. B. (N. S.) 291 ; *Lohre v. Aitchison*, 2 Q. B. D. 501 ; 3 Q. B. D. 558 ; 4 App. Cas. 755.

<sup>4</sup> Co. Litt. 291 a.

<sup>5</sup> Rules of Court, i. 1.

<sup>6</sup> Daniell's Ch. Pr. 36, 1605.

<sup>7</sup> Elton, Copyh. 178 ; Williams on Seisin, 15, 36. In addition to the suit mentioned in the text (suit service), Reeves describes a kind of suit called suit real, due in respect of residence to a leet or toun (Hist. i. 265 ; Scriven, Copyh. 684).

on deposit and shall bear interest at 2 per cent. per annum for the benefit of the suitor entitled to it. The sum required for the payment of this interest is produced by placing all money in Court not required for meeting current demands in the hands of the Commissioners for the Reduction of the National Debt, who invest it in Government securities. This arrangement is called the "Suitsors' Deposit Account."<sup>1</sup> (See *Account*, §§ 13 *et seq.*)

**SUITORS' FEE FUND** was a fund arising partly from the fees of the Court of Chancery, and partly from the surplus income of the Suitsors' Fund (*q. v.*). Out of it the salaries and other expenses of the Court of Chancery were paid. By the Courts of Justice (Salaries and Funds) Act, 1869, the Suitsors' Fee Fund was transferred to the Commissioners for the Reduction of the National Debt, and the salaries and expenses formerly paid out of it were charged on the Consolidated Fund.<sup>2</sup> (See *Account*, §§ 13, 15.)

**SUITORS' FUND** was a fund belonging to the Court of Chancery (see *Account*, §§ 13, 15), and consisting of two parts. Fund A. consisted of Government stocks resulting from the investment of so much of the money in Court belonging to the suitsors as was not required for current purposes. Part of the income arising from these investments was employed in paying certain expenses of the Court, and the balance was invested in Government stocks, which formed Fund B. Subsequently the surplus income of both funds was annually added to the Suitsors' Fee Fund (*q. v.*). By the Courts of Justice, &c. Act, 1869, the Suitsors' Fund was transferred to the Commissioners for the Reduction of the National Debt, and the Consolidated Fund was made liable for the due payment of the money which belonged to the suitsors and had been invested as above stated.<sup>3</sup> (See *Paymaster-General*.)

§ 2. The Official Solicitor to the Court of Chancery (*q. v.*) was originally called the Solicitor to the Suitsors' Fund, by reason of his duties in connection with that fund.<sup>4</sup>

**SUMMARY.**—§ 1. In procedure, proceedings are said to be summary when they are short and simple in comparison with regular proceedings, that is, in comparison with the proceedings which alone would have been applicable, either in the same or analogous cases, if summary proceedings had not been available. Summary proceedings are sometimes concurrent with regular proceedings, that is, either may be adopted.

Civil. § 2. Petitions, special cases, motions, and summonses, not being interlocutory proceedings in an action or suit, are instances (chiefly occurring in the Chancery Division, under the statutory jurisdiction of the High Court) of summary proceedings in civil cases, as opposed to suits or actions.<sup>5</sup> For examples see *Petition*, § 4; *Summons*, § 6. There are also summary modes of putting an end to an action, without carrying it on to trial, *e. g.*, by obtaining judgment where the defendant has no defence (see *Judgment*, § 9), or by interpleader proceedings.

Criminal. § 3. In criminal cases, summary proceedings are those which may be had and concluded before a magistrate or justices of the peace, as opposed

<sup>1</sup> See the Chancery Funds Consolidated Rules, 1874; Report of the Chancery Funds Commissioners (1864), lvii.

<sup>2</sup> Rep. Chancery Fund Commissioners, 1864.

<sup>3</sup> Chancery Funds Commissioners' Report, 1864.

<sup>4</sup> Legal Dep. Commissioners' Second Report (1874), 40.

<sup>5</sup> Blackstone remarks that the common law is a stranger to summary proceedings, except in the case of contempt of court (Bl. Com. iv. 280).



to regular proceedings by indictment or information and trial by a jury. The Summary Jurisdiction Act, 1879, has much extended the power of magistrates to dispose of cases summarily, provided that the accused, if an adult, consents, and that the offence is one of minor gravity, *e.g.* larceny.<sup>1</sup> (See *Complaint*; *Justice of the Peace*; *Information*, § 16; *Quarter Sessions*.)

As to summary process, see *Process*, § 5, and the Summary Jurisdiction (Process) Act, 1881.

As to summary proceedings in ecclesiastical matters, see *Cause*, § 2. Ecclesiastical.

**SUMMING-UP**, on the trial of an action by a jury, is a recapitulation of the evidence adduced, in order to draw the attention of the jury to the salient points. The counsel for each party has the right of summing-up his evidence, if he has adduced any, and the judge finally sums up the whole.<sup>2</sup> (See *Reply*; *Right to begin*; *Trial*.)

**SUMMONS**.—§ 1. A summons is a document issued from the office of a Court of justice, calling upon the person to whom it is directed to attend before a judge or officer of the Court for a certain purpose. (See *Writ of Summons*; *Motion*; *Petition*.)

§ 2. In the High Court of Justice, a summons is a mode of making an application to a judge or his deputy in chambers (*q. v.*). Summonses are therefore only used on applications which are either of subsidiary importance, or can be conveniently disposed of in chambers, such as applications for enlarging the time to take certain steps, for discovery and production of documents, for appointing examiners and receivers,<sup>3</sup> for leave to sign judgment under Ord. XIV. (see *Judgment*, § 9), for the committal of a judgment debtor, &c., &c. In simple cases, the solicitors of the parties attend on their behalf: in difficult or important cases counsel are instructed.<sup>4</sup>

§ 3. In the Queen's Bench Division some summonses must be heard in the first instance by a master, and others by a judge. An appeal lies from a master to a judge in chambers, and from the judge to the Divisional Court.<sup>5</sup>

§ 4. In the Chancery Division every summons is heard in the first instance before the chief or junior clerk, but either party, if dissatisfied with the decision, is entitled to have the summons heard by the judge in chambers. This is called adjourning the summons to the judge. The judge may also adjourn the summons to be argued in Court; or if he refuses to do so, the dissatisfied party may either move before the judge in Court to rescind the order made in chambers, or may appeal to the Court of Appeal. (See *Appeal*, § 3.)

Chancery  
Division.

Summonses in the Chancery Division are of two kinds:—

(1) § 5. Summonses in pending actions and matters. These are of infinite variety, as already indicated (*supra*, § 2). An important kind is the

Ordinary  
summonses.

<sup>1</sup> Paley on Convictions, 15; Steph. Comm. iv. 329; Summary Jurisdiction Act, 1879, and the Rules and Forms, 1880, issued thereunder.

<sup>2</sup> Smith's Action, 157.

<sup>3</sup> See generally as to summonses, Rules of Court, liv. (especially the Rules of April,

1880); Chitty, Pr. 1598 *et seq.*; Daniell, Ch. Pr. 1050.

<sup>4</sup> Some of the Chancery judges do not hear counsel in chambers.

<sup>5</sup> Rules of Court, liv. 6 (May, 1880), lviiA.

summons to proceed. When a judgment or order has been made in Court directing accounts, inquiries, or other steps to be taken in chambers, the matter is brought before the chief clerk by a summons "to proceed under the judgment (or order), dated the, &c." Appointments before the chief and junior clerks are obtained on this summons, from time to time, until the matter is disposed of, and the certificate made.<sup>1</sup> (See *Certificate*, § 4.)

**Originating.** (2) § 6. An originating summons is so called because it is the first step taken in the matter, that is, the matter is commenced by the issue of a summons in the same way as an action is commenced by the issue of a writ (see *Matter*), and the persons served (the defendants) enter an appearance in the same way as defendants to an action. The most important instance of this kind of summons formerly was the administration summons under 15 & 16 Vict. c. 86, s. 45, on which an order for the administration of the *personal* estate of a deceased person might be made on the application of a creditor, legatee or next of kin without the institution of a regular action or suit.<sup>2</sup> Since the Judicature Acts, however, it has become usual in simple cases to obtain a judgment on a writ of summons, without pleadings, and hence administration summonses are not of such frequent occurrence as formerly. Maintenance orders are sometimes obtained on originating summonses.

**County Court.** II. § 7. In a County Court action as soon as the plaint (*q. v.*) has been entered, a summons requiring the defendant to appear and answer the plaintiff's claim on a certain day, is issued and served on the defendant; attached to it are the particulars of demand (*q. v.*), if any, and endorsed on it are various notices for the guidance of the defendant.<sup>3</sup> Where it cannot be served in time, successive summonses may be issued.<sup>4</sup> In certain cases the plaintiff may, upon filing an affidavit that the debt sued for is due to him, obtain a summons for judgment by default, which informs the defendant that unless within sixteen days after service he gives notice of his intention to defend the action, the plaintiff may sign judgment.<sup>5</sup>

**Successive  
summonses.**

**Default  
summonses.**

§ 8. The attendance of witnesses in County Court actions is enforced by summons, with or without a clause requiring the production of books, &c. in their possession.<sup>6</sup> (See *Subpœna*.)

**Justices of the  
Peace, &c.**

III. § 9. In magisterial practice, a summons is the ordinary way of compelling the appearance of a person against whom a complaint, information or other proceeding has been brought. (See *Warrant*.)

**SUNDAY.**—The principal statutes directed against profanation of the Lord's Day by trading, unlawful pastimes, &c. are 27 Hen. 6, c. 5; 1 Car. 1, c. 1; 29 Car. 2, c. 7; 21 Geo. 3, c. 49, amended by 38 & 39 Vict. c. 80 (as to public entertainments), and the various Factory and Workshop Regulation Acts, and the Licensing Acts (*q. v.*).<sup>7</sup> The stat.

<sup>1</sup> See Daniell, 1085.

<sup>2</sup> See Hunter's Suit, 240; Daniell, Ch. Pr. 1051, 1071.

<sup>3</sup> See County Court Forms, 1875, No. 11; Pollock's C. C. P. 84 *et seq.*

<sup>4</sup> Pollock, 92; C. C. Rules, 1875, viii. 6.

<sup>5</sup> Pollock, 93; County Courts Act, 1875, s. 1.

<sup>6</sup> Pollock, 117.

<sup>7</sup> Steph. Comm. iv. 212. As to Sunday

29 Car. 2, c. 7, forbids the exercise by any person of his ordinary calling on the Lord's Day under a penalty of five shillings: it also makes the service or execution of any writ, process, judgment, &c. on the Lord's Day (except in the case of treason, felony or breach of the peace) absolutely void, and makes the person offending liable to an action for damages. No proceedings can be taken under this act except with the consent of the chief officer of police or magistrate of the district.<sup>1</sup> Subject to the provisions of these statutes it seems that any act or thing done on Sunday is legal and valid.<sup>2</sup>

**SUPERFLUOUS LANDS** are lands acquired by a railway company under its statutory powers, and not required for the purposes of its undertaking. The company is bound within a certain time to sell such lands, and if it does not, they vest in and become the property of the owners of the adjoining lands.<sup>3</sup> (See *Pre-emption*.)

**SUPERINSTITUTION.**—Where a church is full by institution, and a second institution is granted to the same church, this is a superinstitution, and necessarily raises the question who is entitled to the benefice. It is said that the party who obtains a superinstitution may try his title by ejectment, but that in consequence of its inconveniences this method is discouraged, and the more usual remedy of a *quare impedit* adopted.<sup>4</sup>

**SUPERSEDEAS** is a writ which stays or put an end to a proceeding. Thus, if a *certiorari* (*q. v.*) has been wrongly issued, and has been returned, the Court will grant a *supersedeas*.<sup>5</sup> So, where a person has been irregularly found a lunatic, or has been found a lunatic and afterwards recovers, the inquisition may be superseded or set aside on petition by him to the Lord Chancellor.<sup>6</sup>

§ 2. Formerly the writ of *supersedeas* was of great importance in the law of bailable proceedings, it being the means by which a defendant who had been arrested on *mesne* process obtained his discharge. A prisoner entitled to the writ was said to be *supersedeable*.<sup>7</sup>

§ 3. Under the old practice in bankruptcy, when the proceedings were commenced by commission, the bankruptcy was put an end to *ab initio* by superseding the commission which was done by writ of *supersedeas*.<sup>8</sup> The same effect is now produced by annulling the adjudication. (See *Annul*.)

**SUPERSTITIOUS USES AND TRUSTS**, or dispositions of real or personal estate for propagating religious rites not tolerated by the law, are void; such is a bequest for masses for the soul of the testator.<sup>9</sup>

trains on railways, see 7 & 8 Vict. c. 85, s. 10. As to Jews working in workshops, see stat. 34 Vict. c. 19.

<sup>1</sup> Stat. 34 & 35 Vict. c. 87; *Expiring Laws Continuance Acts*, 1880, 1881.

<sup>2</sup> See Benjamin on Sales, 442; citing *Drury v. Defontaine*, 1 Taunt. 131.

<sup>3</sup> Lands Clauses C. Act, 1845, ss. 127 *et seq.*; *Hodges on Railways*, 330; *In re Metr. Dist. Railway and Cosh*, 13 Ch. D.

607.

<sup>4</sup> Phillimore, *Eccl. Law*, 476.

<sup>5</sup> Tidd's Pr. 403.

<sup>6</sup> Pope on Lunacy, 190.

<sup>7</sup> Lee's Dict. Pr. 1301.

<sup>8</sup> 8 Ves. 533; 10 Ves. 104.

<sup>9</sup> *Tudor's Char. Trusts*, 18; *Watson's Comp. Eq.* 39; *West v. Shuttleworth*, 2 M. & K. 684. The rule apparently does not apply to Ireland.

§ 2. Property given by will to superstitious uses goes to the representatives of the testator (his heir, next of kin, residuary legatee, &c. according to circumstances), unless the uses are charitable as well as superstitious, in which case it goes to the crown to be applied to valid charitable objects.<sup>1</sup> (See *Charity*.)

**SUPERVISION.** See *Winding-up*.

**SUPPLEMENTAL BILL.** See *Bill of Complaint*, § 8.

**SUPPLICAVIT.**—When a justice of the peace refuses to compel a person to give security to keep the peace, the person exhibiting the articles (that is, the person making complaint) may apply to the High Court for a *supplicavit*, which is a mandatory writ compelling the justice to require security. But as the High Court may make an order for security to be given without the intervention of a justice of the peace, this writ is seldom used.<sup>2</sup> (See *Articles of the Peace*; *Breaches of the Peace*.)

**SUPPORT.**—The right of support to land is either a natural right or an easement.

Natural right. I. § 1. Every proprietor of land is entitled to so much lateral support from his neighbour's land as is necessary to keep his soil at its natural level, that is, his neighbour must not excavate so close to the boundary as to cause his land to fall or subside. Similarly, if one person is entitled to the surface of land, and the land beneath the surface belongs to another proprietor, the owner of the surface is entitled to vertical support as against him; that is, the owner of the subjacent land must not cause subsidence of the surface unless he has an easement entitling him to do so. (See *Easement*.) This natural right to support, whether lateral or vertical, does not extend to the case of land, the weight of which has been increased by buildings, unless it can be shown that the land would have sunk if there had been no buildings on it.<sup>3</sup>

Easement. II. § 2. The right to extraordinary support, that is, to the support of land on which buildings have been erected, and which, consequently, requires more support than it did in its natural condition, is an easement. It was formerly considered that such an easement was not within the provisions of the Prescription Act (*q. v.*), on the grounds that it is a negative easement; and that the second section of the act only applies to positive easements.<sup>4</sup> Both these propositions have been discredited, if not overruled, by the recent decision of *Dalton v. Angus*;<sup>5</sup> and it is now established that the easement of support may not only exist by virtue of

<sup>1</sup> Tudor, 29 *et seq.*; and see stat. 23 & 24 Vict. c. 134, as to gifts to Roman Catholic charities.

<sup>2</sup> Steph. Comm. iv. 292.

<sup>3</sup> Gale on Easements, 358; Dart's V. & P. 368.

<sup>4</sup> Gale on Easements, 370.

<sup>5</sup> *Angus v. Dalton*, 3 Q. B. D. 85; 4 Q. B. D. 162; 44 L. T. 844.

an express grant, or in the case of an ancient messuage, but may also be acquired by twenty years' uninterrupted enjoyment.

§ 3. The easement of support to a building by a building, or the right of the owner of a building to have it lean against and be supported by a building belonging to his neighbour, seems to stand in the same position. It may also arise by implied grant under a disposition by the owner of two tenements<sup>1</sup> (see *Easement*, § 10).

See *Easement*; *Lost Grant*; *Prescription*; *Ancient Messuages*.

**SUPPRESSIO VERI.** See *Suggestio Falsi*.

**SUPREME COURT OF JUDICATURE** is the Court formed by the Judicature Act, 1873 (as modified by the Judicature Act, 1875, the Appellate Jurisdiction Act, 1876, and the Judicature Acts of 1877, 1879 and 1881), in substitution for the various superior Courts of law, equity, admiralty, probate and divorce, existing when the act was passed, including the Court of Appeal in Chancery and Bankruptcy, and the Exchequer Chamber. It consists of two permanent divisions, viz., a Court of original jurisdiction, called the High Court of Justice, and a Court of appellate jurisdiction, called the Court of Appeal (see those titles).<sup>2</sup> Its title of "supreme" is now a misnomer, as the superior appellate jurisdiction of the House of Lords and Privy Council, which was originally intended to be transferred to it, has been allowed to remain. (See *Court*.)

**SUR—SUR DISCLAIMER—SUR DISSEISIN.**—"Sur" = "upon." In the titles of real actions "sur" was used to point out what the writ was founded upon. Thus a real action brought by the owner of a reversion or seignory, in certain cases where his tenant repudiated his tenure, was called a writ of right sur disclaimer.<sup>3</sup> So a writ of entry sur disseisin was a real action to recover the possession of land from a disseisor.<sup>4</sup> (See also *Cui in Vitâ*; *Cui ante Divortium*; *Writ of Entry*.)

**SURCHARGE.**—§ 1. To surcharge a common is to put more cattle thereon than the pasture and herbage will sustain, or than the commoner has a right to do.<sup>5</sup> As to the remedy for this injury, see *Admeasurement*, § 2. § 2. Where an account is being investigated in the Chancery Division, and the party at whose instance it is taken shows that an item has been omitted for which the accounting party ought to give credit, he is said to surcharge the accounting party.<sup>6</sup> (See *Account*; *Falsify*.) § 3. Under the Public Health Acts, where an auditor disallows an item of expenditure by an urban authority as being illegal, he surcharges it on the person who made or authorized it; in other words, he makes him personally liable for the amount.<sup>7</sup>

Commons.

In accounts.

**ETYMOLOGY.**—French, *sur*, over, in addition, in excess, and *charge*.<sup>8</sup>

<sup>1</sup> Gale, 384 *et seq.*; *Angus v. Dalton*, *supra*.

<sup>2</sup> Judicature Act, 1873, ss. 3, 4.

<sup>3</sup> Bl. Comm. 233.

<sup>4</sup> *Ibid.* 183, note.

<sup>5</sup> Bl. Comm. iii. 237; Co. Litt. 165 a.

<sup>6</sup> Daniell's Ch. Pr. 577.

<sup>7</sup> Local Government Act, 1858, s. 60, § 1, repealed and re-enacted by the Public Health Act, 1875, s. 247, § 7.

<sup>8</sup> See, in *Harrison v. Carter*, 2 C. P. D. p. 32, a description of a charity for the benefit of poor persons "surcharged by children."

**SURETY.**—§ 1. A surety is a person who binds himself to satisfy the obligation of another person, if the latter fails to do so : thus, if A. owes B. money, and C., for good consideration, promises B. that he will pay him the money if A. does not, here C. is a surety for A., the principal debtor, and his promise constitutes a contract of suretyship.<sup>1</sup> § 2. In the general sense of the word, therefore, a surety is the same thing as a guarantor (*q. v.*), but in practice the term is usually restricted to the case of a person who binds himself by a bond : thus, it is frequently necessary for a person who enters upon an office to obtain one or more sureties who bind themselves by a bond to answer for his acts and defaults in the performance of the office, either generally, or to a limited amount or a limited time.<sup>2</sup> A security given in a judicial proceeding also generally takes the form of a bond or recognizance with sureties. (See *Bail; Recognizance; Security*, §§ 2, 13 *et seq.*)

Rights of  
surety.

§ 3. If a surety satisfies the obligation for which he has made himself liable, he is entitled to recover the amount from the principal debtor. If one of several sureties is compelled to pay the whole amount or more than his share, he is entitled to contribution from his co-sureties (see *Contribution*, § 2); and if one of them has become insolvent, the solvent sureties may be compelled to contribute toward payment of the whole debt, as if the insolvent surety had never been liable.<sup>3</sup>

§ 4. It is also a general rule that a surety is entitled to the benefit of all the securities which the creditor has against the principal ; so that if a debt is secured by a bond with a surety, and also by a mortgage, and the surety pays the debt, he is entitled to stand in the place of the mortgagee and obtain repayment out of the mortgaged property.<sup>4</sup> And by the Mercantile Law Amendment Act, 1856, every surety who pays the debt or performs the duty for which he is liable, is entitled to have assigned, to himself or a trustee, every judgment, specialty or other security held by the creditor, and to use the name of the creditor in any action or other proceeding.

Discharge of  
surety.

§ 5. If the creditor releases the principal debtor, this will discharge the surety from liability, unless the creditor reserves his rights against the surety ; such a release is then in effect merely a covenant not to sue the principal debtor.<sup>5</sup> (See *Release*, § 3 ; *Joint*, § 5.) The surety may also be discharged by a variation of the contract by the creditor, or by the substitution of a new contract before breach of the old one.<sup>6</sup>

**SURFACE.** See *Land*, § 2 ; *Minerals* ; *Support*.

**SURMISE** is a suggestion or allegation.

§ 2. In ecclesiastical practice, an allegation in a libel (*q. v.* § 5) is called a surmise. A collateral surmise is a surmise of some fact not appearing in the libel.<sup>7</sup>

<sup>1</sup> See *Lakeman v. Mountstephen*, L. R., 7 H. L. at p. 24.

<sup>2</sup> See *Chitty on Contracts*, 485 *et seq.* ; *Snell's Eq.* 389.

<sup>3</sup> *White & Tudor*, L. C. i., notes to

*Dering v. Earl of Winchelsea*.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Green v. Wynn*, 4 Ch. App. 204.

<sup>6</sup> See *De Colyar on Guarantees*, ch. vi.

<sup>7</sup> *Phill. Eccl. Law*, 1445.

**SURPLUSAGE** is where there is something over or in excess. In pleading, surplusage is the allegation of unnecessary matter, and is forbidden.<sup>1</sup>

§ 2. Where A. holds land of B. in fee at a certain rent (*e. g.* five shillings), and B. holds the same land of C. at a less rent (*e. g.* one shilling), and C. purchases A.'s estate, so that B.'s seignory or mesnalty (*q. v.*) becomes extinct; here C. is bound to pay to B. a rent equal to the difference between A.'s rent and B.'s rent (*i. e.* four shillings), and this is called, in the old books, a rent by surplusage.<sup>2</sup>

**SURPRISE.**—§ 1. Where a person enters into a contract, conveyance, or the like, with excessive haste or want of deliberation, this fact may give rise to the inference that there was no true consent, or that the consent was not free, and that the transaction ought therefore to be set aside on the ground of surprise or improvidence.<sup>3</sup> (See *Catching Bargains; Undue Influence.*)

§ 2. In procedure, a judgment, nonsuit, or order may be set aside, or a new trial ordered, on the ground of surprise, if the Court thinks that substantial injustice has been done. Thus, if a verdict is obtained by a trick, a new trial will be ordered.<sup>4</sup>

**SURREBUTTER**, under the former common law practice, was the pleading which followed the rebutter.<sup>5</sup> The same name is generally applied to the corresponding pleading under the new system. (See *Pleading*, § 6.)

**SURREJOINER**, under the old practice both at common law and in chancery, was the pleading which followed the rejoinder.<sup>6</sup> It had long been obsolete in Chancery. The same name is commonly applied to the corresponding pleading under the new system. (See *Pleading*, § 6.)

**SURRENDER**, in the law of real property, "is a yeelding up an estate for life or yeares to him that hath an immediate estate in reversion or remainder, wherein the estate for life or yeares may drowne [*i. e.* merge] by mutuall agreement betweene them."<sup>7</sup> Thus, if A., being tenant in fee of land, grants a lease for years to B., and B. surrenders the term to A., it ceases to exist, being merged in A.'s reversion. § 2. Surrenders are of two kinds—in deed and in law. A surrender in deed is one made by express words. It must now, in every case, be effected by a deed.<sup>8</sup> Surrenders in law take effect by implication or operation of law, without express words. Thus, if a lessee accepts a new lease incompatible with his existing lease, this operates as a surrender in law of the latter.<sup>9</sup> (See *Merger.*)

§ 3. A surrender is the principal mode of aliening copyholds. Every tenancy in copyholds, though practically amounting to more or less abso-

<sup>1</sup> Rules of Court, xix. 1, 4; Stephen on Pleading (5), 467; Co. Litt. 303 b.

<sup>2</sup> Litt. §§ 231, 232; Co. Litt. 150 b, and Hargrave's note, 309 b.

<sup>3</sup> *Evans v. Llewellyn*, 2 Bro. C. C. 150; 1 Cox, 333; Pollock on Contract, 537.

<sup>4</sup> Archbold's Pr. 1220; Rules of Court, xli. 6.

<sup>5</sup> Stephen, Pl. 64.

<sup>6</sup> *Ibid.*; Mitford, Pl. 321.

<sup>7</sup> Co. Litt. 337 b.

<sup>8</sup> Woodfall's L. & T. 270.

<sup>9</sup> Co. Litt. 338 a; Bl. Comm. ii. 326, n.

lute ownership, is in theory merely a tenancy at will, which is, of course, incapable of being transferred as such by the tenant; for if he attempted to convey his interest by a common law conveyance, he would forfeit his estate.<sup>1</sup> (See *Tenant at Will*.) Hence, when a copyholder wishes to transfer his interest in the land, he surrenders it into the hands of the lord, in favour of (technically, *to the use of*) the intended transferee, or surrenderee, as he is called; and the lord thereupon admits the surrenderee, that is, accepts him as tenant in lieu of the surrenderor.<sup>2</sup> (See *Admittance*.) "The essential part of a surrender appears to be the giving up of the customary seisin to the lord; and where this is effectually done, the form of relinquishment is not, as it seems, essential, unless the rights of a third person are injured."<sup>3</sup> § 4. Formal surrenders are made by the surrenderor delivering to the lord, steward, or other person taking the surrender, a rod,<sup>4</sup> straw, glove, or other symbol which represents the seisin of the land. A memorandum of the surrender is entered on the court rolls, and a copy of it, generally on parchment, and signed by the surrenderor and steward, is delivered to the surrenderee. § 5. A mortgage of copyholds is generally effected by a conditional surrender, or surrender made upon condition that, on payment of the mortgage debt on a certain day, the surrender shall be void. If the debt is not paid on the day fixed, the mortgagor still has an equity of redemption in the same way as if the land were freehold.<sup>5</sup>

Conditional.

As to surrenders of copyholds for estates tail, and as disentailing assurances, see *Estate Tail*, § 6.

Surrender to  
uses of will.

§ 6. Formerly, copyholds in some manors were not devisable at all, or devisable subject to restrictions, while in many manors they were devisable by the testator making a surrender to the use of his will, and then devising the land as he wished. This necessity was abolished by stat. 55 Geo. 3, c. 192; and, by the Wills Act, full provision was made for the devise of copyholds in all cases. It seems, however, that a married woman cannot devise her copyholds without a surrender to the use of her will, made after separate examination by the steward, and with her husband's assent; and that a joint tenant cannot devise his share without a previous surrender.<sup>6</sup>

§ 7. Formerly, surrenders were usually made in Court, that is, at a customary Court Baron (*q. v.*); and surrenders made "out of Court" (that is, at any other place or time), were in some cases invalid, unless they were afterwards presented in Court by the homage.<sup>7</sup> Now, however, the entry of the surrender on the rolls of the manor is sufficient.<sup>8</sup>

Dayne Sur-  
render.

§ 8. "In the extensive district comprised in the manor of Taunton Deane in Somersetshire, there is a peculiar conveyance known as a Dayne Surrender, which is used when a copyholder alienes his tenement, but desires to retain a part for his own life. The purchaser is admitted to the whole

<sup>1</sup> Litt. § 74.

<sup>2</sup> *Ibid.*

<sup>3</sup> Elton, Copyh. 62.

<sup>4</sup> See *Verge*. In practice the rod is generally represented by an office ruler or

an umbrella.

<sup>5</sup> Williams, R. P. 431.

<sup>6</sup> Elton, 85.

<sup>7</sup> Watkins, Copyh. 79.

<sup>8</sup> Stat. 4 & 5 Vict. c. 35, s. 89.



of the land (which is called the Dayne Tenement), and pays a fine of one-third of the amount of an ordinary admittance fine, and further makes himself responsible for the heriot to be paid on the death of the tenant for life. On the death of the surrenderor, the whole land belongs to the Dayne tenant."<sup>1</sup> (See *Copyhold; Presentment*, § 1; *Admittance*.)

§ 9. A corporation created by charter may give up or surrender its charter to the crown, unless the charter was granted under an act of parliament (*e.g.*, the Municipal Corporations Act, 1835), imposing indefeasible duties on the bodies to which it applies.<sup>2</sup> Charter.

**SURROGATE** is a person appointed by a bishop or an ecclesiastical judge to act for him,<sup>3</sup> *e.g.*, to grant licences of marriage.<sup>4</sup>

**SURVIVORSHIP** is where a person becomes entitled to property by reason of his having survived another person who had an interest in it. The most familiar example is in the case of joint tenants, the rule being that on the death of one of two joint tenants the whole property passes to the survivor. (But see *Joint; Jus accrescendi*.) Another example is, the right of a wife—(i) to all her leaseholds not disposed of by her husband during his lifetime by conveyance or other act inter vivos:<sup>5</sup> (ii) to all her choses in action not reduced into possession by him: (iii) to such of her reversionary interests as have not been disposed of by her under Malins's Act<sup>6</sup> (see *Chose in Action; Reduction into Possession; Reversionary Interest*, § 3).

See *Commorientes*.

**SUSPENSION.**—I. § 1. An estate, interest, right or remedy is said to be suspended when it is extinguished for a time, but may afterwards revive: thus, if a copyholder in his own right become seised of the manor in right of his wife, the copyhold interest in his land will be suspended during the coverture; so if a person holding land in fee by certain rents or services, acquires the seignory during his life, the rents, services, &c. are suspended during his life.<sup>7</sup> (See *Unity of Possession*.) Estate, right, &c.

II. § 2. In ecclesiastical law, suspension is of two kinds. Suspension relating only to the clergy is where a clergyman is temporarily deprived either of his office or his benefice, or both: suspension from office prevents him from officiating as a minister; suspension from benefice deprives him of the profits of the living.<sup>8</sup> The other sort of suspension, which extends to the laity as well as the clergy, is suspension ab ingressu ecclesiæ, or from the hearing of divine service and receiving the holy sacrament.<sup>9</sup> Ecclesiastical law:  
ab officio  
et beneficio;  
  
ab ingressu  
ecclesiæ.

<sup>1</sup> Elton, *Copyh.* 81.

<sup>2</sup> Grant on Corporations, 45.

<sup>3</sup> Phill. Eccl. Law, 1191.

<sup>4</sup> Stat. 4 Geo. 4, c. 76, s. 18.

<sup>5</sup> In the case of a married woman married since 9th August, 1870, leaseholds coming to her during coverture under an intestacy belong to her for her separate use (see *Married Women's Property Acts*); Wil-

liams, R. P. 408.

<sup>6</sup> Williams, P. P. 433 *et seq.*

<sup>7</sup> Co. Litt. 313 a; Co. Copy. § 62; Preston's Conv. iii. 9; Gale on Easements, 581 *et seq.*

<sup>8</sup> Phill. Eccl. Law, 1375; *Martin v. Mackonochie*, 4 Q. B. D. 697.

<sup>9</sup> Phill. 1375.

**SYNDIC.**—Where a testator appoints a corporation aggregate to be his executor, administration with the will annexed will be granted to their syndic, that is, a person specially appointed by the corporation for the purpose.<sup>1</sup>

**SYNDICATE** is a mercantile term which has recently come into use to denote an association of persons for a temporary purpose. Thus, if several persons unite to subscribe for, or guarantee the subscription of, an issue of shares or bonds, with a view to dividing the risk and the profit, they are said to form a syndicate. Sometimes a syndicate is formed, by persons who are individually possessed of property of the same description (generally shares, or the like), and wish to subject it to a common management, with a view to its realization, after which each member takes the profit or loss accruing in respect of his proportion.

## T.

**TACIT.**—A communication of intention is said to be tacit when it consists of mere silence.<sup>2</sup>

As to the distinction between “tacit” and “constructive,” “express” and “implied,” see those titles.

**TACKING.**—§ 1. In the law of mortgages, where land is mortgaged by ordinary deeds of mortgage to several persons in succession, each ignorant of the security granted to the other, the general rule is that they rank in order of date. But the first mortgagee, who alone obtains the legal estate,<sup>3</sup> has this advantage over the others, that if he takes a further charge on a subsequent advance to the mortgagor, without notice of any intermediate second mortgage, he will have priority in respect of his subsequent advance over the second mortgagee: in other words, he will be in the same position as if he had made his subsequent advance at the same time that he made his original advance. And if a third mortgagee, who has made his advance without notice of a second mortgage, can procure a transfer to himself of the first mortgage, and thus acquire the legal estate, he may tack or annex his third mortgage to the first mortgage, and so postpone the second mortgagee: in other words, he is in the same position as if he had advanced the amounts of both the first and third mortgages at the date when the first mortgage was made. § 2. The term “tacking,” though especially applied to the case of a subsequent mortgagee getting in the legal estate, is also applied to the first case given above, namely, that of a first mortgagee adding a subsequent advance to his first mortgage. The essentials to

<sup>1</sup> Browne's Probate Pr. 129; Williams on Executors, 220.

<sup>2</sup> Savigny, Syst. iii. 248.

<sup>3</sup> As to the priorities where the first mortgage is an equitable one, see *Priority*.

the operation of tacking are—(i) possession of the legal estate; (ii) absence of notice, at the time of making the advance to be tacked, of the existence of the incumbrance which will be postponed.

§ 3. Tacking was abolished from the 7th August, 1874, to the 1st January 1876, by the operation of the Vendor and Purchaser Act, 1874; it was restored as from the latter date by the Land Transfer Act, 1875, without prejudice to anything done in the interval.<sup>1</sup>

See *Consolidation of Securities*; *Mortgage*; *Priority*.

**TAIL.** See *Estate Tail*.

**TALES** (dissyllabic).—If, when a jury has been summoned, a sufficient number of jurors do not appear, or, if by reason of challenges or exemptions, a sufficient number do not remain to make up the proper number, either party may pray a tales, that is, ask the Court to make up the deficiency. A tales (Latin = such) is a supply of *such* men as were summoned upon the first panel. For this purpose a writ of *decem tales, octo tales*, used to be issued to the sheriff; but by stat. 6 Geo. 4, c. 50, s. 37, the judge is empowered to award a *tales de circumstantibus*, that is, to command the sheriff to return so many other men duly qualified as shall be present or can be found, to be taken first from those summoned on the common jury panel, if the deficiency is of special jurors, and if there are not enough common jurors, then from any persons who are present in Court or can be found.<sup>2</sup> The jurors so added are called talesmen.

**TAXATION—TAXES.**—I. § 1. In public law, taxation signifies the system of raising money for public purposes by compelling the payment by individuals of sums of money called taxes.

§ 2. Taxation is of two kinds. Some taxes are imposed on persons generally, without reference to locality, to raise money for the public expenses of the United Kingdom; other taxes are imposed on persons residing, or owning or occupying property, within a certain district, to raise money for the public expenses of that district. Taxes of the first class are sometimes called imperial, being required for the *imperium* or supreme government; sometimes parliamentary, because their amount is fixed by parliament. Taxes of the second class are called local, parochial, municipal, &c., to denote that they are assessed and levied by local authorities. More often still they are called “rates,” and the term “taxes” is confined to imperial taxes. (See *Rates*.) Tithes (*q. v.*) are in the nature of local taxes, but are not usually so classified.

§ 3. Imperial or parliamentary taxes include—customs; excise duties; stamp duties (including probate, legacy and succession duties); land tax; and income tax (see the various titles; also *Consolidated Fund*). As to

<sup>1</sup> Williams, R. P. 440; Fisher on Mortgage, 599 *et seq.*; White & Tudor, L. C. i. 550.

<sup>2</sup> Bl. Comm. iii. 364; Steph. Comm. iii. 528, iv. 424. It is said, however, that the

old practice of directing a *decem* or *octo tales* to be summoned still applies to trials at bar, as the stat. 6 Geo. 4 is confined to trials at nisi prius. Archb. Pr. 347.

“assessed taxes” (popularly called “queen’s taxes,” to distinguish them from local taxes or rates), see *Excise*.

Of costs.

II. § 4. In procedure, taxation is the process of going through, and, if necessary reducing, the bill of costs of an attorney or solicitor by a judicial officer. In the Queen’s Bench Division, this process is performed by the Masters of the Supreme Court (*q. v.*); in the Chancery Division, by the Taxing Masters (see *Masters*, § 2); in the Probate, Divorce and Admiralty Division, and in the Court of Bankruptcy and the County Courts, by the respective registrars. (See *Registrar*, §§ 2, 3, 9, 17.)

Taxation is of two kinds, taxation in an action, matter or other judicial proceeding, and taxation under the Attorneys and Solicitors’ Act (6 & 7 Vict. c. 73).

In a cause, &c.

§ 5. Taxation of the former kind takes place where costs are awarded to a party and made payable either—(i) by his opponent, or (ii) out of a trust fund or the estate of a deceased person, &c. In the former case, the taxation is voluntary, that is, the person who is ordered to pay the costs is entitled to have them taxed, but he may pay them without taxation if he likes: in the latter case, the taxation is generally compulsory, that is, the costs must be taxed for the protection of the persons interested in the fund or estate, unless they are all *sui juris* and dispense with taxation. Taxation of the latter kind appears to occur only in chancery and probate actions.

Review of.

§ 6. When a party has reason to complain of the manner in which the master (or other officer) has taxed the costs, he may carry in objections before the master, showing the items objected to, and apply to the master to review his taxation. If the objecting party is dissatisfied with the decision of the master, he may apply to a judge at chambers for an order to review the taxation, and the judge then decides (subject to an appeal) whether the objection is well founded.<sup>1</sup>

§ 7. In the Chancery Division, when an interlocutory order directs the payment of costs by one party to another, the latter is entitled to have them taxed and paid at once. In the Queen’s Bench Division, there is generally only one taxation of costs in an action, however many interlocutory applications there may have been; but this rule does not apply to orders of the Court of Appeal.<sup>2</sup>

As to taxation between party and party, and between solicitor and client, see *Costs*, §§ 8 *et seq.*

Under statute.

§ 8. Taxation under the Attorneys and Solicitors’ Act is the remedy for a person who is dissatisfied with a bill of costs rendered to him by his solicitor, whether for services in an action, &c., or in non-contentious business, such as conveyancing. The general rule is that a client can only tax an unpaid bill within a year after it has been delivered, unless there are special circumstances, and that he cannot tax it after it has been paid, unless it was paid under pressure or under protest, &c., and in no case after a year from the payment. On the other hand, a solicitor cannot commence an action for the recovery of costs until a month after he has

<sup>1</sup> Rules of Court (Costs), 32.

<sup>2</sup> *Phillips v. Phillips*, 5 Q. B. D. 60.

delivered to the client a signed bill, that is, a bill signed by him or enclosed in or accompanied by a letter signed by him, and if the client applies for taxation the solicitor is restrained from commencing an action for his costs pending the taxation.<sup>1</sup>

See *Higher and Lower Scale*.

**TAXING OFFICER.**—Each house of parliament has a taxing officer, whose duty it is to tax the costs incurred by the promoters or opponents of private bills.<sup>2</sup> (See *Taxation*, §§ 4 *et seq.*).

**TEMPORALITIES** of a bishop are all such things as he has by livery from the crown, as castles, manors, lands, tenements, tithes, &c.<sup>3</sup> During a vacancy of a bishopric the crown has the custody of the temporalities, and (nominally) the rents and profits thereof.<sup>4</sup> (See *Guardian of the Spiritualities*.)

**TENANCY** is the relation of a tenant to the land which he holds. Hence it signifies (1) the estate of a tenant, as in the expressions "joint tenancy," "tenancy in common;" (2) the term or interest of a tenant for years or at will, as when we say that a lessee must remove his fixtures during his tenancy. (See *Fixtures*, § 3.) In old writers, "tenancy" sometimes denotes the land itself: "the tenant may plead that the tenancy is *extra feudum* of him;"<sup>5</sup> this use of the word is obsolete. (See *Tenant*; *Tenure*.)

**TENANCY IN COMMON**, in the strict sense of the term, is where two or more persons are entitled to land in such a manner that they have an undivided possession but several freeholds: that is, no one of them is entitled to the exclusive possession of any particular part of the land, each being entitled to occupy the whole in common with the others, or to receive his share of the rents and profits; and on the death of any one of them his share passes, not to the survivors, but to his heir or devisee, who then becomes tenant in common with the survivors. Tenants in common may acquire land by several titles, or in several rights, or at different times, and hence the only characteristic common to joint tenants and tenants in common is that of undivided possession.<sup>6</sup>

§ 2. Persons may also be tenants in common of chattels real or personal, so that on the death of one of them his share passes to his personal representatives.<sup>7</sup>

See *Coparcenary*; *Joint Tenancy*; *Estate*; *Partition*; *Prescription*, note (7), p. 632; *Severalty*; *Unity of Possession*.

<sup>1</sup> As to taxation generally, both in causes and under the statute, see Daniell, Ch. Pr. 1238, 1726; Archbold's Pr. 120, 430.

As to taxation of parliamentary costs, see stats. 10 & 11 Vict. c. 69; 42 & 43 Vict. c. 17; May Parl. Pr. 842.

<sup>2</sup> May Parl. Pr. 843.

<sup>3</sup> Phillimore Eccl. Law, 78.

<sup>4</sup> Steph. Comm. ii. 530.

<sup>5</sup> Co. Litt. 1 b.

<sup>6</sup> Litt. § 292; Co. Litt. 188 b; Williams, R. P. 138; White & Tudor's L. C. i. 160 *et seq.*

<sup>7</sup> Litt. §§ 319 *et seq.*

**TENANT.**—§ 1. Strictly speaking, a tenant is a person who holds land; but the term is also applied by analogy to personalty: thus we speak of a person being tenant for life or tenant in common of stock.

§ 2. In its proper use, "tenant" connotes either estate or tenure. Every person who has an estate in land is a tenant; thus, a person who has an estate in fee simple is a tenant in fee simple, and a person who has an estate in joint tenancy is a joint tenant (see the following titles). Again, every tenant holds the land by tenure, "because all the lands and tenements in England in the hands of subjects are holden mediately or immediately of the king. . . . And therefore the king in this sense cannot be said to be a tenant, because he hath no superior but God Almighty."<sup>1</sup> In this sense "tenant" is opposed to "lord" (*q. v.*, and see *Tenure*).

§ 3. In its more popular sense, "tenant" signifies a lessee of land or buildings for occupation, agriculture, &c. (See *Lease*; *Landlord and Tenant*; *Term*, § 3.)

**TENANT AT SUFFERANCE** is a person who has originally come into possession of land by a lawful title, and holds such possession after his title has determined. "A tenant at sufferance is he that at the first came in by lawfull demise, and after his estate ended continueth in possession and wrongfully holdeth over. As [where] tenant *pur terme d'auter vie* continueth in possession after the decease of *cestui que vie*, or [where] tenant for yeares holdeth over his terme."<sup>2</sup> A tenancy at sufferance is a chattel interest. (See *Chattel*; *Estate*, § 5.)

§ 2. At common law, a tenant at sufferance is not a trespasser until the lessor or person entitled to the possession enters on the land, because his continuance in possession is imputed to the laches of the lessor in not entering at once;<sup>3</sup> but this doctrine has been modified by statute. (See *Holding over*.)

**TENANT AT WILL** "is where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him."<sup>4</sup> Similarly the tenant may leave when he likes. He has a right to emblements (*q. v.*), and to remove his goods, &c., if he is turned out by the landlord. He is liable for voluntary waste.

§ 2. A tenancy at will may be created by parol (if followed by entry) or by deed. It may be determined not only by the will of either party, but also if the tenant should assign his estate to another, or if he should commit waste.<sup>5</sup> As this kind of letting is very inconvenient to both parties, it is scarcely ever adopted; and in construction of law, a lease at an annual rent, made generally without expressly stating it to be at will,

<sup>1</sup> Co. Litt. 1 a.

<sup>2</sup> *Ibid.* 57 b.

<sup>3</sup> *Ibid.*

<sup>4</sup> Litt. § 68.

<sup>5</sup> Co. Litt. 57 a.

and without limiting any certain period, is not a lease at will, but a lease from year to year.<sup>1</sup> (See *Tenancy from Year to Year*.)

A tenancy at will is a chattel interest in land.<sup>2</sup> (See *Chattel; Estate*, § 5.)

**TENANT BY COPY OF COURT ROLL** (shortly, "tenant by copy") is the old-fashioned name for a copyholder.<sup>3</sup> (See *Copyholds*.)

**TENANT BY THE CURTESY.** See *Curtesy*.

**TENANTS BY THE VERGE** "are in the same nature as tenants by copy of court roll [that is, copyholders]. But the reason why they be called tenants by the verge, is, for that when they will surrender their tenements into the hands of their lord to the use of another they shall have a little rod (by the custome) in their hand, the which they shall deliver to the steward or to the bailife . . . and the steward or bailife according to the custome shall deliver to him that taketh the land the same rod, or another rod, in the name of seisin; and for this cause they are called tenants by the verge, but they have no other evidence [title deed] but by copy of court roll."<sup>4</sup> (See *Surrender*, § 4.)

**TENANT FOR LIFE** is a person who is entitled to land or tenements either for the term of his own life or for that of another person. In the latter case he is called tenant pur autre vie, and the person for whose life the land is holden is called the cestui que vie.<sup>5</sup> (See *Occupancy*, § § 3 *et seq.*)

§ 2. An estate for life may be created by deed of grant or feoffment, or by will. At the present day estates for life are principally created by settlements and wills: as where property is given to a man for his life, and after his death to his children. (See *Assignment; Heir*, § 9; *Surrender*.)

§ 3. An ordinary tenant for life is not allowed to commit waste, but if his estate is given to him without impeachment of waste he may cut timber and open mines, &c., so long as he does not commit equitable waste.<sup>6</sup> (See *Waste*.) As to leases by tenants for life, see *Settled Estates Act*. See also *Emblements; Improvement of Land Acts*.

§ 4. Where a person has a life interest in a chattel (*e.g.*, in a sum of stock), he is sometimes called a tenant for life.

**TENANT FOR YEARS.**—§ 1. "Tenant for terme of yeares is where a man letteth lands or tenements to another for terme of certaine yeares, after the number of yeares that is accorded between the lessor and the lessee. And when the lessee entreth by force of the lease, then is he

<sup>1</sup> Williams, R. P. 373; Woodfall's L. & T. 208.

<sup>2</sup> Williams, R. P. 390.

<sup>3</sup> Litt. § 73.

<sup>4</sup> Litt. § 78; Co. Litt. 61 a.

<sup>5</sup> Litt. § 56; Co. Litt. 41 b; Williams, R. P. 16 *et seq.*

<sup>6</sup> Williams, 25.

tenant for terme of yeares; and if the lessor in such case reserve to him a yearly rent upon such lease, he may chuse for to distraine for the rent in the tenements letten, or else he may have an action of debt for the arrerages against the lessee."<sup>1</sup> A tenant for years is liable for waste (*q. v.*).<sup>2</sup>

§ 2. The expression "tenant for years" is not much used at the present day. Where a term is created by an ordinary lease, the tenant is called lessee. As to his rights and liabilities, see *Lease; Landlord and Tenant; Fixtures; Interesse Termini*. If the term is one of those long terms created by settlements and the like, under which no rent, covenants, &c. are reserved, the tenant is called a "trustee of the term." (See *Term*, § 3.)

**TENANT FROM YEAR TO YEAR** is a tenant of land whose tenancy can only be determined by a notice to quit expiring at that period of the year at which it commenced. In the case of ordinary tenancies from year to year a six months' notice to quit is required.<sup>3</sup> Thus, if a house is held on a tenancy from year to year, beginning at Midsummer, and either the landlord or the tenant wishes to determine it, he must, at or before Christmas, give notice to the other to quit at Midsummer following.

§ 2. A tenancy from year to year of land subject to the provisions of the Agricultural Holdings Act, 1875 (*q. v.*), requires a year's notice to quit.<sup>4</sup>

§ 3. Whenever one person holds land of another, and there is no express limitation or agreement as to the term for which it is to be held, then, if the rent is payable with reference to divisions of the year (*e.g.*, quarterly), the tenancy is deemed to be a tenancy from year to year.<sup>5</sup> (See *Tenant at Will*.)

**TENANT IN FEE.** See *Fee*.

**TENANT IN TAIL.** See *Estate Tail*.

**TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINCT** "is where tenements are given to a man and his wife in especiall taile. If one of them die without issue, the survivor is tenant in taile after possibility of issue extinct,"<sup>6</sup> because there is no possibility of issue being born capable of inheriting the estate. And so if tenements are given to a man and the heirs of his body by his present wife, and the wife dies without issue, then the husband is tenant in tail after possibility of issue extinct,<sup>7</sup> because no issue by another wife could inherit the estate tail. Such a tenant is, in effect, only a tenant for his own life; for he cannot bar the entail;<sup>8</sup> and on his death the estate will pass to the person next entitled in remainder or reversion. The tenancy has, how-

<sup>1</sup> Litt. § 58.

<sup>2</sup> *Ibid.* § 67.

<sup>3</sup> Williams, R. P. 391.

<sup>4</sup> Stat. 38 & 39 Vict. c. 92; Woodfall, 302.

<sup>5</sup> Woodfall's Landlord & Tenant, lxxi. 201, 300.

<sup>6</sup> Litt. § 32.

<sup>7</sup> *Ibid.* 33.

<sup>8</sup> 3 & 4 Will. 4, c. 74, s. 18.



ever, some of the privileges of an estate tail, *e. g.*, the tenant is not punishable for waste.<sup>1</sup> (See *Estate Tail*.)

**TENANT IN TAIL EX PROVISIONE VIRI.**—A woman was said to be tenant in tail ex provisione viri where she had an estate tail, either alone or jointly with her husband, in any lands or hereditaments inherited or purchased by her husband, or given to the husband and herself by any of the ancestors of the husband. Such a tenant in tail could not bar the entail after the death of the husband except with the consent of the issue in tail.<sup>2</sup> This kind of estate no longer exists.<sup>3</sup>

**TENANT TO THE PRÆCIPE.**—Before the Fines and Recoveries Act, if land was conveyed to a person for life with remainder to another in tail, the tenant in tail in remainder was unable to bar the entail without the concurrence of the tenant for life, because a common recovery could only be suffered by the person seised of the land. In such a case, if the tenant for life wished to concur in barring the entail, he usually conveyed his life estate to some other person in order that the præcipe in the recovery might be issued against the latter, who was therefore called the tenant to the præcipe.<sup>4</sup> (See *Præcipe*, § 3; *Recovery*, § 7.)

**TENANT-RIGHT.**—I. § 1. In agricultural districts, tenant-right Agricultural  
lands. signifies the right of a tenant to claim a beneficial interest in the land, notwithstanding the expiration of his lease. In England, different usages have long prevailed in different counties and districts, conferring on an outgoing agricultural tenant a claim to remuneration for various operations of husbandry, from reaping the advantage of which he is prevented by the termination of his tenancy. Thus, by what is called the Lincolnshire tenant-right custom, if a tenant spreads chalk or bones upon the land, the money expended in this operation is divided by a certain number of years (three to seven); and if the tenant quits before the expiration of that period, he receives from the landlord a part of his outlay, proportionate to the number of years of the period remaining unexpired.<sup>5</sup>

§ 2. A kind of statutory tenant-right has been created in some cases by the Agricultural Holdings Act, 1875 (*q. v.*).

II. § 3. Tenant-right estates are a peculiar kind of customary freeholds, found in the north of England. Although they appear to have many qualities and incidents which do not properly and ordinarily belong to villenage or copyhold tenure: and also to have originally had some which savoured more of military tenure by knight-service: and to want some of the characteristic qualities and circumstances which belong to copyhold tenure (namely, in not being holden at the will of the lord and in not being alienable by surrender and admittance): it seems to be settled that these customary tenant-right estates are not freehold, but copyhold.<sup>6</sup> (See *Customary Freeholds*.) Tenant-right  
estates.

**TENDER.**—§ 1. A tender is an offer by a debtor to his creditor of the amount of the debt. The offer must be in money, which must be

<sup>1</sup> Co. Litt. 27 b; Litt. § 34.

<sup>2</sup> Stats. 11 Hen. 7, c. 20; 32 Hen. 8, c. 36; Co. Litt. 326 b.

<sup>3</sup> 3 & 4 Will. 4, c. 74, s. 16; Shelford, R. P. Stat. 322.

<sup>4</sup> Williams on Seisin, 169.

<sup>5</sup> Rep. on Agric. Customs, 16 *et seq.*; Cooke's Agric. Holdings Act, 6.

<sup>6</sup> *Doe v. Huntingdon*, 4 East, 271, cited by Elton, Copyh. 6.

actually produced to the creditor, unless by words or acts he waives production: therefore, a mere statement by the debtor that he has the money in his possession ready for payment is not sufficient, even if the creditor says he will not receive it.<sup>1</sup> But if the debtor brings the money in purses or bags, it is not necessary to show or count it, because that is "the usual manner to carry money in, and then it is the part of the party that is to receive it to put it out and tell it."<sup>2</sup> The offer must also be unconditional. If the debtor requires a receipt, he must prepare and stamp it, and ask the creditor to sign it, and if the latter refuses to do so he is liable to a penalty.<sup>3</sup>

Plea of tender. § 2. If a debtor has made a tender, and continues ready to pay, he is exonerated from liability for the non-payment, but the debt is not discharged. Therefore if he is sued he should plead the tender, and also allege that he always was and still is ready to pay the debt, and he must pay the money into Court: if he can maintain the defence of tender and readiness to pay, he will be entitled to judgment for his costs.<sup>4</sup>

Legal tender. § 3. Money is said to be legal tender when a creditor cannot refuse to accept it in payment of a debt. Coins issued by the Royal Mint for circulation in the United Kingdom are legal tender; gold coins up to any amount, silver up to 2*l.*, and bronze coins up to 1*s.* Gold coins coined at certain colonial mints are also legal tender in this country. Notes of the Bank of England are legal tender.<sup>5</sup>

Goods. § 4. The term "tender" is also applied to goods when they are offered to a person in performance of a contract for their delivery.

**TENEMENT** signifies a thing which is the subject of tenure (*q. v.*). The term "includeth not only all corporate inheritances [*i. e.*, corporeal hereditaments] which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exercisable within the same, though they lie not in tenure . . . as rents, estovers, commons, or other profits whatsoever granted out of land; or uses, offices, dignities, which concerne lands or certain places . . . because all these savour of the realtie."<sup>6</sup> But a personal hereditament, such as an annuity granted to a man and his heirs, is not a tenement. (See *Hereditament*; *Estate Tail*, § 5; *Land*.)

§ 2. In popular language, "tenement" means a house. (See *Messuage*.)

As to "dominant" and "servient" tenements, see *Easement*.

ETYMOLOGY.]—Norman-French, *tenement*,<sup>7</sup> from Latin, *tenere*, to hold.

**TENENDUM**.—(Latin = "to be held"). In a deed of conveyance of land, the tenendum is the clause which formerly indicated the tenure by which the grantee was to hold the land of the grantor—"tenendum de me et

<sup>1</sup> Leake on Contracts (2nd edit.), 862; *Thomas v. Evans*, 10 East, 101.

<sup>2</sup> Co. Litt. 208 a.

<sup>3</sup> Leake, 866; *Laing v. Meader*, 1 C. & P. 257.

<sup>4</sup> Leake, 859.

<sup>5</sup> *Ibid.* 863; Coinage Act, 1870; Colonial Branch Mint Act, 1866; stat. 3 & 4 Will. 4, c. 98.

<sup>6</sup> Co. Litt. 19 b, 6 a; Perkins, § 114.

<sup>7</sup> Britton, 163.

*hæredibus meis sibi et hæredibus suis, per servitium,*" &c. When the statute *Quia Emptores* abolished subinfeudation, the clause was altered to indicate that the grantee was to hold of the superior lords—" *tenendum de capitalibus dominis*;" but now it simply says that the land is to be held by the grantee, without mentioning of whom.<sup>1</sup> (See *Tenure*; *To have and to hold*; *Habendum*; *Quia Emptores*.)

**TENOR.**—The tenor of a document is its purport and effect, as opposed to the exact words of it. Thus, on a writ of certiorari (*q. v.*) it is sometimes sufficient to certify the tenor of the record, while in other cases the record itself must be certified.<sup>2</sup>

As to an executor according to the tenor of the will, see *Executor*, § 3.

**TENTERDEN'S ACT** is the statute 9 Geo. 4, c. 14. It is a supplement to the Statute of Frauds (*q. v.*) and requires the following promises and engagements to be in writing: (i) an acknowledgment of a debt barred by the Statute of Limitations; the act further provides that an acknowledgment by one joint contractor shall not affect the others (see *Acknowledgment*, § 1; *Limitation*, § 8): (ii) a promise to pay a debt incurred, or a ratification of a contract made, during infancy (see *Infant*): (iii) a representation as to a person's character, ability, &c. made to enable him to obtain money or goods upon credit:<sup>3</sup> (iv) executory contracts for the sale of goods, as to which see *Statute of Frauds*.<sup>4</sup>

**TENTHS** are the tenth part of the annual profit of an ecclesiastical benefice according to the valuation contained in the *Valor Beneficiorum* or King's Books, compiled in Henry VIII.'s reign.<sup>5</sup> As to the origin and history of tenths, see *First Fruits*. § 2. These ecclesiastical tenths must not be confounded with the tax consisting of one-tenth of every man's whole personal property, formerly levied by the crown under the name of tenths.<sup>6</sup>

**TENURE.**—I. § 1. Tenure in its general sense is a mode of holding Offices, &c. or occupying: thus we speak of the tenure of an office, meaning the manner in which it is held, especially with regard to time (tenure for life, tenure during good behaviour), and of tenure of land in the sense of occupation or tenancy, especially with reference to cultivation and questions of political economy, *e. g.*, tenure by peasant proprietors, cottiers, &c.<sup>7</sup>

II. § 2. In its more technical sense, tenure signifies the mode in Land. which all land in England is theoretically owned and occupied. The rule is that no person except the Queen can be the absolute owner of land in

<sup>1</sup> Sheppard, Touch. 79; Williams on Seisin, 9.

<sup>2</sup> Gilb. Exec. 143.

<sup>3</sup> The words of the statute have been misplaced: it reads "obtain credit, money or goods upon." See Williams P. P. 106.

<sup>4</sup> Williams P. P. 104 *et seq.*

<sup>5</sup> Steph. Comm. ii. 533.

<sup>6</sup> *Ibid.* 554.

<sup>7</sup> J. S. Mill, Polit. Econ. bk. ii. ch. 9; the Cobden Club Essays on the Tenure of Land; Reports by Consuls on Tenures.

England, because all lands in the hands of subjects are held of some superior, and mediately or immediately of the crown; that is, every person who is possessed of land is theoretically merely a tenant and owes obligations in respect of it either to the crown or to an intermediate lord. The manner of his possession is called tenure, and the extent of his interest is called an estate (*q. v.*). The rule is a relic of the feudal system, and can only be understood with reference to it;<sup>1</sup> in practice it has but little effect except in respect of manors and copyhold land, an ordinary tenant in fee simple of freehold land being to all intents and purposes absolute owner. (See *Feudal System*; *Escheat*; *Copyhold*; *Lord*; *Tenant*; *Tenement*; *Faalty*; *Homage*; *Service*; *Manor*.)

*Perfect.* I. § 3. With reference to the relation between the lord and the tenant, a tenure is either perfect or imperfect. A perfect tenure is where one person holds land of another, or of the crown, in fee simple, and this is accordingly subdivided into (a) tenure in capite or in chief, which is the tenure existing between the crown and those who hold land of it directly;<sup>2</sup> and (b) mesne tenure, which is where one subject holds land of another. (See *Mesne*.)  
*In capite*; mesne.  
*In gross.* (See *Mesne*.) § 4. When land is held of a private person merely by reason of his having the seignory of that particular land, the tenure is technically called a tenure in gross, as opposed to the case of land being held of a person in his capacity of owner of a manor, county palatine or the like.<sup>3</sup>  
*Imperfect.* § 5. Imperfect tenure is that which exists between a tenant of land and a person to whom he has granted a smaller estate than his own, as where a tenant in fee simple creates an estate in tail or for years. § 6. An imperfect tenure may be created by anyone at the present day, while a perfect tenure can now only be created by the crown.<sup>4</sup> (See *Subinfeudation*.)

II. With reference to the services to which they give rise, tenures are of various kinds.<sup>5</sup> (See *Service*, § 1.)

*Lay.* 1. § 7. Temporal or lay tenures are those by which land is or used to be held by secular persons. They are of two kinds according as their services were originally free or base. (A) To the former class (frank or freehold tenure) belong (a) knight's service with its varieties (grand serjeanty, escuage, castle ward and cornage, which are commonly called feudal tenures par excellence, and have all been abolished by being converted into common socage), and (b) free socage with its varieties (petty serjeanty, burgage tenure, borough-English and gavelkind). (B) Base or villein tenures are (a) pure villenage, which no longer exists, except in the form of copyhold and customary freehold tenures; and (b) the obsolete privileged villenage or villein socage, from which is derived tenure in ancient demesne.  
*Free.* (See the various titles; also *Tenant-Right*, § 3).  
*Base.* § 8. Copyhold, ancient demesne and customary freehold are sometimes called customary tenures, because they depend on local custom, and not on the general law.<sup>6</sup>  
*Customary.*

<sup>1</sup> Wright on Tenures, *passim*.

<sup>2</sup> Bl. Comm. ii. 60. As to the proper meaning of the expression, see *In Capite*.

<sup>3</sup> Co. Litt. 108 a.

<sup>4</sup> Co. Copyh. 48.

<sup>5</sup> Bl. ii. 60; Stephen's Comm. i. 186.

<sup>6</sup> Elton, Copyh. 7. There are sometimes customs incident to the tenure of a freehold estate in fee simple, but this does not make the tenure a customary one: Williams on Seisin, 11; Blount's Tenures, *passim*.

2. § 9. Ecclesiastical or spiritual tenures are: tenure in frankalmoign, and tenure by divine service (*q. v.*).<sup>1</sup> *Ecclesiastical or spiritual.*

ETYMOLOGY.]—Norman-French, *tenure*; from Latin, *tenere*, to hold.<sup>2</sup>

**TENURE BY DIVINE SERVICE** is where an ecclesiastical corporation, sole or aggregate, holds land by a certain divine service, as to say prayers on a certain day in every year, "or to distribute in almes to an hundred poore men an hundred pence at such a day."<sup>3</sup> This tenure differs from frankalmoign in the service being certain, in consequence of which the lord may distrain if the service is not performed. Fealty is also due by the tenant.<sup>4</sup> (See *Frankalmoign*; *Service*, § 2; *Tenure*.)

**TERM.**—I. § 1. In the law of real property, a term of years is where a man lets lands or tenements to another for a certain number of years,<sup>5</sup> as in the case of an ordinary lease for seven years; the word "term" not only signifies the limit of time, but also the estate and interest that pass for that time, so that if a lease is surrendered before the expiration of the time, the term is at an end.<sup>6</sup> A tenant for term of years is called in the old books a termor.<sup>7</sup> Term of years.  
Termor.

§ 2. A term is personal property (see *Chattels*; *Estate*, § 5; *Survivorship*), except in the respects mentioned in the title *Leaseholds*.

§ 3. In practice, the word "term" is seldom applied to a term of years granted for the purpose of occupation by the termor, such a term being described as a lease (*q. v.*),<sup>8</sup> while "term" generally signifies a long term of years granted, not for the purpose of occupation by the grantee, but as security for the performance of an obligation, such as the payment of money.<sup>9</sup> For this purpose it is often more convenient to limit a long term to the person in whose favour the obligation is created, and to allow the ownership of the property, subject to the term, to remain in the person entitled to the enjoyment of it, than to transfer the whole ownership as security, as in the case of a mortgage (*q. v.*). Thus, when land is settled on the marriage of the owner, it is usual to provide for the payment of a jointure to the wife, and of portions for the younger children, without interfering with the possession of the estate by the husband. This is done by vesting long terms of years (from 99 to 1,000) in trustees, upon trust, out of the rents and profits of the estate, or by sale or mortgage thereof for the whole or any part of the term, to raise the money required, and upon trust to permit the tenant for life to receive the residue of the rents and profits. In practice, however, the power thus created of receiving the rents directly from the tenants, or of selling or mortgaging the term, is rarely exercised, except for raising gross sums

<sup>1</sup> Co. Litt. 95 a. As to tenure by priority and posteriority, see 1 Rep. 102 b. note.

<sup>2</sup> Britton, 162 b; Co. Litt. 1 a. As to the origin of tenures, see Maine, *Early Inst.* 119 *et seq.*

<sup>3</sup> Litt. § 137. It was originally called tenure in alms, as distinguished from tenure

in free alms (frankalmoign). Britton, 164 b.

<sup>4</sup> *Ibid.*; Co. Litt. 96 b.

<sup>5</sup> Litt. § 58.

<sup>6</sup> Co. Litt. 45 b.

<sup>7</sup> Litt. § 60.

<sup>8</sup> See *Belaney v. Belaney*, L. R., 2 Ch.

138.

<sup>9</sup> Williams, R. P. 412.

(*e. g.*, portions), as it is to the advantage of the tenant for life to keep down the annuities so that he may not be disturbed in the possession of the land.<sup>1</sup> § 4. Terms created in this manner are called pin-money-terms, jointure-terms, portions-terms, &c. according to the purposes for which they are created.<sup>2</sup> (See *Settlement*, § 4.)

**Satisfied term.** § 5. When the purpose for which a term has been created is accomplished, the term is said to be satisfied. (See *Cesser*.)

**Attendant term.** § 6. Formerly, when a term had become satisfied, it was usual in some cases to keep it on foot "in trust to attend the inheritance," as it was expressed. Thus, if property subject to a long term was sold, so that the powers of raising portions, &c. out of the land were no longer exerciseable, the purchaser often preferred to keep the term on foot, because it protected him from any unknown incumbrances on the freehold created by the former owner since the commencement of the term, such incumbrances being postponed until the expiration of the term. The purchaser, therefore, would have the term assigned to a trustee in trust for him, his heirs and assigns, and to attend the inheritance. Such a term was called an attendant term, while an ordinary term was called a term in gross.<sup>3</sup> Now, by the stat. 8 & 9 Vict. c. 112, every term becoming attendant upon the inheritance of land, immediately ceases and determines; but the protection afforded by attendant terms existing before the act is preserved.<sup>4</sup>

**Term in gross.** § 7. By the Conveyancing Act, 1881, where a residue unexpired of not less than 200 years of a term which, as originally created, was for not less than 300 years, is subsisting in land, without any trust or right of redemption affecting the term in favour of the freeholder or reversioner, and without any rent having a money value, then (i) any person beneficially entitled, in right of the term, to possession of any land comprised in the term, or (ii) any person who is in receipt of the income of the land in right of the term, or in whom the term is vested in trust for sale, or (iii) any person in whom the term is vested as personal representative of any deceased person, may by deed declare that the term shall be enlarged into a fee simple. Thereupon the term is enlarged accordingly, and the person in whom the term was vested acquires the fee simple, subject to the same trusts, powers, rights, obligations, &c. as the term would have been subject to.<sup>5</sup> "Numerous instances occur in practice in which estates really held merely for the residue of long terms are practically treated as freehold. This section enables such terms, when the residue is not less than 200 years and the original term not less than 300 years, to be enlarged into a fee simple."<sup>6</sup>

**Enlargement of terms.** II. § 8. "Term" also signifies a portion of the year during which, according to the former practice of the Courts, judicial business could

**Law terms.**

<sup>1</sup> Williams, 413; Elphinstone, Conv. 325.

<sup>2</sup> Elphinstone, 328.

<sup>3</sup> As to the rule that the beneficial interest in an attendant term did not pass by a general bequest, see Co. Litt. 111 b;

Hargrave's note (3); *Gunter v. Gunter*, 23 Beav. 571; *Belaney v. Belaney*, L. R., 2 Ch. 138.

<sup>4</sup> Williams, 416 *et seq.*

<sup>5</sup> Sect. 65.

<sup>6</sup> Williams's Conveyancing Act, 102.

alone be transacted. By modern statutes, however, a considerable part of the intervening vacations was made available for the sittings of the Courts and other business; and now by the Judicature Acts, 1873, 1875, the division of the year into terms has been abolished, so far as relates to the administration of justice, the year being now divided into sittings and vacations (*q. v.*);<sup>1</sup> but the terms still exist for some purposes,<sup>2</sup> *e. g.*, in computing the period required for a call to the bar by the Inns of Court. The terms for judicial business were—(1) Hilary, from 11th to 31st January; (2) Easter, from 15th April to 8th May; (3) Trinity, from 22nd May to 12th June; and (4) Michaelmas, from 2nd to 25th November.<sup>3</sup>

III. § 9. In ecclesiastical procedure, term signifies a period. Thus, a term probatory is the time assigned by the Court for the examination of witnesses.<sup>4</sup> Ecclesiastical procedure.

### TERM OF YEARS—TERMOR. See *Term*, § 1.

**TERRE-TENANT** or **TER-TENANT**, which in Norman-French literally means “land-holder,” is used in the old books to signify a person who has the seisin of land, as opposed either (i) to the lord of whom he holds it, and who merely has a seignory (*q. v.*), or (ii) to a person to whose use he was seised of the land, before the Statute of Uses. Thus, if before the Statute of Uses, A. conveyed land by feoffment to B. and his heirs, to the use of C. and his heirs, B. was called the terre-tenant or feoffee to uses, and C. was called the cestui que use.<sup>5</sup> (See *Use*.) The word is now obsolete. § 2. In the law of execution a “terre-tenant” is an owner in fee of land which he has acquired from a defendant who has suffered judgment. Formerly every judgment charged the land of the defendant, and if he died after judgment, execution might be issued against his heirs and terre-tenants.<sup>6</sup> (See *Judgment*, § 16.)

**TERRITORIAL—TERRITORIALITY.**—These terms are used to signify connection with, or limitation with reference to, a particular country or territory. Thus, “territorial law” is the correct expression for the law of a particular country or state<sup>7</sup> (*e. g.*, England), although “municipal law” is more common (see *Law*, § 3). “Territorial waters” are that part of the sea adjacent to the coast of a given country which is by international law deemed to be within the sovereignty of that country, so that its Courts have jurisdiction over offences committed on those waters, even by a person on board a foreign ship. The ordinary limits of territorial waters are a distance of one marine league from low-water mark.<sup>8</sup> (See *High Seas*, § 1, and note; *King’s Chambers*.)

As to territorial jurisdiction, see *Jurisdiction*, § 6: see also *Extra-Territoriality*.

<sup>1</sup> Jud. Act, 1873, ss. 26 *et seq.*

<sup>2</sup> *College of Christ v. Martin*, 3 Q. B. D. 16.

<sup>3</sup> Smith’s *Action* (11th edit.), 17; Arch. Pr. 162. For the history of terms, see Steph. Comm. iii. 482 *et seq.*

<sup>4</sup> Phill. Eccl. Law, 1256.

<sup>5</sup> Co. Litt. 271 b; Bl. Comm. ii. 91, 328.

<sup>6</sup> See Wms. Saunders, ii. 51; Archbold, Pr. 928.

<sup>7</sup> Savigny, Syst. viii. *passim*.

<sup>8</sup> Territorial Waters Juris. Act, 1878 (passed in consequence of the decision in *Reg. v. Keyn*, 2 Ex. D. 63).

**TESTABLE.**—A person is said to be testable when he has capacity to make a will; a man of twenty-one years of age and of sane mind is testable. The capacity to make a will must be distinguished from a special power to dispose of property by will: thus, a power given to a married woman by a settlement to dispose of property by will, does not make her testable.<sup>1</sup> But if property is settled on a married woman for her separate use, she is testable so far as that property is concerned.

**TESTAMENT** is, strictly speaking, a will of personal property: a will of land not being called a testament.<sup>2</sup> The word "testament" is now seldom used, except in the heading of a formal will, which usually begins—"This is the last will and testament of me, A. B., &c."

**ETYMOLOGY.**—Latin, *testamentum*, from *testari*, to declare, and not from *testatio mentis*, as stated by Lord Coke.<sup>3</sup>

**TESTAMENTARY.**—§ 1. "Testamentary power" is the power of making a valid will, either generally, or with reference to particular kinds or dispositions of property. "Testamentary capacity" usually refers to the absence of some disability which prevents a person from making a valid will: thus, infants and lunatics have not testamentary capacity.

§ 2. A paper, instrument, document, gift, appointment, &c. is said to be testamentary when it is written or made so as not to take effect until after the death of the person making it, and to be revocable and retain the property under his control during his life, although he may have believed that it would operate as an instrument of a different character. Thus, deeds of gift, marriage settlements, letters, &c. when executed with the formalities of a will, have been admitted to probate as testamentary instruments.<sup>4</sup> The term "testamentary documents" of course includes wills and codicils, which are in form as well as in effect testamentary. (See *Script.*)

As to testamentary guardians, see *Guardian*, § 9.

**TESTATE.**—A person is said to die testate when he leaves a will. (See *Intestate.*)

**TESTATOR** is a person who makes a will.

**TESTATUM WRIT.**—Formerly a writ of execution could not be issued into a county different from that in which the venue in the action was laid, without first issuing a writ into the latter county, and then another writ, which was called a testatum writ, into the former. This was abolished in ordinary cases by the Common Law Procedure Act, 1852, s. 121.<sup>5</sup> A testatum writ seems to be still necessary when a *fi. fa.*

<sup>1</sup> *Willcock v. Noble*, L. R., 7 H. L., p. 593.

<sup>2</sup> *Williams on Executors*, 6, 7.

<sup>3</sup> *Just. Inst.* ii. 10; *Co. Litt.* 322 b.

<sup>4</sup> *Williams on Executors*, 100, 373, 1498; *Watson's Comp. Equity*, 1171.

<sup>5</sup> *Chitty*, Pr. 604.



de bonis ecclesiasticis has been issued into one diocese, but the entire debt is not levied on it, and the plaintiff wishes to have the residue levied from the defendant's ecclesiastical goods and chattels in another diocese.<sup>1</sup>

**TESTE** is the concluding part of a writ, giving the date and place of its issue. It is so called because it begins with the words "Witness ourself" (in Latin, *Teste meipso*), or similar words. Every writ of summons and other writ issued in the High Court of Justice is tested (that is, the teste runs) in the name of the Lord Chancellor.<sup>2</sup>

**TESTIMONY** is the evidence of a witness given vivâ voce in a Court of justice or other tribunal. (See *Evidence*, § 7.) In the old books "testimony" means "witness."<sup>3</sup>

**THAMES CONSERVANCY.** See *Conservators of Rivers*.

**THEFT** is larceny (*q. v.*) or the act of stealing.

**THELLUSSON ACT.** See *Accumulation*, § 3.

**THIBAUT.**—Anton F. J. Thibaut was born 4th January, 1772, became professor at Jena and Heidelberg, and died 28th March, 1840. He wrote *Juristische Encyclopädie*, *Theorie der logischen Auslegung des Römischen Rechts*, *System des Pandectenrechts*, and numerous essays, &c.<sup>4</sup> He was an opponent of the historical school of jurisprudence, and was considered by his contemporaries as hardly inferior to Savigny, but his writings are now seldom referred to.

**THIRD PARTY.**—"Third party" is a colloquial and not very logical phrase, signifying a person who is a stranger to a transaction or proceeding; in other words, someone who is not a party at all. (See *Stranger*.) It is chiefly used in the expression "notice to third party," as to which see *Citation*, § 2.<sup>5</sup>

**THIRTY-NINE ARTICLES.** See *Articles of Religion*.

**THREATS.**—In criminal law, the sending of a letter threatening to kill or murder a person, or to commit arson, or to injure cattle, is a felony punishable with ten years' penal servitude (maximum); and anyone who attempts to extort money, &c. from a person by threatening to accuse him of certain crimes is liable to penal servitude for life; demanding money, &c. by other threats is punishable with penal servitude for five years (maximum).<sup>6</sup>

<sup>1</sup> Chitty, Pr. 1284; Archbold's Pr. 1064.

<sup>2</sup> Rules of Court, ii. 8.

<sup>3</sup> Co. Litt. 32 b.

<sup>4</sup> Holtz. Encycl.

<sup>5</sup> *MacAllister v. Bishop of Rochester*, 5 C. P. D. 194; *Wye Valley Rail. Co. v. Hawes*, 16 Ch. D. 489.

<sup>6</sup> Stat. 24 & 25 Vict. cc. 96, 100, s. 16; Steph. Crim. Dig. 154, 227.

**TIDAL RIVERS.** See *Navigation*; *Rivers*.

**TIMBER.**—§ 1. Timber, strictly speaking, includes only oak, ash and elm; “also in places where timber is scant, and beeches or the like are converted to building for the habitation of man, or the like, they are all accounted timber.”<sup>1</sup>

§ 2. Timber and other trees form part of the land, and on the death of the owner intestate they pass with it to the heir, therein differing from growing crops. Timber when severed is personal estate.

§ 3. Cutting down timber is a form of waste (*q. v.*), except so far as it is required for estovers (*q. v.*). If a tenant without impeachment of waste cuts timber in a husbandlike manner it vests in him: otherwise, if timber is cut or blown down, it belongs to the tenant in fee.<sup>2</sup> Where timber on a settled estate is likely to be injured by standing, the Court will allow it to be cut, provided the money is secured for the persons entitled to the estate.<sup>3</sup>

§ 4. Where a person takes by succession land with timber or other trees, not being coppice or underwood, he must pay succession duty on all sums (exceeding 10*l.* in any one year) from time to time received from any sales of such timber, unless he commutes the duty.<sup>4</sup>

See *Succession*, § 4; *Succession Duty*.

**TIME.**—As to the meanings of the expressions day, month, year, &c., when used in statutes or legal instruments, see the respective titles. By the act 43 & 44 Vict. c. 9, whenever any expression of time occurs in any act of parliament, deed, or other legal instrument, the time referred to shall, unless otherwise specifically stated, be held in the case of Great Britain to be Greenwich mean time, and in the case of Ireland, Dublin mean time.

§ 2. The Courts take judicial notice of the calendar, as settled by the stat. 24 Geo. 2, c. 23. (See *Notice*, § 1.)

As to time being of the essence of a contract, see *Essence of the Contract*.

**TIME-BARGAINS.** See *Wager*.

**TIME OUT OF MIND.** See *Memory*.

**TIME POLICY.** See *Policy of Assurance*, § 3.

By stat. 30 & 31 Vict. c. 23, s. 8, no policy of marine insurance may be made for any time exceeding twelve months, and any policy made for a longer period is void.

<sup>1</sup> Co. Litt. 53 a.

<sup>2</sup> Williams, P. P. 19. As to the power of the Court to give relief to a *bonâ fide* purchaser of settled land where part of the purchase-money has by mistake been paid

to the tenant for life, see stat. 22 & 23 Vict. c. 35, s. 13; Williams, R. P. 310.

<sup>3</sup> Williams, R. P. 25.

<sup>4</sup> Succession Duty Act, s. 23.

**TINBOUNDING** is a custom regulating the manner in which tin is obtained from waste land, or land which has formerly been waste land, within certain districts in Cornwall and Devon.<sup>1</sup> The custom is described in the leading case on the subject as follows:—"Any person may enter on the waste land of another, and may mark out by four corner boundaries a certain area; a written description of the plot of land so marked out with metes and bounds, and the name of the person, is recorded in the local Stannaries Court, and is proclaimed on three successive court-days. If no objection is sustained by any other person, the Court awards a writ to the bailiff to deliver possession of the said 'bounds of tin-work' to the 'bounder,' who thereupon has the exclusive right to search for, dig, and take for his own use all tin and tin-ore within the enclosed limits, paying as a royalty to the owner of the waste a certain proportion of the produce under the name of toll-tin."<sup>2</sup> The right of tinbounding is not a right of common (see *Common*), but is an interest in land, and, in Devonshire, a corporeal hereditament.<sup>3</sup> In Cornwall tin bounds are personal estate.<sup>4</sup> (See *Forest of Dean*; *Stannaries*.)

**TIPSTAFF.**—Tipstaves are officers attached to the Lord Chancellor and Master of the Rolls, and to the Queen's Bench Division of the High Court. Since the abolition of imprisonment on mesne process, the functions of these officials have been confined to arresting persons guilty of contempt of Court, except in the Queen's Bench Division, where the tipstaff also has charge of any prisoner brought before the Court, or committed by the Court, in the exercise of its criminal jurisdiction.<sup>5</sup>

**TITHES** are payments due by the inhabitants of a parish for the support of the parish church, and generally payable to the parson of the parish. In extra-parochial places the king is entitled to the tithes.<sup>6</sup> Tithes payable to a rector are called rectorial tithes, those payable to a vicar are vicarial tithes, and those payable to a lay person are lay tithes; the last belong to the class of incorporeal hereditaments.<sup>7</sup> As to exemptions from tithes, see *De non Decimando*; *Modus*; *Real Composition*.

§ 2. Originally tithes were paid in kind, and consisted of the tenth In kind, part of all yearly or periodical profits of certain descriptions, tithes being divisible into prædial, mixed and personal. Prædial tithes (so called Prædial, from Latin *prædium*, a farm) were profits arising immediately from the soil, *e.g.*, corn, grass, &c.: mixed tithes were those arising from animals mixed, deriving their nutriment from the soil, *e.g.*, tithes of wool, milk, &c.: personal tithes are those arising entirely from the personal industry personal, of man; these last exist only in a few instances, as in the case of fish caught in the sea, or by special custom for fish caught in rivers. Tithes

<sup>1</sup> Bainbridge on Mines, 146 *et seq.*

<sup>2</sup> *Rogers v. Brenton*, 10 Q. B. 26, cited in Elton, Comm. 113.

<sup>3</sup> Elton, 114.

<sup>4</sup> Bainbridge, 150.

<sup>5</sup> Second Report Legal Dep. Comm. (1874), 20; Archbold, Pr. 18; stat. 25 & 26 Vict. c. 104.

<sup>6</sup> Bl. Comm. i. 284; Phillimore, Eccl. Law, 1487; Burton, Comp. §§ 1173 *et seq.*

<sup>7</sup> Bl. i. 387, ii. 24.. See *Impropriation*.

payable in respect of corn-mills were personal tithes, but they have been commuted (*infra*, § 4). Tithes of mineral may also be payable by custom.<sup>1</sup>

Great. § 3. Tithes were also divided into (a) great tithes, comprehending the  
Small. tithes of corn, peas, beans, hay and wood, and (b) small (or privy) tithes, which included all other kinds of tithes. The distinction is important, because vicars are frequently endowed with small tithes only.<sup>2</sup>

Commuta- § 4. Tithes have now ceased to be paid in kind, except in a very few  
tion. instances, for by a series of voluntary agreements and compulsory awards made under the Tithe Commutation Acts,<sup>3</sup> a rent-charge varying with the price of corn has been substituted for almost all tithes, whether payable in kind or under a *modus* or composition.<sup>4</sup> (See *Rent*, § 9.) Mineral tithes, tithes of fish and other personal tithes (except mill-tithes) are not liable to compulsory commutation.<sup>5</sup>

Merger. § 5. Tithe rentcharges do not merge in the lands out of which they are payable by mere unity of ownership; but the owner may by deed or declaration approved by the Tithe Commissioners cause a merger to take place.<sup>6</sup>

**TITHING** is a local division or district forming part of a hundred (*q.v.*), and is so called because every tithing formerly consisted of ten freeholders with their families.<sup>7</sup> (See *Frankpledge*.)

**TITLE.**—I. § 1. In the primary sense of the word, a title is a right.<sup>8</sup> Thus a title of presentation is the right to present to a benefice.<sup>9</sup> (See *Next Presentation*.) This use of the word, however, is comparatively rare, and generally "title" means a right to property considered with reference either to the manner in which it has been acquired, or to its capacity of being effectively transferred.

In this sense of the word, titles are of the following kinds:—

Original,	§ 2. With reference to the modes by which they are acquired, titles are of two kinds, namely, (1) <i>original</i> , where the person entitled does not take with reference to any predecessor; as in the case of title by occupancy, by capture, by invention (patent, copyright, trade-mark, &c.),
derivative;	and by creation (as where the crown grants a peerage <sup>10</sup> ): and (2) <i>derivative</i> , where the person entitled takes the place of a predecessor; this latter class is divisible into (a) title by the lawful and voluntary act of one or both of the parties; <i>e.g.</i> , title by conveyance, gift, devise, bequest, &c.;
by act of the party;	in the case of realty this is called title by purchase: (b) title by operation or act of the law, including title by descent, intestacy, succession, survivorship, escheat, forfeiture, marriage, dower, curtesy, limitation, prescription, bankruptcy, &c.: and (c) title by wrong or tort, which
by act of the law;	
by wrong.	

<sup>1</sup> Bl. ii. 24, n. (9); Burton, § 1174.

<sup>2</sup> Bl. ii. 24, n. (9); Steph. Comm. ii. 726; Phill. 1485.

<sup>3</sup> Stats. 6 & 7 Will. 4, c. 71 to 23 & 24 Vict. c. 93.

<sup>4</sup> Phill. 1504.

<sup>5</sup> Stats. 6 & 7 Will. 4, s. 90; 2 & 3 Vict. c. 62, s. 9.

<sup>6</sup> Phill. 1552; see the acts above referred to.

<sup>7</sup> Bl. Comm. i. 114. See *Maurer*; *Freipflege*, *passim*.

<sup>8</sup> Co. Litt. 345 b; Viner, Abr. *Title*, C. 1.

<sup>9</sup> Co. Litt. 120 a.

<sup>10</sup> *Ibid.* 16 a.

occurs in the case of wrongful possession, abatement, disseisin, intrusion, deforcement, usurpation, and purpresture.<sup>1</sup> This last kind of title differs from the others in being liable to be defeated by the person rightfully entitled, until the title of the wrongdoer has become absolute by lapse of time (see *Limitation*, § 6): subject to this, a title by wrong is always deemed to be the most extensive right which the subject-matter admits of; thus a disseisor of land is seised of an estate in fee simple by wrong.<sup>2</sup>

§ 3. With reference to their capacity of being effectually transferred, titles to land are of various kinds. Thus, a marketable title is one which goes back forty years; that is, the vendor must show a chain or transmission of title, by conveyance, descent or other lawful means, from his predecessor or predecessors, commencing at least forty years ago. A safe holding title is one resting on the undisturbed possession of the vendor for twenty years adversely to persons not under disability.<sup>3</sup> Where a person agrees to sell land without making any stipulation as to the title, he must show a marketable title. In almost all cases, however, the contract of sale stipulates that the title shall commence at a more recent date than forty years. In any case, the conveyance or other document with which the title commences is called the root of title;<sup>4</sup> and if the vendor shows that he has the title which he is bound to prove, he is said to show a good title.

Title to land,  
marketable,

holding.

Root of title.

§ 4. The Vendor and Purchaser Act, 1874, and the Conveyancing Act, 1881, contain a number of provisions similar to those usually inserted in ordinary contracts for sale of real property and leaseholds, so that a person who enters into an open contract now runs less risk of failing to show a good title than formerly. But these provisions are obviously inadequate to meet special defects.

§ 5. Under the Land Transfer Act, 1875, a person entitled to land may prove and register either (1) an absolute title, being a title good against all the world (except incumbrancers and cestui que trusts, if any); or (2) a qualified title, being a title subject to specified reservations; or (3) a possessory title, being a title subject to all estates, rights, and interests existing at the time of registration.<sup>5</sup> (See *Land Registries*.)

Registered  
title,  
absolute,  
qualified,  
possessory.

§ 6. The investigation of titles is one of the principal branches of conveyancing (*q. v.*); and in that practice the word "title" has acquired the sense of "history" rather than of "right." Thus, we speak of an abstract of title (see *Abstract*), and of investigating a title, and describe a document as forming part of the title to property.

II. § 7. "Title" formerly had the technical sense of a right to avoid an estate by entry, as opposed to the remedy by action. Thus if A. conveyed land to B. upon condition not to alien it in mortmain, and B. broke the condition, A. was said to have a title

<sup>1</sup> Co. Litt. 3 b, 18 b; Bl. Comm. ii. 200 *et seq.*

<sup>2</sup> Williams on Seisin, 7.

<sup>3</sup> Greenwood's Conv. 15; stat. 37 & 38 Vict. c. 78. As to title to advowsons, see Williams, R. P. 448.

<sup>4</sup> Dart's V. & P. 293—296; Jarman, Conv. i. 62. Where the first document is a will, the root of title seems, strictly speaking, to be the fact of the seisin of the testator, because the will does not prove that the land belonged to him. *Ibid.*

<sup>5</sup> Sects. 5 *et seq.*

of entry, or title of mortmain; but he could not bring an action, and therefore had no right in the technical sense.<sup>1</sup> (See *Right of Entry*, § 3.)

Titles of  
ordination.

III. § 8. In ecclesiastical law "title" signifies (1) a cause for which a person might be ordained. The most common causes of ordination are either a presentation to a vacant benefice or the possession of some source of income. Hence, title signifies (2) a presentation to a benefice, (3) the church or living to which the minister was presented, and (4) a source of income, *e. g.*, a pension.<sup>2</sup> In the Roman Catholic Church, titles or *tituli* are the churches in and near Rome which are assigned to cardinals.<sup>3</sup>

Of honour  
and dignity.

IV. § 9. "Title" also signifies an appellation or address indicative of honour or dignity. Such titles are to a certain extent dependent on courtesy. Thus, no person can compel another to address or describe him by his title; but, so far as their use by the person himself is concerned, titles are matters of right, and, as it were, of property, and therefore, no person who cannot show a legal right to it, is permitted to use a title of dignity or honour on any public occasion.<sup>4</sup> Some titles are hereditary and descend in fee simple or in tail, according to the nature of their creation.<sup>5</sup> (See *Dignity*.)

Of action, &c.

V. § 10. Hence "title" signifies a description. Thus, in procedure, every action, petition or other proceeding, has a title, which consists of the name of the Court in which it is pending, the names of the parties, and (in the High Court of Justice) also the "reference to the record" (*q. v.*); administration actions are further distinguished by the name of the deceased person whose estate is being administered. Every pleading, summons, affidavit, &c., commences with the title. In many cases it is sufficient to give what is called the "short title" of an action, namely, the Court, the reference to the record, and the surnames of the first plaintiff and the first defendant, *e. g.*, "In the High Court of Justice, Chancery Division. 1875. S. 311. *Smith v. Jones*."

Of a patent.

§ 11. The title of a patent is the short description of the invention, which is copied in the letters-patent from the inventor's petition, *e. g.*, "a new and improved method of drying and preparing malt."<sup>6</sup> (See *Patent; Disclaimer*, § 2.)

ETYMOLOGY.]—Norman-French, *title*; from Latin, *titulus* = a label, hence a name, pretext or motive, and then a cause or basis of acquiring a right.<sup>8</sup> The word was chiefly used in Roman law to denote an equitable right to property which was capable of being developed by usucapion into a complete right of ownership.<sup>9</sup> From this is derived the common definition of title as a mode of acquisition, the *titulus* in Roman law not being considered a right, but only the foundation of a right.

**TITLE-DEEDS**, "though moveable articles, are not strictly speaking chattels. They have been called the sinews of the land,"<sup>10</sup> and are so

<sup>1</sup> 8 Rep. 153 b; Co. Litt. 252 b, 345 b.

<sup>2</sup> Gibson, Codex, 140, 1441 *et seq.*; Steph. Comm. ii. 661.

<sup>3</sup> Holtz. Encycl. i. 465.

<sup>4</sup> See *Keet v. Smith*, 1 P. D. at p. 78, where it was decided that "reverend" is not a title of honour or dignity.

<sup>5</sup> Co. Litt. 16 a; Selden on Titles of Honour; Madox, Bar. Ang.; Bl. Comm. ii. 216.

<sup>6</sup> Johnson on Patents, 90.

<sup>7</sup> Britton, 86 b, 121 a.

<sup>8</sup> Dirksen, Man. Lat. s. v.

<sup>9</sup> Dig. xxix. 4, fr. 30; Savigny, Syst. iii. 372; Hunter's Roman Law, 119. As to the exploded doctrine of *titulus* and *modus acquirendi*, see Austin, Jur. 995; Holtz. ii. 546.

<sup>10</sup> Co. Litt. 6 a.

closely connected with it that they will pass, on a conveyance of the land, without being expressly mentioned: the property in the deeds passes out of the vendor to the purchaser simply by the grant of the land itself. In like manner a devise of lands by will entitles the devisee to the possession of the deeds; and if a tenant in fee simple should die intestate, the title deeds of his lands will descend along with them to his heir-at-law."<sup>1</sup> § 2. But where a vendor of lands has other lands to which the deeds relate, or retains any legal interest in the lands conveyed, he has a right to keep the deeds.<sup>2</sup> The purchaser, however, is entitled to a covenant for the production of the deeds whenever required in support of his title, if the vendor can give such a covenant.<sup>3</sup> In the case of sales of land after the 31st December, 1881, a purchaser will be entitled to a written acknowledgment of his right to production of the deeds, in lieu of, but with the same effect as, an ordinary covenant for production; and if he requires attested copies of the title deeds retained by the vendor, he will have to bear the expense of making them.<sup>4</sup>

§ 3. A tenant for life, or for any greater estate, is entitled to the possession of the title deeds of the land, but he must not injure or part with them.<sup>5</sup>

See *Muniments*.

**TO HAVE AND TO HOLD** are the words in a conveyance which show the estate intended to be conveyed. Thus, in a conveyance of land in fee simple, the grant is to "A. and his heirs to have and to hold the said [land] unto and to the use of the said A., his heirs and assigns for ever."<sup>6</sup>

Strictly speaking, however, the words "to have" denote the estate to be taken, while the words "to hold" signify that it is to be held of some superior lord, that is, by way of tenure (*q. v.*). The former clause is called the *habendum*, the latter, the *tenendum*.<sup>7</sup>

**TOFT.**—§ 1. "When land is built upon, it is a messuage, and, if the building afterwards fall to decay, yet it shall not have the name of land, although there be nothing in substance left but the land, but it shall be called a toft, which is a name superior to land, and inferior to messuage: and this name it shall have in respect of the dignity which it once bore."<sup>8</sup> § 2. The term "toft" is specially applied to ancient tenements within a parish or other district, the owners or occupiers of which are entitled to rights of common or commonable rights over land situate in the parish.<sup>9</sup> (See *Ancient Messuages; Lammas Lands*.)

**TOLL**—I. § 1. A toll is a payment for passing over or using a bridge, road, ferry, railway, market, port, anchorage, &c. Frequently the

<sup>1</sup> Williams, P. P. 10.

<sup>2</sup> *Ibid.* See V. & P. Act, 1874, s. 2, § 5.

<sup>3</sup> V. & P. Act, 1874, s. 2; Williams, R. P. 464.

<sup>4</sup> Conveyancing Act, 1881, s. 3, § 6, s. 9.

<sup>5</sup> Williams, P. P. 12.

<sup>6</sup> See Williams, R. P. 198.

<sup>7</sup> Co. Litt. 6 a.

<sup>8</sup> Plowd. 170, cited in Broom & Had. Comm. ii. 17, n. (i).

<sup>9</sup> Cooke, Incl. 48; General Inclosure Act, 1845, s. 53.

right to demand tolls forms part of a franchise (*q. v.*), as in the case of ferries, markets, ports, &c. Turnpike, harbour and railway tolls are generally created by act of parliament.<sup>1</sup>

Toll traverse. § 2. Toll traverse is a sum payable for passing over the private soil of another, or over a private road, bridge, ferry, or the like. § 3. Toll thorough is a sum payable for passing over the public highway: to support a claim for such a toll (which is a franchise) a consideration must be shown, *e.g.*, repairs to the highway by the owner of the franchise.<sup>2</sup>

Toll thorough.

§ 4. A right of distress is incident to every toll, but the distress cannot be sold except in the case of turnpike tolls.<sup>3</sup>

See *Rankness*; *Prescription*; *Stallage*.

II. As to "toll" in the sense of taking away, see *Descent Cast*.

**TOMBSTONES.**—§ 1. Tombstones in churchyards, it seems, can only be erected with the consent of the incumbent, and he may refuse to allow objectionable inscriptions on tombs. Tombstones in the body of the church can only be erected by leave of the ordinary, given by a faculty, though it seems that the consent of the incumbent is usually sufficient, or that of the rector, if the stone is to be erected in the chancel. A tombstone, when properly erected, does not vest in the incumbent, although annexed to the church or churchyard, the freehold of which is in him; therefore the person who set it up, or the heirs of the deceased, have an action of trespass against anyone who defaces or removes it.<sup>4</sup> § 2. Gifts by will for the erection or maintenance of tombstones in churchyards are void, if unlimited in point of time, being contrary to the rule against perpetuities: gifts for the maintenance of tombstones or monuments forming part of the fabric of a church are valid because they are for the public benefit, and are therefore charitable within the equity of the stat. 43 Eliz. c. 4. (See *Burial*; *Charity*; *Churchyard*.)

**TONNAGE** was anciently a duty on imported wines, imposed by parliament, in addition to prisage (*q. v.*).<sup>5</sup> The present duties on wines are regulated by the Customs Acts.

**TONNAGE-RENT.**—When the rent reserved by a mining lease or the like consists of a royalty on every ton of minerals gotten in the mine, it is often called a tonnage-rent. There is generally a dead rent in addition. (See *Rent*, § 6.)

**TORT.**—I. § 1. In its original and most general sense, "tort" is any wrong—as in the phrase "executor de son tort." (See *Executor*, § 4.)

II. § 2. More commonly, however, "tort" signifies an act which gives rise to a right of action, being a wrongful act or injury consisting in the

<sup>1</sup> As to railway tolls, see *Hodges on Railways*, 456 *et seq.*

<sup>2</sup> *Shelford*, R. P. Stat. 36; Bl. Comm. ii. 38; Co. Litt. 114.

<sup>3</sup> *Shelford*, 36.

<sup>4</sup> *Phill. Eccl. Law*, 880 *et seq.*; *Keet v. Smith*, 1 P. D. 73.

<sup>5</sup> *Steph. Comm.* ii. 561.



infringement of a right created otherwise than by a contract.<sup>1</sup> Torts are divisible into three classes, according as they consist in the infringement of a jus in rem, or the breach of a duty imposed by law on a person, either towards another person or towards the public.

§ 3. The first class includes (a) torts to the body of a person—such as assault, battery, nuisance; or to his reputation—such as libel, slander, malicious prosecution; or to his liberty—as in the case of false imprisonment and malicious arrest: (b) torts to real property, such as ouster, trespass, nuisance, waste, subtraction, disturbance: (c) torts to personal property, consisting (i) in the unlawful taking or detaining of or damage to corporeal personal property or chattels (see *Replevin*; *Detinue*; *Trover*); or (ii) in the infringement of a right to a patent, trade-mark, copyright, &c. (see *Infringement*; *Piracy*, § 1): (d) slander of title: (e) deprivation of service and consortium (see *Master and Servant*, § 3; *Per quod*).  
 To person.  
 To realty.  
 To personalty.

§ 4. The second class includes deceit and fraud (*q. v.*), and negligence in the discharge of a private duty. Thus, if A., a stage-coach proprietor, contracts with B. to carry his servant C., and, in performing his contract, is guilty of negligence which causes bodily hurt to C., and consequent damage, by loss of his services, to his master; then A. may be sued by B. for breach of contract, and by C. for negligence, that is for a tort. So, if a physician is guilty of negligence in treating a patient, he may be sued either for breach of contract or for tort.<sup>2</sup> This kind of tort is called a tort arising out of contract, in opposition to a pure tort (*e. g.*, an assault).<sup>3</sup>  
 Fraud and negligence.

§ 5. The third class includes those cases in which special damage is caused to an individual by the breach of a duty to the public, whether the breach consist of malfeasance, nonfeasance, or misfeasance. The principal instances of this class of torts fall under the heads of negligence and nuisance. Thus, if a person does something, which is not only a public nuisance, but also causes special damage to an individual, he is liable to that individual for a tort.<sup>4</sup>  
 Special damage by public nuisance, &c.

§ 6. These divisions are of importance with reference to the question whether, on the death of the person injured, or of the tortfeasor, his personal representatives can sue or be sued for the tort; the general rule being, that the right to sue, and the liability to be sued, for torts to

<sup>1</sup> See *Bryant v. Herbert*, 3 C. P. D. 189, 389; *Fleming v. M. & S. Rail. Co.*, 4 Q. B. D. 81. As to torts generally, see the works of Addison and Underhill; Broom's C. C. L. 651 *et seq.* As to the place of torts in a scientific system, see Hunter's Roman Law, xxxvi.

<sup>2</sup> Bl. Comm. iii. 165; Broom, 672. At first sight it seems incorrect to make what is apparently a breach of contract equivalent to a tort, and the author was at one time disposed to call this kind of injury a quasi-tort, as is done by Mr. Underhill (p. 24). It is submitted, however, that the old classification is really correct. It is of course possible for a person who is about to travel by a stage coach, or to undergo an operation, to stipulate that he shall be

carried safely, or that the operation shall be skilfully performed; but not only is this never done expressly, but the parties do not as a rule even think of such a condition at the time. The duty on the part of the contractor, therefore, is not created by an actual contract, whether express or tacit, but is created by the law, and the breach of it is rightly called a tort. The inaccuracy consists in also treating it as a breach of contract; but this is explained by the fact that in English law contracts and quasi-contracts are not distinguished. (See *Quasi-Contract*.) See, however, the remarks in Dicey on Parties, 16 *et seq.*

<sup>3</sup> *Berringer v. G. E. R.*, 4 C. P. D. 163.

<sup>4</sup> Broom, 657.

*property*<sup>1</sup> passes to the personal representatives of the injured person, or of the tortfeasor, but that in other cases it does not, except where the death of the deceased was caused by the tort.<sup>2</sup> (See *Actio personalis*, &c.)

§ 7. The distinction between tort and contract is important with reference to the limitation of actions (*q. v.*), and in the law of bankruptcy, claims for damages from torts not being proveable.<sup>3</sup> (See *Debt*, § 11.)

See *Damage*; *Damnum sine Injuriâ*; *Injury*; *Negligence*; *Quasi-Tort*.

ETYMOLOGY.]—Norman-French, *tort*, a wrong; from Latin, *tortus*, twisted.<sup>4</sup>

**TORTFEASOR** is a wrongdoer, or one who commits a tort, especially a trespass.<sup>5</sup> (See *Contribution*, § 2; *Omnia præsumuntur*, &c.)

ETYMOLOGY.]—Norman-French, *tort*, a wrong, and *feasor* or *fesour*, a doer.<sup>6</sup>

**TORTIOUS** is wrongful. Formerly certain modes of conveyance (*e. g.*, feoffments, fines, &c.) had the effect of passing not merely the estate of the person making the conveyance, but the whole fee simple, to the injury of the person really entitled to the fee, and they were hence called tortious conveyances.<sup>7</sup> But this operation has been taken away. (See *Feoffment*, § 3; *Fine*, § 9.)

**TOTAL LOSS.** See *Loss*.

**TOUT TEMPS PRIST** (= always ready) is the Norman-French name for the plea or defence which a defendant sets up when he is sued on a contract for something which he has always been ready and willing to do, if the plaintiff had asked or allowed him to do it. Its effect, if true, is to deprive the plaintiff of his right to damages for the nonfeasance complained of.<sup>8</sup> For an example, see *Tender*. (See also *Uncore prist*.)

**TOWAGE.**—In admiralty law, a towage service is where one vessel is employed to expedite the voyage of another, when nothing more is required than to accelerate her progress,<sup>9</sup> as opposed to a salvage service, which implies danger or loss. (See *Salvage*.) A towage service gives a right to remuneration; but although in many cases where salvage has been claimed the Court has decreed towage remuneration only, there are comparatively few cases in which suits have been instituted for mere towage.<sup>10</sup> Claims for towage remuneration are generally enforced in Courts having admiralty jurisdiction. (See *Admiralty*; *Action*, §§ 11 *et seq.*)

**TOWN**, in the technical sense of the word, is a collection of houses, which "hath, or in time past hath had, a church and celebration of

<sup>1</sup> Including fraud; *Twyer v. Grant*, 4 C. P. D. 40.

<sup>2</sup> See Dicey on Parties, 314, 402, 481; stats. 3 & 4 Will. 4, c. 4; 9 & 10 Vict. c. 93.

<sup>3</sup> Bankruptcy Act, 1869, s. 31.

<sup>4</sup> Co. Litt. 158 b.

<sup>5</sup> Cro. Jac. 383.

<sup>6</sup> Britton, 32 b.

<sup>7</sup> Litt. § 611; Co. Litt. 271 b, n. (1); 330 b, n. (1).

<sup>8</sup> See Co. Litt. 33 a; Leake on Contracts (2nd edit.), 858.

<sup>9</sup> *The Princess Alice*, 3 W. Rob. 140; cited Williams and Bruce's Admiralty, 151, n. (a).

<sup>10</sup> Williams & Bruce, 152.

divine service, sacraments and burials," but "if a towne be decayed so as no houses remaine, yet it is a towne in law."<sup>1</sup> Some towns are cities or boroughs (*q. v.*, and see *Municipal Corporation*). In the old books, "upland town" seems to mean a town which is neither a city nor a borough.<sup>2</sup> (See *Vill.*)

§ 2. In the popular sense of the word, a town is a congregation of houses so near to one another that the inhabitants may fairly be said to dwell together. The word is so used in the pre-emption clause of the Lands Clauses Act.<sup>3</sup> (See *Pre-emption*.) The name of such a town is a matter of reputation.<sup>4</sup>

**TOWNS IMPROVEMENT.**—The Towns Improvement Clauses Act, 1847, was passed to consolidate in one act certain provisions usually contained in acts for paving, draining, cleansing, lighting and improving towns. Local acts appointing commissioners for the improvement of towns generally incorporate the provisions of this act, but such acts are now rarely passed, as the provisions of the General Health Acts, the Local Government Acts, the Sanitary Acts, and the Public Health Acts (see the various titles) have practically superseded them.

**TOWNSHIP** seems to mean a district of land containing a town, and under the same administration as the town itself. Blackstone says, that when a hamlet or other small collection of houses is adjacent to a town, but governed by separate officers, it is, to some purposes in law, looked upon as a distinct township.<sup>5</sup>

**TRADE.** See *Restraint of Trade*; *Trade-Mark*; *Trader*. As to usages of trade, see *Custom*, § 8.

**TRADE-MARK.**—§ 1. In the most general sense of the words, "trade-mark" denotes any means of showing that a certain trade or occupation is carried on by a particular person or firm, including therefore not only trade-marks in the narrower sense of the word (*infra*, § 2), but also trade-names (*q. v.*) and marks which are not in themselves, or in their origin, distinctive, but become known by custom and reputation as showing that goods or implements of trade are made, sold or employed by a particular person or firm. Thus coloured lines in the hem or fringe of cloth may, by the custom of a particular place or trade, be understood to show that the cloth is made by a particular firm.<sup>6</sup> So where A. ran a line of omnibuses between two places, B. was restrained by injunction from running on the same line of route omnibuses having upon them such names, words and devices as to form a colourable imitation of the names, words and devices on A.'s omnibuses.<sup>7</sup> (See *Use*.)

<sup>1</sup> Co. Litt. 115b.

<sup>2</sup> *Ibid.* 110b.

<sup>3</sup> *Reg. v. Cottle*, 16 Ad. & El., N. S. 412; *London & S. W. Rail. Co. v. Blackmore*, L. R., 4 H. L. 610.

<sup>4</sup> *Collier v. Worth*, 1 Ex. D. 464.

<sup>5</sup> Bl. Comm. i. 115.

<sup>6</sup> *Singer, &c. Co. v. Wilson*, 2 Ch. D. at p. 441; *Orr Ewing v. Johnston*, 13 Ch. D. 434.

<sup>7</sup> *Knott v. Morgan*, 2 Keen, 213.

§ 2. In the narrower sense of the word, a trade-mark is a distinctive mark or device affixed to or accompanying an article intended for sale for the purpose of indicating that it is manufactured, selected, or sold by a particular person or firm. Thus a representation of a lion enclosed in a ring, or the facsimile of the signature of a person, may be used as trade-marks in connection with a certain kind of goods: but the right to a trade-mark applicable to cloth does not entitle the owner to prevent another trader from applying it to iron or the like.<sup>1</sup> Trade-marks of this kind must be registered under the Trade-Marks Registration Act, 1875 (*q. v.*).

Goodwill.

§ 3. A trade-mark cannot exist in gross, that is, apart from the goodwill of the business with which it has been connected.<sup>2</sup>

§ 4. The right of the owner of a trade-mark in the narrower sense of the word is clear; he is entitled to prevent anyone else from applying it, or any device closely resembling it, to goods of the same class as those in connection with which he himself uses it. (As to his remedies, see *Infringement*.) This right is an absolute one, and does not depend on the state of mind of the infringer: A. may bona fide invent a trade-mark which has already been used by B., but the fact that he never heard of B.'s trade-mark is no defence to proceedings for infringement.<sup>3</sup> Again, where goods are sold under a false trade-mark, "even if the purchaser is told that the goods are the goods of the actual seller, but the imitated mark is upon them, there is ground for interference [by the Court], since the goods may be resold bearing the mark, but without the information necessary to correct the statement thereby made."<sup>4</sup> From its absolute and negative nature, the right to a trade-mark is frequently called a property (*q. v.*).<sup>5</sup>

§ 5. The true nature of a trade-mark in the wide sense of the word, that is, of trade-marks not capable of registration, is not yet settled. It was formerly considered that the right of the owner of a trade-mark of this kind (*e.g.*, a trade-name) was entirely dependent on the question of misrepresentation, so that a person who without fraud used a name or mark which had been previously used by another person, could not be made liable for doing so.<sup>6</sup> This doctrine has been recently shaken, but the point is still open.<sup>7</sup>

§ 6. There are certain trade-marks which are subject to special statutes, the most important of which are the Hallamshire Acts, regulating marks on cutlery, and the acts regulating marks on hops, gunbarrels and gold and silver plate.<sup>8</sup>

See *Goodwill*; *Merchandise Marks Act*; *Publici Juris*.

<sup>1</sup> Ludlow & Jenkyns on Trade-Marks, 3; *Orr Ewing v. Registrar of Trade-Marks*, 4 App. Ca. 479.

<sup>2</sup> Sebastian on Trade-Marks, 180. See the provisions of the Trade-Marks Registration Act, 1875, as to the assignment of registered trade-marks.

<sup>3</sup> Ludlow & Jenkyns, 73; *Edelsten v. Edelsten*, 1 De G., J. & S. at p. 199.

<sup>4</sup> Sebastian on Trade-Marks, 8, citing *Sykes v. Sykes*, 3 B. & Cr. 541.

<sup>5</sup> See Ludlow & Jenkyns, 4; *Maxwell v. Hogg*, L. R., 2 Ch. 307.

<sup>6</sup> *Singer, &c. Co. v. Wilson*, 2 Ch. D. 434.

<sup>7</sup> See the judgments of Lords Cairns and Blackburn, same case, 3 App. Ca. 376.

<sup>8</sup> Ludlow & Jenkyns, 77; *Trade-Marks Registration Act*, 1875, ss. 9 *et seq.*

**TRADE-MARKS REGISTRATION ACT, 1875**, is the statute 38 & 39 Vict. c. 91, amended by the acts of 1876 and 1877. It provides for the establishment of a register of trade-marks under the superintendence of the Commissioners of Patents, and for the registration of trade-marks as belonging to particular classes of goods; and for their assignment in connection with the goodwill of the business in which they are used. Registration is substituted for public use as the mode of acquiring the right to a trade-mark, so that now no one can enforce his right to a trade-mark until it is registered. For the purposes of the act, a trade-mark consists (i) of a name of an individual or firm printed, impressed or woven in some particular and distinctive manner; or (ii) of a written signature or copy of a written signature of an individual or firm; or (iii) of a distinctive device, mark, heading, label, or ticket.<sup>1</sup> There may be added to any one or more of these essential particulars any letters, words or figures. Certain kinds of marks used as trade-marks before the passing of the act may be registered under the act, although not coming within the statutory definition.<sup>2</sup>

§ 2. The act does not provide for the registration of the colour in which a trade-mark is used, and, therefore, the shape of the device alone is considered in deciding whether one trade-mark is like another.<sup>3</sup>

**TRADE-NAME.**—§ 1. A trade-name is a name which by user and reputation has acquired the property of indicating that a certain trade or occupation is carried on by a particular person. (See *Goodwill*.) The name may be that of a person, place or thing, or it may be what is called a fancy name (that is, a name having no sense as applied to the particular trade), or a word invented for the occasion, and having no sense at all.<sup>4</sup> It may be applied to goods,<sup>5</sup> to a magazine,<sup>6</sup> or any other subject of trade.

§ 2. A trade-name gives the person entitled to use it the right of preventing any other person from using it so as to induce purchasers to believe that his goods are the goods sold or manufactured by the original maker, and thus to injure the latter. Thus, where a firm had obtained a reputation for a particular kind of goods distinguished by the word "Glenfield," which was the name of the place where the goods had originally been manufactured, a person who sold the same kind of goods under the name "Glenfield" was restrained by injunction from so doing, although he had a small manufactory at the place called Glenfield, because it was apparent on the evidence that he used the word to induce the public to believe that in buying his goods they were buying the goods of the plaintiff, the original manufacturer.<sup>7</sup>

As to whether fraud is an essential to make the use of a trade-name actionable, see *Trade-Mark*, § 5.

<sup>1</sup> See *Ex parte Stephens*, 3 Ch. D. 659.

<sup>2</sup> See generally as to the act, Sebastian on Trade-Marks; *Orr Ewing v. Registrar of Trade-Marks*, 4 App. Ca. 479; *Mitchell v. Henry*, 15 Ch. D. 181.

<sup>3</sup> *Re Worthington*, 14 Ch. D. 8.

<sup>4</sup> Sebastian on Trade-Marks, 37.

<sup>5</sup> *Ford v. Foster*, L. R., 7 Ch. 611.

<sup>6</sup> *Maxwell v. Hogg*, L. R., 2 Ch. 307; and, see *Ludlow & Jenkyns*, 56 *et seq.*; *Levy v. Walker*, 10 Ch. D. 436; *Massam v. Thorley's Food Co.*, 14 Ch. D. 748.

<sup>7</sup> *Wotherspoon v. Currie*, L. R., 5 H. L. 508.

**TRADER.**—Traders are subject to special provisions of the bankruptcy law; thus, the time allowed for compliance with a debtor's summons (*q. v.*) is shorter in the case of a trader than in the case of ordinary persons, and the doctrine of reputed ownership (*q. v.*) is confined to traders. "Trader" within the bankruptcy law includes not only persons carrying on trades in the ordinary sense, but also bankers, ship-owners, and many similar classes, enumerated in the 1st schedule to the Bankruptcy Act, 1869.<sup>1</sup>

**TRADE-UNIONS** were originally merely friendly societies consisting of artisans, engaged in a particular trade, such as carpenters, bricklayers, &c.; but in course of time they acquired the character of associations for the protection of the interests of workmen against their employers. The principal objects of such societies at the present day are to increase the rate of wages, reduce the hours of labour, and bring about an equal division of work among a large number of workmen by establishing a uniform minimum rate of wages. They attain these objects principally by the legal means of "strikes," *i. e.*, the stoppage of work by all the members until their demands are complied with, and the illegal means of intimidation, rattening, picketing, &c. (*q. v.*). The members are supported during strikes by the funds of the society, which are obtained by weekly subscriptions during periods of work. Many trade-unions are also friendly societies.

§ 2. Formerly trade-unions were not recognized by law; and, as a general rule, their regulations, being in restraint of trade, were illegal, and incapable of being enforced;<sup>2</sup> but, by the Trade Union Act, 1871, this doctrine was abolished,<sup>3</sup> and provisions (analogous to those applying to friendly societies (*q. v.*)) are made for the registration of trade-unions, for the regulations to be contained in their rules, and for the appointment of trustees in whom the property of the union is to vest, &c. But no agreements between the members as to the conditions on which they are to work, or as to the payment of subscriptions or application of the funds, are enforceable in any Court of law.<sup>4</sup>

Account.

**TRANSCRIPT** is an official copy of certain proceedings in a Court. Thus, any person interested in an account in the books of the Paymaster-General for the Chancery Division can obtain a transcript of it.<sup>5</sup> (See *Account*, § 14.)

Privy  
Council.

§ 2. In the Privy Council, when an appeal is brought, the appellant has to see that a transcript of the proceedings and evidence in the Court below is prepared and transmitted to the Colonial Office by the proper officer.<sup>6</sup> (See *Appeal*, § 5.)

Property.

**TRANSFER.**—I. § 1. In the law of property, a transfer is where a right passes from one person to another, either (1) by virtue of an act

<sup>1</sup> See *In re Cleland*, L. R., 2 Ch. 466.

<sup>2</sup> Davis, 187; *Hornby v. Close*, L. R., 2 Q. B. 153; 36 L. J., M. C. 43.

<sup>3</sup> Sects. 2 and 3.

<sup>4</sup> Sect. 4; *Rigby v. Connol*, 14 Ch. D. 482.

<sup>5</sup> Order as to Court Fees, Oct. 1875 (last item in schedule).

<sup>6</sup> Macpherson, Privy C. Pr. 80.

done by the transferor with that intention, as in the case of a conveyance or assignment by way of sale or gift, &c.; or (2) by operation of law, as in the case of forfeiture, bankruptcy, descent, or intestacy.<sup>1</sup> A transfer may be absolute or conditional, by way of security, &c. (See *Assignment; Bill of Sale; Conveyance.*)

§ 2. In practice, "transfer" is used principally in the sense of voluntary transfer, and is applied especially to the operation of changing the ownership of stock, shares, &c., whether by registering an assignment or other instrument, or by making a simple entry in the register kept for that purpose. The person making the transfer is called the transferor, and the person to whom it is made the transferee. (See *Share; Stock.*)

Transfer of stock, &c.

§ 3. In chancery and lunacy practice, stocks and other securities standing in the names of trustees, lunatics, and other persons, are sometimes ordered to be transferred into the name of the Paymaster-General pending the proceedings, in order that they may be kept in safety until the time comes for them to be transferred out of Court to the parties entitled. (See *Payment into Court; Account, § 14; Certificate, § 18.*)

Transfer into Court.

§ 4. Land registered under the Land Transfer Act, 1875, is transferred or conveyed by the execution of an instrument of transfer in the statutory form, and by the entry of the transfer on the register.<sup>2</sup> The transfer of registered charges is similar.<sup>3</sup> (See *Charge, § 6; Land Registries.*)

Transfer of land.

§ 5. A transfer of a mortgage takes place when the mortgaged property and the right to receive the mortgage debt are conveyed by the mortgagee, either alone or with the concurrence of the mortgagor, to a third person. Formerly it was an advantage to obtain the concurrence of the mortgagor, in order that he might covenant with the transferee for payment of the debt, for otherwise the transferee was obliged to sue for the debt as attorney of the mortgagee;<sup>4</sup> but now the assignee of a debt can sue in his own name.<sup>5</sup> (See *Chose, § 4.*)

Mortgage.

As to the transfer of judgments, see *Judgment, § 20.*

Judgments.

II. § 6. In procedure, "transfer" is applied to an action or other proceeding, when it is taken from the jurisdiction of one Court or judge and placed under that of another. Any action in the High Court may be transferred from one division to another, or (in the case of an action in the Chancery Division) from one judge to another, by order of the Lord Chancellor; in the case of a transfer from one division to another, the consent of the president of each division is required. A division may also transfer an action to any other division with the consent of the president of the latter division.<sup>6</sup> In the Chancery Division, a transfer of a cause from one judge to another may be either for all purposes, or for the purpose of trial or hearing only.<sup>7</sup>

Transfer of cause.

<sup>1</sup> See Markby's *Elements of Law*, §§ 460 *et seq.*

<sup>2</sup> Sects. 29, 34; General Rules, 23; Forms, 23, 24.

<sup>3</sup> Sect. 40; Gen. Rules, 21, Form 21.

<sup>4</sup> Davids. Conv. ii. 815.

<sup>5</sup> Jud. Act, 1873, s. 25, § 6. The Con-

veyancing Act, 1881, provides for the use of statutory forms of transfer in the case of mortgages made in pursuance of the act (s. 27).

<sup>6</sup> Jud. Act, 1873, s. 36; Rules of Court, li. 1, 2.

<sup>7</sup> Rules of Court, li. 1a.

**TRANSHIPMENT.**—If a ship is in distress in a foreign port, and the master is unable to carry the cargo further, he is generally entitled to tranship it, that is, put it on board another vessel and forward it to its destination, and thus earn the freight. But he is not justified in doing so if it would increase the freight payable by the shipper of the cargo, or cause a loss to the owners of the ship.<sup>1</sup>

**TRANSIRE.**—In the law of merchant shipping, when a coasting vessel is about to sail from her port of lading, an account giving particulars of the ship and her cargo must be delivered in duplicate to the Customs Collector of the port. He returns the original account, dated and signed by him, and this constitutes the “clearance” of the ship, and the “transire” or pass for the cargo; that is, it is an authority to the Custom House officers to let the vessel sail. The transire must be delivered up to the collector at the port of discharge before any of the cargo is unladen. A general transire may be granted to a coasting ship.<sup>2</sup>

**TRANSIT—TRANSITUS.** See *Stoppage in Transitu*.

**TRANSIT IN REM JUDICATAM,** “It passes into or becomes a *res judicata*,” is a short mode of saying that when a person has obtained a judgment in respect of a given right of action, he cannot bring another action for the same right, but must take proceedings to enforce his judgment.<sup>3</sup> (See *Merger*, § 2; *Res Judicata*.)

**TRANSITORY.** See *Action*, § 23.

**TRANSPORTATION.**—Under stat. 5 Geo. 4, c. 84, which revised and consolidated the previous acts on the subject, the crown was enabled to appoint places beyond the seas to which offenders might be conveyed and kept to hard labour. During the present reign the punishment of transportation was abolished, and that of penal servitude (*q.v.*) substituted.<sup>4</sup>

Pleadings,  
affidavits, &c.

**TRAVERSE.**—§ 1. In the ordinary practice of the High Court, to traverse is to deny an allegation of fact. The term is used both in pleadings and in affidavits: thus if a plaintiff replies by simply joining issue on the statement of defence he traverses, that is, denies, all the material allegations in the defence.<sup>5</sup> (See *Confession and Avoidance*.) § 2. So in an answer to interrogatories, a denial of the allegation impliedly contained in an interrogatory is a traverse, and may be either simple or subject to an explanation or admission previously given. (See *Answer*, § 1.) In an affidavit of documents, again, the paragraph stating that the

<sup>1</sup> Maude & Pollock, *Merch. Shipp.* 321; *Kay's Shipmaster*, 287.

<sup>2</sup> Customs Consolidation Act, 1876, ss. 145 *et seq.*

<sup>3</sup> *King v. Hoare*, 13 M. & W. 494; *Chitty on Contracts*, 721.

<sup>4</sup> *Steph. Comm.* iv. 449.

<sup>5</sup> *Hull v. Eve*, 4 Ch. D. 341. As to special traverses, traverses de injuriâ, &c. under the old common law practice, see *Stephen*, Pl. (5), 190, 193.



deponent has no documents in his possession except those specified in the affidavit is sometimes called the traverse, because the affidavit is in the same form as if it were made in answer to an interrogatory.<sup>1</sup>

§ 3. Traverse of office or inquisition is a mode by which a subject can, in certain cases, dispute an office or inquisition finding the crown entitled to property claimed by him. It was formerly a convenient remedy, on account of the difficulty of obtaining redress against the crown by petition of right, but since the amendment and extension of the latter mode of proceeding, traverses of office have fallen into disuse. One of the most usual instances of their use was in resisting extents (see *Extent*), in which case the defendant or traverser (*i. e.*, the person claiming the property) entered an appearance and claim, followed by a plea or traverse disputing the debt alleged by the crown, to which the crown replied or demurred, and so on, until issue joined, when the cause was tried by a jury at Westminster. Judgment for the crown on a traverse is, "that the subject take nothing by his traverse;" if for the subject, it is judgment of *amoveas manus*—"that the Queen's hands be amoved, &c."<sup>2</sup>

§ 4. This procedure by traverse was extended to inquisitions in lunacy by stat. 2 & 3 Edw. 6, c. 8. Under the present practice, where a person has been found lunatic by inquisition,<sup>3</sup> and wishes to vacate it on the ground that he was of sound mind and capable of managing himself and his property when it was returned, he presents a petition for leave to traverse the inquisition, which is done by filing in the Petty Bag Office a traverse or plea alleging the insufficiency of the inquisition, to which the prosecutor of the commission replies in the name of the Attorney-General representing the crown. The record is then made up and carried into the Queen's Bench Division for trial, and tried before a jury in the same manner as an ordinary issue. The result is either to affirm or vacate the inquisition.<sup>4</sup>

§ 5. Formerly, where a person indicted of a misdemeanor, but not actually in custody, traversed the indictment by pleading not guilty, the trial was postponed until the next assizes or sessions, and hence "traverse" came to mean "postpone." The stat. 14 & 15 Vict. c. 100, s. 27, provides that no person shall be entitled to traverse, that is, postpone, the trial of any indictment.<sup>5</sup>

ETYMOLOGY.—Old French, *traverser*, to deny;<sup>6</sup> from Latin, *transversus*.

**TRAVERSING ANSWER—TRAVERSING NOTE.**—In suits under the old practice in Chancery, where the defendant refused or neglected to file an answer to the bill, the plaintiff might file either a traversing answer or a traversing note, which produced the same effect as if the defendant had filed an answer traversing the case made by the bill.<sup>7</sup> (See *Pro confesso*.)

<sup>1</sup> *Noel v. Noel*, 1 De G., J. & S. 461; *Rochdale Canal Co. v. King*, 15 Beav. 11.

<sup>2</sup> Chitty, Prer. 356 *et seq.*; Tidd's Pr. 1076.

<sup>3</sup> Not by trial under Lunacy Reg. Act, 1862, s. 4 (see *Inquiry*, § 5), for in that case the inquisition can only be questioned by new trial or new inquiry.

<sup>4</sup> Elmer, Pr. in Lunacy, ch. ix.; Staunf. Prer. c. 20; Pope on Lunacy, 71.

<sup>5</sup> Archbold, Crim. Pl. 97.

<sup>6</sup> Britton, 147 a.

<sup>7</sup> Daniell's Ch. Pr. 436. The modern practice dispenses with these fictions. See Rules of Court, xxix. *passim*.

**TREASON**, in its most general sense, is a crime committed by one person against another to whom he is bound by some tie of allegiance or subjection.<sup>1</sup> It was formerly of two kinds, high treason and petit treason. The former now alone exists.

High treason. I. § 2. A person commits high treason who does an overt act showing an intention to kill or depose the Queen, or to do her any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint; or to kill the wife of a king regnant; or to kill the heir-apparent to the throne; or who levies war against the Queen; or who attempts by insurrection to intimidate the Queen or the Houses of Parliament; or who actively assists the Queen's enemies; or who violates the wife of a king regnant, or the eldest daughter of the sovereign, or the wife of the heir-apparent; or who kills the Lord Chancellor, or one of certain other high officials of the crown. Endeavouring to deprive or hinder any person from succeeding to the crown under the Act of Settlement, or denying the validity of the Act of Settlement, are also treasons.<sup>2</sup> (See *Overt Act*.)

§ 3. High treason is punishable by hanging, or, in the case of a man, by beheading, if so directed by the crown.<sup>3</sup>

§ 4. The offence is an exception to the ordinary criminal law (i) in being subject to limitation in respect of time (stat. 7 Will. 3, c. 3, providing that no person shall be prosecuted for treason but within three years after the offence, except in the case of a designed assassination of the sovereign);<sup>4</sup> (ii) in two witnesses being required for a conviction, unless the prisoner freely confesses his crime;<sup>5</sup> and (iii) in the prisoner being entitled to have a copy of the indictment and lists of the witnesses and jurors delivered to him ten days before the trial, unless he is charged with compassing or imagining bodily harm to the sovereign.<sup>6</sup>

Petty treason. II. § 5. Petty treason was where a servant killed his master, a wife her husband, or an ecclesiastical person his superior, such a crime being considered a violation of private allegiance. Petty treason has been abolished by being converted into the crime of murder, from which it only differed in its punishment.<sup>7</sup>

See *Accessory*.

ETYMOLOGY.]—Norman-French, *tresoun*, *tresun*;<sup>8</sup> Latin, *tradere*, to deliver up, betray.

**TREASURE TROVE** is where any money, coin, gold, silver, plate, or bullion, is found hidden in the earth or other private place. It belongs to the crown, unless the owner appears to claim it.<sup>9</sup> The crown may grant the right to treasure trove found within a certain district to a private person, *e.g.* the lord of a manor. (See *Franchise*; *Manor*; *Prerogative*; *Derelict*; *Wreck*.)

<sup>1</sup> Bl. Comm. iv. 75; Mirror, ch. 1, § 7.

<sup>2</sup> *Ibid.*; Steph. Comm. iv. 162; Steph. Crim. Dig. 32 *et seq.*; stats. 25 Edw. 3, c. 2; 1 Anne, s. 2, c. 17; 6 Anne, c. 7; 36 Geo. 3, c. 7. As to what are called treasonable felonies or treason felonies, such as acts showing an intention to depose the Queen, or to intimidate her or the houses of parliament, see 11 & 12 Vict. c. 12. See also *Assault*, § 4.

<sup>3</sup> Steph. Crim. Dig. 36; see the Felony Act, 1870, s. 31.

<sup>4</sup> Steph. Comm. iv. 163.

<sup>5</sup> *Ibid.* 426.

<sup>6</sup> *Ibid.* 420.

<sup>7</sup> Steph. Comm. iv. 76; Phill. Eccl. Law, 38; stat. 24 & 25 Vict. c. 100, s. 8.

<sup>8</sup> Britton, 16 a.

<sup>9</sup> Bl. Comm. i. 295; Steph. Comm. ii. 546.

**TREASURY** is that fiscal department of the government which controls the payments of the public money in accordance with the votes of the House of Commons. For this purpose it issues directions to the Exchequer (*q. v.*).<sup>1</sup>

**TREATY.**—I. § 1. In private law, treaty signifies the discussion of Agreement. terms which immediately precedes the conclusion of a contract or other transaction. A warranty on the sale of goods, to be valid, must be made during the treaty preceding the sale.<sup>2</sup>

II. § 2. In public and international law, a treaty is an agreement between the governments of two states. (See *State.*) Such an agreement is, of course, not enforceable by legal proceedings. (See *Law*, § 2; *International Law.*) In England, the power of making treaties with foreign states is vested in the crown as part of its prerogative.<sup>3</sup> In some cases, however, treaties made by the crown are not valid in the Courts of this country unless concluded under the powers of an act of parliament. For an instance, see *Extradition*.

**TREBLE COSTS—TREBLE DAMAGES.** See *Costs*, § 7; *Double Damages*.

**TRESPASS** is a generic name for various torts, most of them being distinguished by the Latin words formerly used in the appropriate writs.

§ 1. Trespass *vi et armis* ("with force and arms") includes injuries to Vi et armis. the person accompanied with actual force or violence, as in the case of battery and imprisonment,<sup>4</sup> and the act of entering on another man's land without lawful authority. This latter kind of trespass (in which the "force" is implied or fictitious) is also called trespass *quare clausum fregit*, "because Quare cl. fr. he [the defendant] broke or entered into the close" or land of the plaintiff.<sup>5</sup> Not only entering a man's land, but also the acts of allowing cattle to stray into his land, or driving nails into his wall, or digging the minerals under his land, constitute trespass qu. cl. fr.<sup>6</sup> To enable a person to bring an action of trespass qu. cl. fr., he must have actual possession of the land. Therefore, an heir of land cannot maintain an action for a trespass committed before he took possession by entry.<sup>7</sup> (See *Possession*, §§ 11, 12.)

§ 2. Where a person has by law the right to enter on the lands of another Ab initio. for a certain purpose, and, after entry, he does something which he is not entitled to do, then he is considered a trespasser ab initio, or as if his entry had been unlawful.<sup>8</sup>

§ 3. A continuing trespass is one which is per- Continuing.

<sup>1</sup> For details, see Homersham Cox, *Inst.* 678 *et seq.*; Return to House of Commons on Public Income and Expenditure (29th July, 1869), pp. 334 *et seq.*; Madox, *Exch.* 262 and *passim*.

<sup>2</sup> Chitty on Contracts, 419.

<sup>3</sup> Steph. Comm. ii. 490.

<sup>4</sup> Broom, C. L. 125.

<sup>5</sup> Stephen's Comm. iii. 364, 398. The fiction of "implied force" in a peaceable though wrongful entry on land is not justi-

fied by the old authorities; the forms for trespass qu. cl. fr. in the Register have sometimes the words *vi et armis*, sometimes not. It is therefore probable that they were originally only inserted where the trespass was forcible as well as wrongful.

<sup>6</sup> Underhill on Torts, 159.

<sup>7</sup> Steph. Comm. iii. 399.

<sup>8</sup> *Six Carpenters' Case*, 8 Rep. 146 b; Smith's L. C. i.

manent in its nature ; as, where a person builds on his own land so that part of the building overhangs his neighbour's land.

De bonis  
asportatis.

§ 4. Another variety of trespass vi et armis is trespass *de bonis asportatis*, for the wrongful taking of chattels.<sup>1</sup> Injuries committed to chattels while in the owner's possession (*e. g.*, by poisoning his cattle), are also classed under the head of trespass vi et armis.<sup>2</sup>

Trespass on  
the case.

§ 5. Trespass on the case is a class of torts for which no remedy existed at common law until the Statute of Westminster 2 (13 Edw. 1, c. 24) directed that whenever a writ existed, and "in a like case" (in *consimili casu*), falling under the same right, and requiring a like remedy, no form of writ was to be found, then a new writ should be framed. The principal distinction between trespass vi et armis and wrongs for which writs were framed under this statute (hence called writs of trespass on the case, or "case" simply), is that in the former the damage is direct, and in the latter consequential. Thus, if a man throws a log on a highway, and in so doing injures a person, this is trespass ; but if the log lies on the ground, and a person is injured by falling over it, this is case.<sup>3</sup> The principal action for trespass on the case, having a specific name, is *trover (q. v.)*,<sup>4</sup> but the class also includes a large number of torts having no specific name, especially those arising from negligence, fraud, &c.<sup>5</sup>

§ 6. Trespass gives rise to a right of action for damages. (See *Tort*, § 2.)

**TRIAL** is that step in an action, prosecution or other judicial proceeding, by which the questions of fact in issue are decided. (See *Fact ; Issue ; Questions of Law*.)

I. In actions in the High Court, there are five principal modes of trial, viz., trial before a judge and jury, before a judge alone, before a judge with assessors, before a referee alone, and before a referee with assessors.<sup>6</sup>

Jury.

§ 2. Trial before a judge and jury (formerly called trial per pais), is a mode of trial which was formerly peculiar to the superior Courts of common law. By the stat. 21 & 22 Vict. c. 27, power was given to the Court of Chancery to summon juries to try questions of fact ; but the power was seldom exercised. Under the Judicature Act, the rule in all the divisions of the High Court is that where the action is of such a nature that either party would have been entitled, before the act, to have it tried by a jury, then either party may insist on its being tried by a jury, unless it is a case coming within the power of compulsory reference possessed by the Court.<sup>7</sup> (See *Notice of Trial ; Reference*, § 4.) Therefore either party may require an action for assault to be tried by

<sup>1</sup> Broom, 807.

<sup>2</sup> *Ibid.* 809 ; Underhill, 209.

<sup>3</sup> Broom, 125. Hence in actions on the case the words used in the writ were not *vi et armis*, but *contra pacem nostram*, "against our peace;" see *Termes de la Ley*, s. v. *Trespass*.

<sup>4</sup> *Assumpsit* is also a variety of trespass on the case ; Stephen's Pl. 18.

<sup>5</sup> Dacey on Parties, 24.

<sup>6</sup> Rules of Court, xxxvi. 2.

<sup>7</sup> Jud. Act, 1873, s. 56 ; Rules of Court, xxxvi. 3, 4, 5, 26 ; *Sugg v. Silber*, 1 Q. B. D. 362.

a jury, while no such right exists in the case of an action for specific performance, for dissolution of a partnership, or the like.<sup>1</sup> § 3. Where an action in the Chancery Division is to be tried by jury, it is not tried before the judge to whom it is assigned, but is set down for trial at the sittings in London or Middlesex, or at the assizes. § 4. A trial by jury consists of the operation of calling and swearing the jury (see *Jury*; *Challenge*), of a speech by the counsel for the plaintiff (see *Open*, § 2), the examination, cross-examination and re-examination of his witnesses: a speech by the counsel for the defendant, followed by the examination, cross-examination and re-examination of his witnesses, and a summing up of their evidence by him: the reply or speech by the plaintiff's counsel: the summing up of the whole case by the judge for the jury: and, lastly, the jury's verdict.<sup>2</sup> (See the various titles; also *Right to begin*.) It sometimes happens, however, that the trial comes to a premature end by the non-appearance of one of the parties, or by nonsuit (*q. v.*), or the withdrawal of a juror (*q. v.*). If the plaintiff does not appear at the trial, the action is dismissed; if the defendant does not appear, the plaintiff must prove his case, so far as the burden of proof lies upon him. A verdict or judgment so obtained may be set aside by the Court upon terms.<sup>3</sup> § 5. Sometimes a trial is ordered to take place before several judges and a jury:<sup>4</sup> this was formerly called a trial at bar (see *Bar*, § 3), as opposed to the ordinary trial, which is sometimes called, by way of distinction, "trial at nisi prius." (See *Nisi Prius*.)

Trial at bar.

§ 6. Where the judge who tried the action has misdirected the jury in point of law, or admitted evidence which ought to have been refused, or rejected evidence which ought to have been admitted, or where the jury have found against the weight of the evidence, or given excessive damages, and generally wherever it is clear that a fair trial has not been had, the party aggrieved may obtain an order for a new trial on motion made for that purpose. (See *Order*, § 3; *Rule*, § 3.) The whole proceedings on the trial are then gone through afresh, and, if the case is again not properly tried, a third trial may be ordered, and so on.<sup>5</sup>

New trial.

§ 7. The other modes of trial are similar to trial before a judge and jury, except that the calling and swearing of the jury, and the summing up by the judge, are necessarily absent. Where the trial is before a judge alone, the evidence is sometimes taken by affidavit. (See *Affidavit*, § 2; *Evidence*, § 7.)

Trial before judge, referee, &amp;c.

§ 8. Admiralty actions involving nautical questions, *e.g.*, actions of collision, are generally tried before a judge with Trinity Masters sitting as assessors (*q. v.*).<sup>6</sup>

Trial with assessors.

<sup>1</sup> See *Swindell v. Birmingham Syndicate*, 3 Ch. D. 127; *Rushion v. Tobin*, 10 Ch. D. 558. If the parties to an action in the Chancery Division agree to take the evidence by affidavit, neither can insist on trial by jury; *Brooke v. Wigg*, 8 Ch. D. 510.

<sup>2</sup> *Smith's Action*, 130 *et seq.*; *Steph. Comm.* iii. 512; *Kino v. Rudkin*, 6 Ch. D. 160.

<sup>3</sup> *Rules of Court*, xxxvi. 18 *et seq.*

<sup>4</sup> *Ibid.* xxxvi. 7.

<sup>5</sup> *Smith's Action*, 149 *et seq.*; *Rules of Court*, xxxix.

<sup>6</sup> *Roscoe's Admiralty*, 179.

By the record. The following kinds of trial are either obsolete or very rare. § 9. Trial by the record is where issue is joined as to the existence of a particular record (*q. v.*): such an issue is tried by the Court itself on production of the record.<sup>1</sup> Trial by certificate is where a fact can only be proved by the certificate of a public official: thus, the custom of the city of London in respect of foreign attachment is proved by the oral certificate of the recorder.<sup>2</sup> (See *Certificate*, § 1, note (3).)

County Court. II. § 10. In County Court actions, the plaintiff appears in Court on the return day of the summons, and the defendant must appear to answer the plaint. On answer being made in Court, the judge proceeds to try the cause in a summary way:<sup>3</sup> in small cases the plaintiff and defendant are sworn and make their statements to the judge, being asked questions by him when necessary; but in cases where counsel or solicitors are employed, and a jury summoned, the course of proceeding resembles that on a trial in the High Court (*supra*, § 4).

Criminal procedure. III. § 11. In criminal cases, the trial of a person accused of a crime usually takes place before a judge and petty jury at the assizes, or at the Central Criminal Court, or at bar, that is, by a jury before three or more judges of the Queen's Bench Division: this last mode of trial is only used in important cases. (See *Queen's Bench*.) The steps on a criminal trial are substantially the same as those above described (*supra*, § 4), substituting "prosecutor" for "plaintiff," and "prisoner" for "defendant."<sup>4</sup> (See also *Acquittal*; *Conviction*.) The obsolete modes of trial by ordeal, by the corsned, and by battle, will be found described in Blackstone.<sup>5</sup>

Trial by peers. § 12. In cases of treason and felony, a nobleman is entitled to be tried by his peers, that is, by members of the House of Lords.<sup>6</sup> (See *Certiorari*, § 3; *Lord High Steward*; *House of Lords*.)

ETYMOLOGY AND HISTORY.]—Old French, *trier*; from late Latin, *tritare*, to sift, separate, determine; from Latin, *terere*, *tritum*, to thrash corn.<sup>7</sup>

In the old writers "trial" signified not only the trial of questions of fact, but also what we call the argument or hearing of questions of law, *e. g.* on demurrer.<sup>8</sup>

**TRIERS** or **TRIORs** are persons appointed by the Court (when necessary) to decide challenges to jurors, where no jurors have been already sworn on the jury. As soon as two jurors are sworn, they decide all subsequent challenges. Challenges to the array may be tried by the Court itself.<sup>9</sup> (See *Challenge*; *Elisors*.)

**TRINITY HOUSE** is the short name usually given to "The master,

<sup>1</sup> Smith's *Action* (11th edit.), 126; Archbold's *Pr.* 750.

<sup>2</sup> *Mayor of London v. Cox*, L. R., 2 H. L. 239; see Co. Litt. 74 a; 9 Co. 30 b *et seq.*; Bl. Comm. iii. 339, for other obsolete varieties of trial.

<sup>3</sup> Pollock's *County Court Practice*, 159.

<sup>4</sup> Steph. Comm. iv. 416.

<sup>5</sup> Comm. iv. 342.

<sup>6</sup> Bl. Comm. i. 401.

<sup>7</sup> Diez. *Wörtl.* ii. 444; Littré, s. v.

A form *detrier* occurs in Britton, 127 a.

<sup>8</sup> Co. Litt. 124.

<sup>9</sup> Archbold, *Pr.* 392.

wardens and assistants of the guild, fraternity or brotherhood of the most glorious and undivided Trinity, and of St. Clement in the parish of Deptford Strond in the county of Kent;" also called the Corporation of the Trinity House of Deptford Strond. It was incorporated in the reign of Henry VIII., and charged by many successive charters and acts of parliament with numerous duties relating to the marine, especially in relation to pilotage (*q. v.*) and the erection and maintenance of light-houses, beacons and sea-marks.<sup>1</sup>

**TRINITY MASTERS** are elder brethren of the Trinity House. If a question arising in an Admiralty action depends upon technical skill and experience in navigation, the judge or Court is usually assisted at the hearing by two Trinity Masters, who sit as assessors and advise the Court on questions of a nautical character.<sup>2</sup> (See *Assessor*.)

**TROVER**.—In common law practice, the action of trover (or trover and conversion) was a species of action on the case (see *Trespas*, § 5), and originally lay for the recovery of damages against a person who had found another's goods and wrongfully converted them to his own use; subsequently the allegation of the loss of the goods by the plaintiff and the finding of them by the defendant was merely fictitious, and the action became the remedy for any wrongful interference with or detention of the goods of another.<sup>3</sup> The name "trover" is sometimes applied to an action brought for the same purpose under the Judicature Act, though, at the present day, it is probably more usual in such a case to bring an action claiming delivery of the goods and damages for the wrongful detention.<sup>4</sup> In an action of trover the plaintiff could only recover the value of the goods, not the goods themselves. (See *Detinue*; *Tort*; *Writ of Delivery*.)

**TRUCK ACT** is the statute 1 & 2 Will. 4, c. 37, passed to abolish what is commonly called the "truck system," under which employers were in the practice of paying the wages of their workpeople in goods, or of requiring them to purchase goods at certain shops: this led to labourers being compelled to take goods of inferior quality at a high price. The act applies to all artificers, workmen and labourers, except those engaged in certain trades, especially iron and metal works, quarries, cloth, silk and glass manufactories. It does not apply to domestic or agricultural servants.<sup>5</sup>

**TRUE BILL.** See *Indictment*.

**TRUST.**—I. § 1. A trust, in its simplest form, is a relation between two persons, by virtue of which one of them (the trustee) holds property

<sup>1</sup> Merchant Shipping Act, 1854; Steph. Comm. iii. 156 *et seq.*

<sup>2</sup> Williams & Bruce's Admiralty, 271.

<sup>3</sup> Stephen's Comm. iii. 425.

<sup>4</sup> See the forms of writs in Appendix A. part ii. section iv. to the Rules of Court.

<sup>5</sup> Smith's Master and Servant, 166; stat. 23 & 24 Vict. c. 151, s. 28.

for the benefit of the other (the cestui que trust), while as regards the rest of the world he (the trustee) is, for most purposes, absolute owner of it.<sup>1</sup> The right of the cestui que trust to that benefit is enforceable as a personal right only against the trustee and those who have acquired interests in the trust property with notice of the trust. As between the trustee and cestui que trust, and those claiming under them, the cestui que trust is in effect beneficial owner of the trust property,<sup>2</sup> either absolutely or with restrictions according to the nature of the trust. As trusts were formerly enforced only in equity, he is sometimes called equitable owner.<sup>3</sup> (See *Ownership*, § 10; *Equity*, § 7; *Estate*, § 13.)

Assignments  
of trusts.

§ 2. This equitable ownership or interest is assignable, except in the case of a restraint on alienation or anticipation (see those titles), or of a discretionary trust (*infra*, § 14). By the Statute of Frauds (*g.v.*) all grants and assignments of trusts must be in writing, signed by the grantor or assignor. No particular form of words is required for an assignment of a trust, but it is the custom to employ the same kind of instrument and the same form of words as if the interest were legal instead of equitable.<sup>4</sup>

Devolution of  
trusts.

§ 3. The devolution of a trust, that is, of an equitable estate or interest in property, follows the rules of law applicable to a corresponding legal estate or interest: therefore if A. holds land in trust for B. absolutely, and B. dies intestate, his heir (whether heir at law, or heir in gavelkind or borough-English,<sup>5</sup> according to the tenure of the land), becomes cestui que trust, or beneficial owner, of the land; in the case of personal property, B.'s interest would pass to his executors, and be distributed, after payment of his debts, among his next of kin. (See *Assets*, § 3.) Trust property is liable to be taken in execution (see *Elegit*, § 2; *Execution*, § 5; *Statute of Frauds*), and if the cestui que trust becomes bankrupt it vests in the trustee in his bankruptcy. The ownership of the trustee, on the other hand, is not subject to his debts, does not pass to his trustee if he becomes bankrupt, and is not liable to succession duty on his death.

Trusts by  
act of the  
party.

Express.

Trusts arise either by the act of the party or by operation of law.

I. § 4. Trusts by act of the party are either express or implied.

A. § 5. An express trust is one created by clear words: as where A. gives property to B. in trust for C., or otherwise expresses a clear intention that C. shall have the benefit of it.<sup>6</sup> A. is called the author of the trust, or the settlor, testator, &c., according to the instrument by which the trust is created. As to where writing is required for the creation of trusts, see *Statute of Frauds*; *Declaration*, § 2. See also *Secret Trusts*.

(1) § 6. With reference to the completeness with which they are expressed by the author of the trust, trusts are of two classes, viz. (i) those in which the objects of the trust are completely indicated, and (ii) those in which

<sup>1</sup> As to trusts generally, see Lewin on Trusts; Watson's Comp. Eq. 839 *et seq.* As to the origin of trusts, see Butler's note to Co. Litt. 290 b, and title *Use*.

<sup>2</sup> *Burgess v. Wheate*, 1 Ed. 224 (at p. 250).

<sup>3</sup> Actions for the execution of trusts must be assigned to the Chancery Division

of the High Court. Judicature Act, 1873, s. 34.

<sup>4</sup> Williams, R. P. 169; Lewin on Trusts, 494.

<sup>5</sup> Williams, R. P. 168.

<sup>6</sup> Provided that it is not of such a nature as to take effect as a use under the Statute of Uses. (See *Use*.)



they are not. (i) § 7. Trusts of the former class are again divisible into trusts executed and trusts executory. An executed trust is one in which the limitations of the equitable interest are complete and final; as if A. conveys property in trust for C. for life, and after his death in trust for D. absolutely. In an executory trust the limitations of the equitable interest are intended to serve merely as minutes or instructions for perfecting the settlement at some future period;¹ thus, a trust in marriage articles to settle land on the intended husband for life, with remainder to the heirs of the body of the husband and wife, is executory, because it contemplates a future settlement in accordance with the intention expressed by the articles, which is that such a limitation may be made as will give the husband a life estate only, with remainder to the eldest and other sons successively in tail;—the distinction is important, for if the limitations in the articles were treated as final (in other words, as an executed trust) they would, under the rule in *Shelley's Case (q. v.)*, give the husband an estate tail, which would enable him to defeat the interests of the issue.² (ii) § 8. A trust in which the objects are not completely indicated is sometimes called a power in the nature of a trust, or a mixture of a trust and power; in other words, a trust of which the outline only is sketched by the settlor, while the details are to be filled up by the good sense of the trustees;³ as if A. gives property to B. with power (or upon trust) to dispose of it among A.'s relations, then in default of a disposal by B. the property will be divisible among A.'s next of kin.⁴

Executed trust.

Executory trust.

Power in the nature of trust.

(2) With reference to their purposes, trusts are either public or private. § 9. "By public must be understood such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. To this class belong all trusts for charitable purposes, and indeed *public* trusts and *charitable* trusts may be considered in general as synonymous expressions. § 10. In private trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time may be, definitely ascertained, and to whom therefore collectively, unless under some legal disability, it is, or within the allowed limit will be, competent to control, modify or determine the trust."⁵ Public trusts are necessarily administrative (*q. v.*); private trusts, on the other hand, may be simple [passive] or special [active].

Public trusts.

Charitable trusts.

Private trusts.

§ 11. "The simple trust is where property is vested in one person upon trust for another, and the nature of the trust not being prescribed by the settlor, is left to the construction of law. In this case the cestui que trust has *jus habendi*, or the right to be put in actual possession of the

Simple or passive trusts

¹ Lewin on Trusts, 89; White & Tudor's L. C. i. 18; notes to *Glenorchy v. Bosville*, Ca. t. Talb. 3.

² *Ibid.*

³ Lewin, 19.

⁴ *Salisbury v. Denton*, 3 K. & J. 529; White & Tudor's L. C. ii. 876. "A disposition of this kind contains a mixture of trust and power. The trust must be exercised for relations and kindred of some description or other. The power of selection belongs to those to whom the testator

has thought right to confide it. . . . If there is any person entitled to exercise the power, the trust will be for those of the relations and kindred whom such person shall select; if the power is extinct the trust is for those who answer the description of relations and kindred according to the construction this Court may put upon these words." Per Sir W. Grant, *Cole v. Wade*, 16 Vesey, at p. 43.

⁵ Lewin, 20.

property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances as the cestui que trust directs;" he is, in short, absolute equitable owner of the property. (See *Trustee*, § 10.)

Special or  
active trusts.

§ 12. "The special trust is where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out, and the trustee is not, as before, a mere passive depository of the estate, but is called upon to exert himself actively in the execution of the settlor's intention; as where a conveyance is to trustees upon trust to sell for payment of debts,"<sup>1</sup> or to pay the income to a given person during his life. (See *Settlement*.) With reference to the obligations of the trustee, special trusts are divisible into imperative and discretionary. § 13. An imperative trust is where the trustee is bound to act in the manner directed; thus, if the property is given upon

Imperative  
trusts.

Discretionary  
trusts.

trust to sell, the trustee is bound to sell. § 14. A discretionary trust is where the performance or exercise of the trust and not merely the *mode* of its exercise is left to the discretion of the trustee: as if property is given to B. upon trust to apply it for the benefit of C. or his wife and children during his life in such manner and so long as B. in his discretion shall think best; such trusts are not unfrequently inserted in wills and settlements when it is desired to prevent an allowance given to a spendthrift and his family from being assigned by him or taken by his creditors on his bankruptcy, because, as the trust cannot be enforced against the trustee, C. has no interest capable of being sold or otherwise dealt with for the benefit of his creditors.<sup>2</sup> § 15. With reference to the mode in which they are to be exercised, special trusts are divisible into ministerial (or instrumental) and discretionary. "Ministerial trusts are such as demand no further exercise of reason or understanding than every intelligent agent must necessarily employ; such is a trust to convey an estate to a certain person. Discretionary trusts (in the general sense of the word) are such as cannot be duly administered without the application of a certain degree of prudence and judgment;<sup>3</sup> as where a fund is vested in trustees upon trust to distribute among such charitable objects as the trustees shall think fit. So a trust for sale must be considered discretionary. (See *Discretion*.) § 16. To this class belongs what is called a trust with a power annexed, where the trust itself is complete, and the power being but an accessory may be exercised or not as the trustee may deem it expedient; as where lands are limited to trustees with a power of varying the securities."<sup>4</sup>

Ministerial or  
administrative  
trusts.

Discretionary  
trusts (sensu  
lato).

Implied  
trusts.  
Precatory.

B. § 17. An implied trust is where the intention to create the trust is inferred. Thus, if A. gives property to B., "not doubting," "entreating," or "hoping" that B. will employ it for the benefit of C., a trust is implied in favour of C., the execution of which C. can enforce, although it is given in a precatory form. This is called a precatory trust.<sup>5</sup>

<sup>1</sup> Lewin, 18.

<sup>2</sup> Elphin. Conv. 297.

<sup>3</sup> Lewin, 18. A trust may therefore be discretionary either with reference to whether it shall be exercised at all, or with reference to the mode in which it shall be

exercised.

<sup>4</sup> Lewin, 19.

<sup>5</sup> *Ibid.* 86, note; *Harding v. Glyn*, 1 Atk. 469; *White & Tudor's L. C.* ii. 860; *Willis v. Kymer*, 7 Ch. D. 181.

§ 18. An honorary trust is where A. gives property to B. "relying on his honour" (or using equivalent words) that he will employ it for the benefit of C. Such a trust is not legally enforceable.<sup>1</sup> Honorary.

II. § 19. Trusts by operation of law are such as are not declared by the party at all, either directly or indirectly, but result from the effect of a rule of equity. They are of two kinds, resulting and constructive. Trusts by operation of law.

§ 20. A resulting trust arises where a trust is created which does not dispose of the property. Thus, if an estate is devised to A. and his heirs upon trust to sell and pay the testator's debts, then the surplus of the beneficial interest constitutes a resulting trust in favour of the testator's heir. (See *Result.*) As a general rule, where in a conveyance or will the legal estate is given to a person, but no trust is expressed, and an intention can be collected that the grantee or devisee should not take the beneficial interest (as where a person purchases property in the name of another), the interest will result to the grantor, purchaser, &c.; similarly, if part of the beneficial interest is disposed of, the residue will result.<sup>2</sup> (See *Advancement*, § 4; *Conversion*.) Resulting trusts.

§ 21. Where a private trust wholly fails, and there are no heir, next of kin or other persons representing the settlor, then, in the case of real estate, the trustee takes it for his own benefit,<sup>3</sup> while in the case of personal estate it goes to the crown as *bonum vacans*.<sup>4</sup> As to charitable trusts, see *Cy-près*. Failure of trust.

§ 22. A constructive trust is one which the Court creates by a construction put upon certain acts of the parties: thus, when a tenant for life of leaseholds renews the lease on his own account, the law gives the benefit of the renewed lease to those who were interested in the old lease.<sup>5</sup> Constructive trusts.

§ 23. As soon as a valid contract for the sale of land has been entered into, the vendor becomes in equity a trustee of the land for the purchaser, to whom the beneficial ownership passes. The vendor has a lien for his purchase-money, and is entitled to retain possession until he is paid; but he is accountable to the purchaser for the rents and profits, and for any wilful waste or neglect.<sup>6</sup>

II. § 24. "Trust" is used in a peculiar sense to denote a mode of carrying on a business for purposes of profit. Thus a "share investment trust" is an agreement between a small number of persons (the trustees) and a comparatively large and fluctuating body of persons (generally called subscribers, certificate holders, or the like), that the trustees shall acquire and hold certain shares in companies and receive the income for the benefit of the subscribers, with power to sell any shares and re-invest the proceeds in other shares. Such an arrangement does not constitute the subscribers an association within the meaning of the Companies Act, 1862, and therefore does not require registration, unless the trustees exceed twenty in number.<sup>7</sup> Investment trusts, &c.

<sup>1</sup> L. R., 18 Eq. 114.

<sup>2</sup> Watson, 868; White & Tudor, i. 184.

<sup>3</sup> Williams, R. P. 167.

<sup>4</sup> Lewin on Trusts, 234.

<sup>5</sup> *Ibid.* 86, n.; White & Tudor, i. 40.

<sup>6</sup> Lewin, 113; *Lysaght v. Edwards*, 2 Ch. D. at p. 506.

<sup>7</sup> *Smith v. Anderson*, 15 Ch. D. 247, overruling *Sykes v. Beadon*, 11 Ch. D. 170, where the question whether the "trust" in that case was a lottery was raised.

**TRUSTEE.**—I. § 1. In the strict sense of the word a trustee is a person who holds property upon trust (*q. v.*).

PRIVATE  
TRUSTEES.

I. As to private trustees, or trustees acting under wills, settlements, and similar instruments.

§ 2. Any person or corporation may hold property as trustee, but as persons under disability (such as infants and married women) are unable to exercise many of the powers annexed to the office, they are rarely appointed trustees. (See *Trustee Acts.*) Corporations, moreover, cannot, as a rule, hold land without the licence of the crown, and therefore are unfit to be trustees of land; they also cannot be cestui que trusts of land without the licence of the crown.<sup>1</sup> (See *Mortmain.*)

Devolution of  
office.

§ 3. The office of a trustee is a personal one, and does not necessarily devolve or pass with the trust property. If one of several trustees dies, the office devolves on the survivors; the property also passes to the survivors, trustees being always made joint tenants.<sup>2</sup> (See *Joint Tenancy*, § 9.) Formerly, when a sole trustee died, the property passed to his heir or devisee if it was realty, or to his personal representatives or legatee if it was personalty. This rule was recently altered as regards bare trustees;<sup>3</sup> and now when any sole trustee or mortgagee of real estate dies after the 31st December, 1881, the same shall, notwithstanding any testamentary disposition, devolve to his personal representatives as if it were a chattel real.<sup>4</sup> When a new trustee is appointed in the place of the deceased, his real or personal representatives convey the property to the new trustee by the same modes of conveyance (deed of grant, assignment, &c.) as those used in conveyances by absolute owners: until that is done they hold the property upon trust so to convey it, but they are not clothed with the office of trustee under the instrument creating the trust, unless it so provides, and therefore they cannot exercise any of the powers conferred by the trust. § 4. Trusteeship is also different from executorship. Therefore if a testator appoints A. to be executor and trustee of his will, and A. renounces the executorship, he remains trustee unless he executes a disclaimer of the office. (See *Disclaim; Renounce.*)

Power of  
appointing  
new trustees.

§ 5. Most instruments creating trusts contain a power of appointing new trustees: the power is generally vested either in the beneficiaries (cestui que trusts) or some of them, or in the trustees themselves, including the last survivor, and his executors or administrators. As regards any instrument executed after 28th August, 1860, under which there is no person having a power of appointing new trustees, and able and willing to act, a power of appointing new trustees to supply any vacancy by death, retirement, &c., was, by the Trustees and Mortgagees Clauses Act,<sup>5</sup> vested in the surviving or continuing trustees or trustee or the acting executors or administrators of the last sur-

<sup>1</sup> Lewin on Trusts, 28, 36.

<sup>2</sup> Williams, R. P. 136.

<sup>3</sup> Stat. 38 & 39 Vict. c. 87, s. 48, repealing stat. 37 & 38 Vict. c. 78, s. 4, both repealed by the Conveyancing Act, 1881, s. 30. (See *Descent*, § 8.) There is no for-

feiture or escheat by failure of the heirs or corruption of the blood of a trustee. Stat. 13 & 14 Vict. c. 60, s. 47; Williams, R. P. 168.

<sup>4</sup> Conveyancing Act, 1881, s. 30.

<sup>5</sup> Stat. 23 & 24 Vict. c. 145.

viving or continuing trustee, or the last retiring trustee.<sup>1</sup> These provisions have been extended by the Conveyancing Act, 1881, ss. 31 *et seq.*, which also provides for the vesting of the trust property in the new trustees by a declaration contained in the deed of appointment. § 6. In the case of instruments executed before 28th August, 1860, and generally whenever it is impossible to appoint new trustees, or to obtain a conveyance of the trust property, recourse must be had to the Court under the provisions of the Trustee Acts (*q. v.*, and see *Vesting Order*). Trustee Acts.

§ 7. In addition to the powers given to trustees by the instruments creating the trusts, powers have been conferred on them by statute, especially by the Trustees and Mortgagees Act, 1860 (supplemented by the Conveyancing Act, 1881, sect. 35), giving trustees power in relation to the sale of real property, and the renewal of leases, &c. As to their statutory powers of investment, see *Investment*. The Conveyancing Act, 1881, sect. 37, empowers trustees to compound and compromise debts, claims, &c., and gives them extensive powers of managing estates belonging to infants, and of applying the income. Lord St. Leonards' Act (stat. 22 & 23 Vict. c. 35) gives trustees a statutory indemnity for losses not caused by their own acts or defaults, and a power to reimburse themselves for their expenses.<sup>2</sup> As to the power of trustees of wills to pay debts, see *Executor*, § 6; as to the power of trustees to apply to the Court for advice, see *Executor*, § 10. Statutory powers.

§ 8. If a trustee cannot safely administer a trust, he may institute an action to have it executed by the Court; or, in a proper case, place the trust fund in the hands of the Court under the Trustee Relief Act (*q. v.*). If a trustee refuses or neglects to administer the trust, or is guilty of a breach of trust, or the like, any beneficiary may institute an action for the execution of the trust by the Court. (See *Administration*; *Executor*, § 12; *Discretion*.) The powers of trustees are suspended by the institution of a suit for the execution of the trusts, and they can only act with the sanction of the Court.<sup>3</sup> Action for execution of trust.

Trustees are of two kinds, active and passive.<sup>4</sup>

§ 9. An active trustee is one who has to perform administrative duties, such as managing the trust property, receiving income and paying it over to the cestui que trusts, &c. The duties and liabilities of such trustees are of infinite variety; but it may be said generally that a trustee is bound to take the same care in acting for his cestui que trust as he would, if a prudent man, in acting for himself;<sup>5</sup> and that he must not derive or attempt to derive any benefit from the trust,<sup>6</sup> unless he is authorized to do so by the cestui que trust or the terms of the trust. (See *Breach of Trust*; *Discretion*; *Negligence*.) Active.

§ 10. A passive trustee is one in whom property is vested simply for the benefit of another person. In such a case the trustee is bound to Passive.

<sup>1</sup> Williams, R. P. 176.

<sup>2</sup> See Shelford, R. P. Stat. 724.

<sup>3</sup> Watson's Comp. Eq. 892.

<sup>4</sup> Umlin's Office of Trustee, 3; see *Trust*,

§ 11.

<sup>5</sup> Lewin on Trusts, 260; Watson's Comp. Eq. 892.

<sup>6</sup> Lewin, 243; Watson, 885.

convey the property to the cestui que trust, or to dispose of it as he may direct, when the time comes for the cestui que trust to deal with it, and in the meantime to hold it on his behalf.<sup>1</sup>

Bare or dry. § 11. When the duties of an active trustee have come to an end, or when the time for the cestui que trust to claim possession of the trust property has come, so that in either case the trustee is compellable to convey the property to the cestui que trust, or deal with it according to his directions, then the trustee is called a bare or dry trustee.<sup>2</sup>

PUBLIC TRUSTEES. II. § 12. As to trustees acting on behalf of the public, or a section of the public, or a large body of persons. Such trustees, if they have any active duties to perform, are usually remunerated for their trouble, while ordinary trustees (*supra*, § 2) rarely are. An important example of this kind of trustee is the trustee in a bankruptcy or liquidation. (See *Trustee in Bankruptcy*.)

Trustee for company. § 13. When a company is intended to be formed, it is sometimes found convenient to appoint a person as "trustee on behalf of the intended company" to enter into contracts, &c., on behalf of the company, the trustee having no personal interest in them. The object generally is to enter into such arrangements for the purchase of property as may serve as a basis for the operations of the company, but so as not to be binding until the company is formed and adopts them.<sup>3</sup> (See *Fraud*, § 16; *Promoter*; *Ratification*, § 2.)

Trustee of loan. § 14. When a loan or issue of debentures, bonds, or the like, is created by a corporation or foreign government, and is intended to be secured by a charge on property, trustees are frequently appointed on behalf of the holders of the bonds or stock to receive and administer the property or the income thereof for their benefit, subject to provisions contained in a document called a trust deed.<sup>4</sup>

Trust deed.

As to trustees of charities, see *Charitable Trusts Act*; *Official Trustee of Charity Lands*; *Official Trustee of Charitable Funds*; *Succession*, § 2.

II. § 15. Trustee is also used in a wide and, perhaps, inaccurate sense to denote that a person has the duty of carrying out a transaction, in which he and another person are interested, in such manner as will be most for the benefit of the latter, and not in such a way that he himself might be tempted, for the sake of his personal advantage, to neglect the interests of the other. In this sense directors of companies are said to be trustees for the shareholders.<sup>5</sup> The essential difference is, that a trustee owns the trust property and deals with it as principal, subject to his equitable obligation towards his cestui que trust, while a director is rather an agent with a limited authority.<sup>6</sup>

<sup>1</sup> Lewin, 18; Umlin, 3; Watson, 891.

<sup>2</sup> See *Lysaght v. Edwards*, 2 Ch. D. at p. 509; L. R., 5 H. L. p. 356. As to the meaning of the term as used in the Land Transfer Act, 1875, s. 48, see *Christie v. Ovington*, 1 Ch. D. 279; *Morgan v. Swansea Urban Sanitary Authority*, 9 Ch. D. 582. The use of the expression "bare trustee" in the Fines and Recoveries Act (3 & 4 Will. 4, c. 74, ss. 27, 31)

has not been explained. See *Official Trustee of Charity Lands*.

<sup>3</sup> For an example, see *In re Western of Canada Oil, &c. Co.*, L. R., 1 Ch. D. 115.

<sup>4</sup> See *National Bolivian Navigation Co. v. Wilson*, 5 App. Ca. 176.

<sup>5</sup> *Ferguson v. Wilson*, 2 Ch. 77; *Great Eastern Rail. Co. v. Turner*, 8 Ch. 149.

<sup>6</sup> *Smith v. Anderson*, 15 Ch. D. 275.

**TRUSTEE ACTS** are the statutes 13 & 14 Vict. c. 60 and 15 & 16 Vict. c. 55, passed to enable the Court of Chancery (now the High Court of Justice, on petition presented in the Chancery Division) to appoint new trustees of a settlement, will or other instrument creating a trust, whenever a trustee's death, lunacy, absence or refusal to act, or other reason, makes it necessary to apply to the Court; in other words, when the power of appointing new trustees contained in the instrument, or provided by statute, cannot be exercised. (See *Trustee*, §§ 5, 6.) They also empower the Court where property is held upon trust or mortgage by a lunatic or person of unsound mind, or out of the jurisdiction of the Court, to transfer it by a vesting order (*q. v.*) to some other person, or to make an order appointing some person to execute a deed in the place of a trustee or mortgagee, so as to give it the same effect as if the trustee or mortgagee had executed it.<sup>1</sup> (See *Petition*.)

**TRUSTEE IN BANKRUPTCY.**—§ 1. A trustee in bankruptcy is a person in whom the property of a bankrupt is vested in trust for the creditors;<sup>2</sup> his duty is to discover, realize and distribute it among the creditors, and for that purpose to examine the bankrupt's property, accounts, &c., to investigate proofs made by creditors, and to admit, reject, expunge or reduce them according to circumstances. (See *Proof*, §§ 6 *et seq.*) He also has to keep various accounts of his dealings with the property, and of the course of the bankruptcy, which are audited by the committee of inspection and the Comptroller in Bankruptcy.<sup>3</sup>

Trustee in  
bankruptcy.

Trustees may be divided into two classes. § 2. Until a trustee is specially appointed in a bankruptcy, and during any vacancy in the office, the registrar having jurisdiction in the matter is *ex officio* trustee.<sup>4</sup>

Ex officio  
trustee.

§ 3. The creditors at the first meeting in the bankruptcy (see *Bankruptcy*, § 6) have to appoint by resolution some fit person to be trustee, and fix the security to be given by him; the appointment is reported to the Court, and the Court upon being satisfied that the requisite security has been entered into, gives a certificate declaring him to be trustee.<sup>5</sup>

Trustee by  
appointment.

§ 4. When the creditors of an insolvent debtor resolve that his affairs shall be liquidated by arrangement and not in bankruptcy, they appoint a trustee, who has in almost all respects the same powers and duties as a trustee in bankruptcy.<sup>6</sup>

Trustee under  
liquidation.

**TRUSTEE RELIEF ACTS.**—If a person has in his hands a sum of money subject to a trust, and he does not know who is beneficially entitled to it, he may, instead of incurring the responsibility of paying it to the wrong person, or of instituting an action for the execution of the trust, pay it into Court under the Trustee Relief Acts, 10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74. He must file in the Chancery

<sup>1</sup> Lewin on Trusts; Shelford's R. P. Stat. 647; Daniell's Ch. Fr. 1798; Pope on Lunacy, 263.

<sup>2</sup> Not for the bankrupt; *In re Lead-bitter*, 10 Ch. D. 388; *Ex parte Sheffield*,

*ibid.* 434.

<sup>3</sup> Robson, 488.

<sup>4</sup> Bankruptcy Act, 1869, s. 17.

<sup>5</sup> *Ibid.* ss. 14, 18.

<sup>6</sup> *Ibid.* s. 125.

Division an affidavit explaining the difficulty, and giving the names of the persons whom he believes to be interested in the money, and must give them notice as soon as it has been paid into Court. Any person claiming to be interested may then present a petition, or issue a summons for payment of the money to him, and the question whom the money belongs to is then decided by the Court.<sup>1</sup>

**TUBMAN** is (or was) a barrister in the Exchequer Division of the High Court, ranking (apparently) next after the postman (*q. v.*).<sup>2</sup>

## U.

**UBERRIMÆ FIDEI** (Latin = "of the fullest confidence"). A contract is said to be *uberrimæ fidei* when the promisee is bound to communicate to the promisor every fact and circumstance which may influence him in deciding to enter into the contract or not. Thus a policy of marine insurance is a contract *uberrimæ fidei*.<sup>3</sup> (See *Insurance*.)

**ULTRA VIRES**, in the law of corporations, is used in two senses.

Of a corporation itself.

I. § 1. A contract or similar act is said to be *ultra vires* of a corporation when it purports to be entered into or done in pursuance of the powers conferred on the corporation, but is really beyond them. Thus, if a company is incorporated for the purpose of constructing a railway, it cannot, under the powers thereby conferred on it, construct a harbour, and any act done in the name of the company with that object is wholly void, even if sanctioned by all the members of the company: *a fortiori*, therefore, a majority of the shareholders cannot bind a dissentient minority by any such act.<sup>4</sup> But the doctrine does not apply to those things which are fairly incidental to what the company is empowered to do, although they may not be expressly authorized.<sup>5</sup>

Of directors, &c.

II. § 2. "*Ultra vires*" is, also, sometimes applied to an act which, though within the powers of a corporation, is not binding on it because the consent or agreement of the corporation has not been given in the

<sup>1</sup> See *Hunter's Suit*, 230 *et seq.*; *Daniell's Ch. Pr.* 1784; *Chancery Funds Rules*, 1874. As to who is a trustee within the meaning of the act, see *Matthew v. Northern Insurance Co.*, 9 Ch. D. 80.

<sup>2</sup> *R. v. Bishop of Exeter*, 7 Mee. & W. 188.

<sup>3</sup> *Goram v. Sweeting*, 2 Wms. Saund. 200, note (1).

<sup>4</sup> *Hodges on Railways*, 60 *et seq.*; *Brice on Ultra Vires*, 52 *et seq.*; *Ashbury, &c. Co. v. Riche*, L. R., 7 H. L. 653.

<sup>5</sup> *Att.-Gen. v. Great Eastern Rail. Co.*, 5 App. Ca. 473. It is said that the term "*ultra vires*" is used in another sense to signify that a certain act is not void as being beyond the powers of the corporation, but that it is not binding on the

members who dissent from it because it is contrary to some provision, express or implied, for the protection of the shareholders; on this principle if a company, being possessed of funds appropriated for a certain purpose, applied them to another purpose within their general powers, that appropriation would be *ultra vires* and only binding on the shareholders who consented to it. (See *Brice*, 52 *et seq.*; *Taylor v. Chichester Rail. Co.*, L. R., 2 Ex. at p. 378.) Since the decisions in *Taylor v. Chichester Rail. Co.* (L. R., 4 H. L. 628) and *Ashbury Co. v. Riche* (L. R., 7 H. L. 653, as explained by *Att.-Gen. v. Great Eastern Rail. Co.*, 5 App. Ca. 473) it is doubtful whether this distinction can be maintained.



manner required by its constitution. Thus where a company delegates certain powers to its directors, all acts done by the directors beyond the scope of those powers are *ultra vires*, and not binding on the company, unless it subsequently ratifies them. An act which is *ultra vires* in the primary sense of the word (§ 1) is incapable of ratification.

**UMPIRE.**—In a submission to the arbitration of two or more persons it is usual to provide that if the arbitrators do not agree upon their award before a certain time, another person shall be called in as umpire, by whose award the parties shall be bound. The award of an umpire is sometimes called an *umpirage*.<sup>1</sup> (See *Arbitration*; *Refer*.)

**UNBORN PERSONS.** See *In Ventre sa Mère*; *Perpetuity*.

**UNCERTAINTY.**—§ 1. In the law of wills, the general rule is that Wills. where a testator has so expressed himself that it is impossible to ascertain what his intention was, the gift or provision so made is void for uncertainty. Thus, a will consisting merely of these words, "I leave and bequeath to all my grandchildren, and share and share alike," is too uncertain to be operative, although it may be conjectured that the word "all" was meant to precede "to," for words will only be transposed when they are inconsistent with the context, not when they are merely unnecessary.<sup>2</sup>

§ 2. In pleading, the general rule is that whatever is alleged must be Pleading. alleged with certainty.<sup>3</sup> An allegation suffering from the defect of uncertainty is apparently liable to be struck out as embarrassing (*q. v.*).<sup>4</sup>

**UNCORE PRIST** (= "still ready") is the Norman-French name for the plea or defence which a defendant sets up when he is sued on a contract for something which he is "still ready" to do up to the time when he puts in his defence. It generally follows a plea of "tout temps prist" (*q. v.*).<sup>5</sup> For an instance, see *Tender*.

**UNDE NIHIL HABET.** See *Writ of Dower*.

**UNDERLEASE—UNDERLESSOR—UNDERLESSEE.**—An underlease is a lease granted by a lessee or tenant for years; in speaking with reference to the underlease he is called the underlessor, and the person to whom the underlease is granted is called the underlessee.<sup>6</sup> As the underlessee is not liable to the original lessor on the covenants, &c. of the original lease, a mortgage of leaseholds is generally made by underlease, and not by assignment. (See *Mortgage*, § 4.)

Another common instance of an underlease is where land is let on

<sup>1</sup> Bl. Comm. iii. 16; Smith's Action, 460.

<sup>2</sup> Jarman on Wills, 356; *Mohun v. Mohun*, 1 Sw. 201.

<sup>3</sup> Steph. Pl. (7th edit.), 275.

S.

<sup>4</sup> Rules of Court, xxvii. 1.

<sup>5</sup> Co. Litt. 207 a; Leake on Contracts (2nd edit.), 858.

<sup>6</sup> Woodfall's Landlord & Tenant, 11, 241.

building lease, and the lessee grants underleases of the houses erected by him. (See *Rent*, § 5.)

See *Assignment*; *Lease*.

**UNDERTAKING.**—I. § 1. In the primary sense of the word, an undertaking is a promise. In the old books “undertaker” means a promisor.<sup>1</sup>

§ 2. “Undertaking” is frequently used in the special sense of a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtaining some concession from the Court or the opposite party. Thus, where an interim or ex parte injunction is granted, the Court generally requires the plaintiff to give an undertaking as to damages; that is, he must undertake that if it should subsequently turn out that he was not entitled to the injunction, and that its operation has caused injury to the defendant, he will pay to the defendant damages for the injury so sustained.

So, if an application is made for an injunction, and the defendant asks that it may be adjourned, he is generally required to give an undertaking not to commit the acts complained of in the meantime; if it is a question of infringement of a patent or the like, he sometimes undertakes to keep an account of all articles made or sold by him during the period of the adjournment.<sup>2</sup>

An undertaking may be enforced by attachment, or otherwise, in the same manner as an injunction.<sup>3</sup>

§ 3. An undertaking to appear in an action is a promise by a solicitor that he will enter an appearance for his client; such an undertaking is given when a solicitor accepts service of a writ of summons in order to save his client the annoyance of personal service. (See *Service*, § 12.) It is enforceable by attachment.<sup>4</sup>

Undertaking  
of company.

II. § 4. In the Lands Clauses Consolidation Act, 1845, the Companies Clauses Act, 1845, and similar acts, applying to companies incorporated for the construction of railways, docks and similar works, “undertaking” means the works or undertaking, of whatever nature, which are authorized by the special act incorporating the particular company. The question what is included in the “undertaking” of a company principally arises in cases where a company has created a mortgage or charge on its undertaking to secure debentures, or the like. It seems that such a charge operates on all the property and revenues of the company, as a going concern, at the time when the security requires to be enforced.<sup>5</sup> (See *Debenture*, § 5; *Security*, § 9.)

**UNDERWRITER** is a person who joins with others in entering into a marine policy of insurance as insurer. Except where an insurance is effected with a company, a policy of marine insurance is generally

<sup>1</sup> *Birkmyr v. Darnell*, 1 Salk. 27.

<sup>2</sup> Seton on Decrees, 344.

<sup>3</sup> *Ibid.* 297. As to enforcing an undertaking for the safe custody of documents, see Conveyancing Act, 1881, s. 9, § 9.

<sup>4</sup> Rules of Court, xii. 14.

<sup>5</sup> *Gardner v. L. C. & D. Rail. Co.*, L. R., 2 Ch. 201; Hodges on Railways, 125; *In re Panama, &c. Co.*, L. R., 5 Ch. 318.

entered into by a number of persons, each of whom makes himself liable for a certain sum, so as to divide the risk; they subscribe or underwrite the policy in lines one under another, and hence to subscribe a policy is sometimes called "taking a line." Policies are usually effected through brokers.<sup>1</sup> (See *Insurance; Policy; Adjustment.*)

**UNDISCHARGED BANKRUPT OR DEBTOR.** See *Bankrupt*, § 3; *Discharge*, § 4.

**UNDUE INFLUENCE.**—§ 1. The equitable doctrine of undue Equity. influence is that where a person enters into an agreement or disposition of property under such circumstances as to show or give rise to the presumption that he has not been allowed to exercise a free and deliberate judgment on the matter, the Court will set it aside. Such a presumption chiefly arises in cases where the parties stand in a relation implying mutual confidence; e. g., parent and child, guardian and ward, trustee and cestui que trust, legal adviser and client; but it may be rebutted by showing that the transaction was in fact reasonable and entered into in good faith.<sup>2</sup>

§ 2. Where a person is induced to execute a will by undue influence, it Will. is liable to be invalidated, or at least so far as the undue influence extends. Such cases chiefly arise where a testator is in feeble health, bodily or mentally, and therefore liable to be influenced by those near him.<sup>3</sup>

§ 3. Undue influence at parliamentary and municipal elections is Parliamentary elections. where anyone interferes with the free exercise of a voter's franchise, by violence, intimidation or otherwise. It is a misdemeanor.<sup>4</sup>

**UNION.**—§ 1. In the poor law, a union consists of two or more parishes which have been consolidated for the better administration of the poor law therein. (See *Poor Law.*)

§ 2. In ecclesiastical law, a union consists of two or more benefices which have been united into one benefice. Such a union may be made under the statute 1 & 2 Vict. c. 106, passed "to abridge the holding of benefices in plurality," and amended by stat. 13 & 14 Vict. c. 98; and under stat. 23 & 24 Vict. c. 142, passed "to make better provision for the union of contiguous benefices in cities, towns and boroughs" (in substitution for stat. 18 & 19 Vict. c. 127), amended by stat. 34 & 35 Vict. c. 90.

As to the union of parishes, see *Parish*, § 1.

**UNITY OF INTEREST** is applied to joint tenants, to signify that no one of them can have a greater interest in the property than each of the others, while, in the case of tenants in common, one of them may have a larger share than any of the others.<sup>5</sup> (See *Unity of Possession*, § 2.)

<sup>1</sup> Maude & Pollock, Merch. Shipp. 331, 334.

<sup>2</sup> White & Tudor, L. C. ii. 571; Pollock on Contract, 503.

<sup>3</sup> See Jarman on Wills, 35 *et seq.*

<sup>4</sup> Stats. 17 & 18 Vict. c. 102; 35 & 36 Vict. c. 60; Russell on Crimes, i. 321; Steph. Crim. Dig. 79.

<sup>5</sup> Williams, R. P. 134, 139.

Suspension of easements, &c.

**UNITY OF POSSESSION**, in the proper sense of the word, is where a piece of land which is subject to an easement, profit à prendre, rent, or similar right, comes into the possession of the person entitled to the easement or other right. At the present day, "unity of possession" is only applied to cases where the possession is temporary: as where the owner of land subject to an easement takes a lease of the dominant tenement, so that the easement is suspended by unity of possession during the lease;<sup>1</sup> or where the owner of a rent disseises the tenant of the land, out of which it issues, so that the rent is suspended by unity of possession.<sup>2</sup> In the old books, "unity of possession" has a wider sense, and includes what is now more commonly called "unity of seisin" (*q. v.*).<sup>3</sup>

Joint tenants.

§ 2. As applied to joint tenants, tenants in common, &c., "unity of possession" is sometimes used to signify that they have an undivided possession. This use of the term seems to have been invented by Blackstone.<sup>4</sup>

See *Joint Tenancy*; *Tenancy in Common*; *Privity*, §§ 4, 8, 9.

**UNITY OF SEISIN** is where a person seised of land which is subject to an easement, profit à prendre, or similar right, also becomes seised of the land to which the easement or other right is annexed. The term is usually applied to cases where the seisin is that of a tenant in fee simple, and is equally high or "perdurable" in both pieces of land, so that the easement or other right is extinguished by the unity of seisin: as where a tenant in fee simple of land, subject to an easement, acquires an estate in fee simple in the dominant tenement. But if one piece of land is held by a conditional or determinable estate, then the unity of seisin is insufficient to work an extinguishment.<sup>5</sup> (See *Unity of Possession*.)

**UNITY OF TIME** is applied to joint tenants, to signify that the estate of each of them must arise at the same time: that is, one cannot take his share first, and then another come in after him. This rule, however, does not apply to estates created under the Statute of Uses, or by will.<sup>6</sup> (See *Unity of Interest*; *Unity of Possession*, § 2.)

**UNITY OF TITLE** is applied to joint tenants, to signify that they hold their property by one and the same title, while tenants in common may take property by several titles.<sup>7</sup> (See *Unity of Interest*; *Unity of Possession*, § 2.)

**UNIVERSITIES.** See *Courts of the Universities*.

**UNLAWFUL.**—"Unlawful" and "illegal" are frequently used as synonymous terms, but in the proper sense of the word, "unlawful," as

<sup>1</sup> Gale on Easements, 581 *et seq.*

<sup>2</sup> Co. Litt. 188 a.

<sup>3</sup> *Ibid.* 313 a; *Tyrringham's Case*, 4 Co.

38.

<sup>4</sup> Bl. Comm. ii. 180; Williams, R. P. 134.

<sup>5</sup> Co. Litt. 313 a, b; Gale on Easement, 582 and notes.

<sup>6</sup> Williams, R. P. 137.

<sup>7</sup> *Ibid.* 134.

applied to promises, agreements, considerations and the like, denotes that they are ineffectual in law because they involve acts which, although not illegal, that is, positively forbidden, are disapproved of by the law, and are therefore not recognized as the ground of legal rights, either because they are immoral (*q. v.*), or because they are against public policy. (See *Policy*.) It is on this ground that contracts in restraint of marriage or of trade are generally void. As a general rule, an unlawful agreement cannot be enforced, or set aside, nor can money paid or property delivered under it be recovered back: *potior est conditio defendantis*.<sup>1</sup>

**UNLAWFUL ASSEMBLY** is an assembly of three or more persons with intent to commit a crime by open force, or with intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it.

Taking part in an unlawful assembly is a misdemeanor.<sup>2</sup>

See *Affray*; *Riot*; *Rout*.

**UNLIQUIDATED** is that which is not ascertained. (See *Damages*; *Judgment*, § 9; *Liquidated*; *Writ of Summons*.)

**UNNATURAL CRIMES**.—See stat. 24 & 25 Vict. c. 100, ss. 61 *et seq.*<sup>3</sup>

**UNSEAWORTHY**. See *Seaworthy*.

**UNSOUND MIND**.—A person of unsound mind is an adult who from infirmity of mind is incapable of managing himself or his affairs. The term, therefore, includes insane persons, idiots and imbeciles. It is generally used (1) in cases where on an inquiry in lunacy the person would be found lunatic, and placed under the care of committees; and (2) in cases where a trustee has become of unsound mind, so as to necessitate an application to the Court under the Trustee Acts (*q. v.*).<sup>4</sup> (See *Insanity*; *Lunatic*; *Non Compos Mentis*.)

**URBAN SANITARY AUTHORITIES**. See *Sanitary Authorities*.

**URE** means operation or effect. To put in ure, therefore, is to put in operation.<sup>5</sup> (Norman-French, from Latin, *opera*, a work: see *Enure*.)

<sup>1</sup> Pollock on Contract (3rd edit.), 250, 348; Chitty on Contracts, 609 *et seq.* See Wright on Conspiracies, 65 *et seq.*; *Reg. v. Prince*, L. R., 2 C. C. R. 154.

<sup>2</sup> Stephen's Crim. Dig. 40; Russell on Crimes, i. 372.

<sup>3</sup> Steph. Crim. Dig. 103, 163; Russell on Crimes, 879.

<sup>4</sup> Pope on Lunacy, 18; stats. 16 & 17 Vict. c. 70, s. 47; 13 & 14 Vict. c. 60, s. 2.

<sup>5</sup> See stat. 13 Eliz. c. 2, s. 1.

**USAGE** is a uniformity of conduct on the part of two or more persons in respect to certain matters of common interest. Hence Coke says, in speaking of custom and prescription, "as for usage, that is the efficient cause or rather the life of both; for custom and prescription lose their being, if usage fail."<sup>1</sup> (See *Custom; Prescription.*) As to usages of trade, see *Custom*, §§ 8, 9.

**USANCE** signifies the time in which all bills of exchange between this country and a foreign country were formerly payable. The time varied for different countries. Thus, a usance between this country and Venice being three calendar months, a bill drawn on Venice at two usances and dated the 1st January, would fall due on the 1st July, subject to the allowance of days of grace.<sup>2</sup> The practice of drawing bills at usances seems to be quite obsolete, the same result being attained by specifying the time for which the bill is to run, but the term "usance" is still employed to signify the period for which bills on a foreign country are by the practice of merchants almost invariably drawn; thus the usance of bills on India is six months.

**USE.**—There are two words "use" in law, which though spelled alike are etymologically and historically distinct. It is of importance to distinguish clearly between them.

"Use"=  
"employ-  
ment."

I. § 1. In law, as in ordinary language, "use" denotes the act of employing a thing: thus, to cultivate land, to read a book, to inhabit a house, is to use those things.

§ 2. In the case of corporeal things, use is one of the modes of exercising ownership. (See *Ownership; Use and Occupation.*) In the case of incorporeal things, use is a mode of acquiring and retaining certain rights. (See *Enjoyment.*) Thus, if A. publicly makes use of his name or of some peculiar word or token (not being a trade-mark in the strict sense) in connection with his trade or occupation, he acquires the right to prevent other persons from using that name, word or token in such a way as to induce the public to believe that their business is carried on by A., and loses that right so soon as he discontinues the use.<sup>3</sup> In the case of trade-marks falling within the Trade-Marks Registration Acts, registration is substituted for public user as a mode of acquiring title. (See *Trade-Mark*: also *Patent Right; Publici Juris.*)

ETYMOLOGY.]—From Latin, *usus*, use.

"Use" =  
"benefit."

II. § 3. In conveyancing, "use" literally means "benefit;" thus, in an ordinary assignment of chattels the assignor transfers the property to the assignee for his "absolute use and benefit."<sup>4</sup> In the expressions

<sup>1</sup> Co. Copyh. § 33.

<sup>2</sup> Smith's Merc. Law, 247; Byles on Bills, 78.

<sup>3</sup> Ludlow & Jenkyns on Trade-Marks, 65, 66.

<sup>4</sup> Shepp. Touch. 501; Littleton (§ 383) mentions a case where an executor took the profits of his testator's lands to his own use, instead of applying them to the use of the dead (*al use le mort*) by distributing the money for his soul.

"separate use," "superstitious use," and "charitable use" (*q.v.*), use has the same meaning. More often, however, "use" has a technical meaning which can only be explained historically.

§ 4. Before the year 1536, if one man (A.) conveyed land by feoffment (then almost the only mode of conveyance) to another (B.), with the intention, express or implied, that B. should not hold it for his own benefit, but for the benefit of a third person (C.),<sup>1</sup> then B. was said to hold the land "to the use," that is, for the benefit, of C. In the courts of common law the feoffee to uses (B.) was looked upon as the owner of the land for almost all purposes, the seisin or legal estate being in him. In the Court of Chancery, on the other hand, he was looked upon as merely the nominal owner; he was bound to allow the cestui que use (C.) to have the profits and benefit of the land and to deal with it as he pleased. C. was therefore the equitable or beneficial owner of the land. The "use" or beneficial ownership was treated like an estate, and descended on the intestacy of the cestui que use to his heir in the same way as the land would have done. A use was also devisable by will, although the land was not.

Uses of land  
before the  
Statute of  
Uses.

§ 5. The effect of a conveyance to uses was twofold. First, it enabled interests in land to be created and transferred with a flexibility and secrecy unknown to the common law: this effect of uses still exists (*infra*, §§ 11 *et seq.*). Secondly, it enabled the owners of land to evade certain inconvenient incidents of common law ownership, especially escheats, forfeitures and other feudal obligations. After several attempts to prevent these effects by various acts of parliament, the statute known as the Statute of Uses was passed (27 Hen. 8, c. 10). This statute in effect enacts that where any person is seised of any lands or other hereditaments to the use, confidence or trust of another, the latter shall be in lawful seisin, estate and possession of the lands for the same estate as he had in the use, and that the estate of the feoffee to uses shall be deemed to be in the cestui que use. The effect of this act was to convert uses into possession, or to make the cestui que use legal instead of equitable owner. The result is that if since the passing of this statute land is conveyed to A. and his heirs to the use of B. and his heirs, so that A. acquires the seisin of the land, then the statute is said to execute the use by turning it into a legal estate; the seisin passes out of A. and vests in B., who thus becomes legal owner of the land in fee simple. (See *Scintilla Juris*.)

Statute of  
Uses.

All estates which before the statute would have been good in equity and to which the statute applies are, since the statute, good estates in law.

§ 6. It will be observed that the statute only applies to cases where one person is seised of land or other hereditaments to the use of another. If, therefore, A. is possessed of a term of years or a chattel, or is in quasi-seisin of copyhold land (all of which are incapable of true seisin), to the use of B., the statute does not execute this use, and the legal estate remains in A. § 7. The statute also does not execute a second use, or a

Exceptions  
from statute.

<sup>1</sup> Or of A. himself; see as to "resulting uses," *infra*, § 10.

"use upon a use," nor does it execute active uses, or uses which impose some active duty on the grantee. If, therefore, land is conveyed to A. to the use of B. to the use of C. (which is a use upon a use), only the first use is executed: B. becomes seised of the land in accordance with the statute, but he holds it to the use of C. as if the statute had never been passed. Again, if land is conveyed to A. to the use (or upon trust) to pay over the rents and profits to B., this use is not executed, and therefore the legal estate remains in A.

Hence uses are of two kinds, uses at common law, or those which remain unaffected by the statute, and uses which operate under the statute,

Uses at com-  
mon law.

I. § 8. Uses at common law include (a) all uses of leasehold and copyhold land and chattels, and (b) uses of freehold land or other hereditaments which are not executed by the statute because they are either "uses on uses" or active uses. A use at common law is now seldom created under that name, almost the only instance being where a copyhold tenant surrenders his land to the lord to the use of some other person; here the lord is merely a trustee or instrument for carrying the intended alienation into effect.<sup>1</sup> When lands or chattels are conveyed to a person to be held by him for the benefit of another, the word "trust" is now always used.<sup>2</sup> (See *Trust*.)

Under the  
statute.

II. § 9. Uses which operate under the statute are those declared of land held by a freehold tenure for an estate of freehold, or of rents, services and most other hereditaments.<sup>3</sup> They are of the following kinds:—

Express,  
implied,  
resulting.

(1) § 10. Expressed or implied. If A. conveys land to B. and his heirs to the use of C. for life, without more, then the land vests in C. for an estate for life, and the reversion in fee after C.'s estate results or returns to A., because it is not otherwise disposed of. Here the use to B. is an express use, and the use to A. is an implied or resulting use.

Executed.

(2) § 11. Executed or executory. An executed use is one which takes effect immediately, as where land is conveyed to A. and his heirs to the

Executory.

use of B. and his heirs. An executory use is one which is to take effect at some future time. Executory uses are of four kinds. (A) § 12. A springing use is one which is limited so as to commence in futuro, independently of any preceding estate; as where land is conveyed to A. and his heirs to the use of B. and his heirs, from to-morrow or on the death of C. Such a use does not take effect in derogation of any estate except that which results to the grantor or remains in him in the meantime.

Springing.

Shifting.

(B) § 13. A shifting or secondary use is one which is limited so as to shift from one person to another on the happening of a given event; in other words, such a use takes effect in derogation of a preceding use; as where land is conveyed to A. and his heirs to the use of B. and his heirs, with a proviso that when C. returns from Rome the land shall be to the use of C. and his heirs. (See *Executory Interests; Limitation*, § 5.)

<sup>1</sup> Davids. Conv. ii. 201; Watson, Comp. Eq. 923.

<sup>2</sup> "Use" was employed in the sense of "trust" in Shakspear's time (*Merchant of*

Venice, iv. 1, line 383).

<sup>3</sup> Except those of which the enjoyment is inseparable from the possession: such as easements and profits à prendre.



(C) § 14. Uses may be limited or declared under powers. (See *Power*, § 7.) Under powers.  
 (D) § 15. Future or contingent uses are those which are limited to take effect as remainders: thus, if land is conveyed to A. and his heirs to the use of B. (a bachelor) for life, and after his death to his eldest son, this is a contingent use. Future or contingent.

§ 16. As to deeds to lead and declare uses, and generally as to conveyances operating under the statute, see *Conveyance*, §§ 5 *et seq.*<sup>1</sup>

ETYMOLOGY.—Norman-French, *oes*,<sup>2</sup> from Latin, *opus*, benefit.

**USE AND OCCUPATION.**—A claim for use and occupation arises where a person has used and occupied the land of another with his permission but without any actual lease or agreement for a lease at a fixed rent.<sup>3</sup> It is sometimes said that the claim is one for damages,<sup>4</sup> but this is hardly correct, for permissive occupation is not a wrongful act; the claim is really based on an implied or tacit contract to pay for the use of the land. The action does not lie against a mere wrongdoer or trespasser.<sup>5</sup>

**USER** is the same thing as “use” in the ordinary sense of the word. (See *Use*, § 1.)

**USES TO BAR DOWER.**—When a conveyance of land is made to a person who was married to his present wife on or before the 1st January, 1834, and he wishes to prevent her right to dower from attaching to the land, it is conveyed to the following uses: (1) to such uses as the purchaser shall appoint; (2) in default of appointment to the use of him and his assigns during his life; (3) in the event of the determination of that estate by forfeiture or otherwise in his lifetime, to the use of a trustee during the life of the purchaser in trust for him, with (4) an ultimate limitation to his heirs and assigns for ever. By this means the purchaser has a full power of alienation without having a greater estate in possession than an estate for life, to which the wife's dower does not attach, and the intermediate estate of the trustee prevents the remainder in fee simple from vesting in the purchaser in possession (and so becoming liable to dower) by any accidental merger of the life estate.<sup>6</sup> (See *Dower*.)

**USURPATION.**—§ 1. In the law of real property, usurpation is where a subject uses a royal franchise without lawful warrant.<sup>7</sup> Of franchise.

§ 2. In ecclesiastical law, when a stranger who has no right presents to a church, and his clerk is admitted and instituted, he is said to be a usurper, Of advowson.

<sup>1</sup> The law of uses will be found explained in Williams, R. P. 157 *et seq.*; Sand. Uses; Hayes's Conveyancing; Sugden on Powers; Butler's note to Co. Litt. 271 b.

<sup>2</sup> Britton, 34a, 112a. The form “oeps,” which also occurs (“al oeps de gentz de religion,” stat. 15 Rich. 2, c. 5), is really a

later form, the “p” having been inserted to make the word more like “opus.”

<sup>3</sup> Stat. 11 Geo. 2, c. 19, s. 14; Woodfall, L. & T. 499; Chitty on Contracts, 341.

<sup>4</sup> Woodfall, 499.

<sup>5</sup> Smith & Soden, L. & T. 181.

<sup>6</sup> See Williams, R. P. 305, and app. (D.).

<sup>7</sup> Co. Litt. 277 b.

and the wrongful act which he has done is called a usurpation. To recover his presentment and possession of the advowson, the patron must bring his action within six months from the induction of the usurper's presentee.<sup>1</sup>

**USURY.**—I. § 1. Originally usury had the same meaning as interest has at the present day, viz., a periodical payment in consideration of a loan. "Purchases, estates and contracts may be avoided . . . by certain acts of parliament against usurie above ten in the hundred."<sup>2</sup> Many attempts were made to evade these statutes by making the interest payable in the form of rents, annuities, &c., and in such cases the question was whether the stipulated payment was *bonâ fide* a rent or annuity, &c., or whether it was usury, and the contract a usurious one within the statute.<sup>3</sup>

II. § 2. Hence "usury" acquired the sense of interest above the rate allowed by those acts of parliament, and the acts making all such usurious contracts void became known as the Usury Laws. They were repealed by stat. 17 & 18 Vict. c. 90.

See *Interest*, §§ 13, 17.

ETYMOLOGY.]—Latin, *usura*, a using or enjoyment, from *uti*, to use, *usura*, interest paid for the use of money. The division into *usura conventionales* and *usura punitoria* is identical with that of interest in English law, into interest payable by contract and interest payable as damages. Thibaut, Pand. § 192.

**UTLARY** = outlawry.<sup>4</sup> (Norman-French, *utlagarie*,<sup>5</sup> from Anglo-Saxon, *utlaga*. See *Outlaw*.)

**UTTER.**—§ 1. In criminal law, to utter a forged document or seal, &c., or counterfeit coin, is to pass or attempt to pass it off as genuine. In the case of a forged document it is not clear whether it is necessary that the offender should actually part with the document, or whether a mere showing of it can be called an uttering.<sup>6</sup>

§ 2. Uttering a forged document (knowing it to be forged) is in general the same offence as that of forging the same document. (See *Forgery*.) Uttering counterfeit money (knowing it to be counterfeit) is a misdemeanor.<sup>7</sup>

**UTTER BARRISTERS.** See *Barrister*.

<sup>1</sup> Phillimore, Eccl. Law, 513.

<sup>2</sup> Co. Litt. 3 b. This rate was varied from time to time by subsequent statutes.

<sup>3</sup> 5 Co. 69 *et seq.*

<sup>4</sup> Co. Litt. 128 a.

<sup>5</sup> Litt. § 197.

<sup>6</sup> *R. v. Ion*, 2 Den. C. C. 475; Russell on Crimes, ii. 721, and Mr. Greaves' n. (l).

<sup>7</sup> Stat. 24 & 25 Vict. c. 99; Stephen's Crim. Dig. 295.

## V.

**VACANT POSSESSION.** See *Possession*, § 1; *Service*, § 10.

**VACARIUS**, commonly called Magister Vacarius, was a Lombard by birth. He gave lectures on Roman law in Oxford from 1149 to 1170. He wrote *Liber ex universo enucleato jure exceptus*.<sup>1</sup>

**VACATE** is to discharge or deprive of legal effect. The term is chiefly applied to recognizances and lites pendentes (*q. v.*), which are cancelled or vacated when they have served their purpose.

**VACATION.**—I. § 1. The vacations are the periods of the year during which the Courts and chambers of the Supreme Court of Judicature are closed for ordinary business. There are, however, certain kinds of business which must be transacted during vacation (*e. g.*, applications for injunctions, for extension of time, &c.); and for this purpose, one or two vacation judges and a staff of officials attend in Court periodically during the vacations. Judicial business.

§ 2. The vacations are four, namely, the Easter Vacation, from Good Friday to Easter Tuesday; the Whitsun Vacation, from the Saturday before Whit Sunday to the Tuesday after; the Long Vacation, from the 10th August to the 24th October; and the Christmas Vacation, from the 24th December to the 6th January.<sup>2</sup> (See *Sittings*; *Term*, § 8.)

II. § 3. Vacation also signifies, in ecclesiastical law, that a church or benefice is vacant; *e. g.*, on the death or resignation of the incumbent, until his successor is appointed.<sup>3</sup> (See *Plenary*; *Sequestration*, § 5.) Ecclesiastical law.

**VAGABONDS—VAGRANCY.**—The provisions of the law with respect to vagrancy are directed against (i) “idle and disorderly persons,” *e. g.*, persons who refuse to work, unlicensed pedlars, beggars, &c.; (ii) “rogues and vagabonds,” *e. g.*, fortune-tellers, persons lodging in deserted buildings or the open air without visible means of subsistence, &c.; (iii) “incorrigible rogues,” *e. g.*, persons twice convicted of being rogues and vagabonds, persons who escape from imprisonment as rogues and vagabonds, &c. These offences are punishable with imprisonment, and (in some cases) with whipping.<sup>4</sup>

**VALUABLE CONSIDERATION.** See *Consideration*, § 7; *Value*.

**VALUATION.**—As to valuation for rates and taxes, see *Assessment*, § 3; *Rate*.

As to valuation of securities in administrative proceedings, see *Creditor*, §§ 3, 4.

**VALUE** is often used as an abbreviation for “valuable consideration,” especially in the phrases “purchaser for value,” “holder for value,” &c.

<sup>1</sup> Holtz. Encycl.

<sup>2</sup> Rules of Court, lxi. 2 *et seq.*; Smith's Action, 22.

<sup>3</sup> 2 Inst. 359; Phill. Eccl. Law, 495.

<sup>4</sup> Stat. 5 Geo. 4, c. 83; Steph. Crim. Dig. 117; Steph. Comm. iv. 287, where the other statutes are mentioned.

The question whether a person acting in good faith has given value for property is often of importance when the person from whom he acquired it had not a perfect title as against some other person. Thus, if a trustee fraudulently sells the trust property to a "bonâ fide purchaser for value," that is, to a person who had no reason to believe that it was affected with a trust, and gave a fair price for it, the cestui que trust has no claim against the purchaser.<sup>1</sup> (See *Bona Fides*; *Consideration*; *Negotiable*.)

**VALUED POLICY.** See *Policy of Assurance*, § 2.

**VANGEROW.**—Karl Adolf von Vangerow was born 5th June, 1808, near Marburg, where he became professor of jurisprudence in 1833. In 1840 he succeeded Thibaut at Heidelberg, where he died 11th Oct., 1870. His principal work is the *Lehrbuch der Pandecten*. He also wrote treatises on the *Latini Juniani* and the *Lex Voconia*.<sup>2</sup>

**VARIANCE**, in procedure, is a discrepancy between a material statement in a pleading and the evidence adduced in support of it at the trial. Power to the Court to amend variances in civil cases is given by the Rules of Court under the Judicature Acts,<sup>3</sup> and in criminal cases by stats. 9 Geo. 4, c. 15, 11 & 12 Vict. c. 46, and 14 & 15 Vict. c. 100.<sup>4</sup>

**VATTEL.**—Emerich von Vattel was born at Couret, in Switzerland, in 1714 and died in 1767. He wrote *Droit de Gens* and *Questions de Droit naturel*.<sup>2</sup>

In aid of fi. fa. **VENDITIONI EXPONAS.**—§ 1. When a writ of fi. fa. has been issued and the sheriff returns that he has taken goods, but that they remain in his hands for want of buyers, a writ of *venditioni exponas* ("that you expose for sale") may be sued out to compel a sale of the goods for any price they will fetch.<sup>5</sup> (See *Distringas*, § 3.)

Extent. § 2. When a writ of extent in chief or in aid has been returned and no one appears to claim the goods, &c. mentioned in the inquisition, a *venditioni exponas* issues directing the sheriff to sell them.<sup>6</sup>

**VENDORS AND PURCHASERS.**—The law relating to vendors and purchasers of real property includes such subjects as the particulars and conditions of sale, the contract of sale, the abstract of title, requisitions, searches, &c., and the preparation and completion of the conveyance.<sup>7</sup> (See the various titles, including those in the *ADDENDA*; and also *Covenant*, §§ 8 *et seq.*; *Sale*; *Specific Performance*; *Title*, §§ 3 *et seq.*; *Title-Deeds*.)

**VENIRE** was a writ formerly used in common law practice for the purpose of summoning juries. It was so called because it commanded the sheriff to "cause to come" twelve men to try the cause.<sup>8</sup>

<sup>1</sup> Lewin on Trusts, 707 *et seq.* See also *In re Gomersall*, L. R., 1 Ch. D. 137.

<sup>2</sup> Holtz. Encyc.

<sup>3</sup> Order XXVII. As to the old law on the subject, see Smith's Action (11th edit.), 82, 159.

<sup>4</sup> Steph. Comm. iv. 371.

<sup>5</sup> Chitty's Pr. 678; Smith's Action, 197; App. of Forms to Jud. Act. 1875.

<sup>6</sup> Tidd's Pr. 1068.

<sup>7</sup> Dart's Vendors & Purchasers, *passim*; Watson's Comp. of Equity, 931 *et seq.*

<sup>8</sup> Smith's Action at Law, 136, u.

**VENIRE DE NOVO**, in criminal practice, is a writ issued by the Queen's Bench on a writ of error (*q. v.*) from a verdict given in an inferior Court, vacating the verdict and directing the sheriff to summon jurors anew, whence the name of the writ. It is in fact a mode of directing a new trial.<sup>1</sup> (See *Trial*, §§ 6, 11.) It was formerly also used in civil actions.<sup>2</sup>

**VENIRE FACIAS AD RESPONDENDUM** is a writ to summon a person, against whom an indictment for a misdemeanor has been found, to appear and be arraigned for the offence. It may be issued by the Queen's Bench, by a judge of assize, or a Court of quarter sessions. A justice's warrant is now more commonly used.<sup>3</sup> (See *Distringas*; *Outlawry*; *Warrant*.)

**VENTER** in the old books is equivalent to mother: as when Littleton speaks of a man having issue two sons "by divers venters," that is, by different wives; or of two brothers "by divers venters," meaning two brothers having different mothers.<sup>4</sup>

**ETYMOLOGY.**—Norman-French, *ventre*;<sup>5</sup> from Latin *venter*, the womb.

**VENUE.**—§ 1. In criminal procedure, the venue is a note in the margin of an indictment, giving the name of the county or district within which the Court in which the indictment is preferred has jurisdiction. The common law rule is that the venue must be laid (that is, the indictment must be preferred in a Court having jurisdiction in) the county where the offence was committed, but in many cases it may by statute be laid in the county in which the offender was apprehended, or in some cases, in any county. If a man is wounded in one county and dies in another, the venue may be laid in either.<sup>6</sup>

Criminal practice.

§ 2. In the former common law practice, the venue was that part of the declaration in an action which designated the county in which the action was to be tried. It was inserted in the margin of the declaration thus: "Middlesex to wit," "London to wit," &c. Venue was of two kinds: *transitory* or *local*. It was transitory when the cause of action was of a sort which might have happened anywhere, in which case the plaintiff might adopt any county he pleased as a venue. It was local when the cause of action could have happened in one county only, and then the venue must have been laid in that county. Thus if the action were trespass for breaking the plaintiff's close, the venue must have been laid in the county where the close was situated; for such a trespass could have happened nowhere else. If it were trespass for assaulting the plaintiff, the venue was transitory, for such a cause of action might happen anywhere, and so, in general, in all cases of contract. Under the new rules of pleading venue is expressly abolished,<sup>7</sup> but the plaintiff, if he wish the action tried elsewhere than in Middlesex, must name in his statement of claim a place for its trial, subject to the place being altered by a judge's order.<sup>8</sup>

Common law practice.

Transitory.

Local.

**ETYMOLOGY.**—Said to be derived from Norman-French, *visne*, Latin, *vicinetum* (neighbourhood), because in ancient times the jury was empanelled from the vill or hundred where the cause of action arose.<sup>9</sup>

<sup>1</sup> Archbold, *Crim. Pl.* 188; Pritchard, *Q. S.* 352. See *Reg. v. Murphy*, *L. R.*, 2 *P. C.* 535 and the cases there cited.

<sup>2</sup> Archbold, *Pr.* (3rd edit.) ii. 27.

<sup>3</sup> Archbold, *Crim. Pl.* 81.

<sup>4</sup> *Litt.* § 6.

<sup>5</sup> Loysel, *Inst. Cout.* 56 and glossary.

<sup>6</sup> Archbold's *Crim. Pl.* 25 *et seq.*; Steph. *Comm.* iv. 363; *R. v. Rogers*, 3 *Q. B. D.* 28.

<sup>7</sup> Rules of Court, xxxvi. 1.

<sup>8</sup> Smith's *Action*, 65.

<sup>9</sup> Lee's *Dict. s. v.*; Reeves, iii. 107; *Co. Litt.* 125 a; Smith's *L. C.* i. 692.

**VERDICT.**—§ 1. A verdict is the opinion of a jury (or of a judge sitting as a jury<sup>1</sup>) on a question of fact in a civil or criminal proceeding.

**General.** The verdict of a jury must be unanimous. § 2. A general verdict is where the jury find the point in issue generally, as where they find for the plaintiff or defendant, or return a verdict of guilty or not guilty.<sup>2</sup> § 3. A

**Special.** special verdict is where they find the facts of the case specially, that is, they say that certain facts have been proved, leaving to the Court the application of the law to the facts thus found. A special verdict is drawn like a special case (*q. v.*), settled by the counsel (and by the judge if necessary), and argued before the Court in the same way as a demurrer.<sup>3</sup> § 4. Where a doubtful question of law arises, the jury may, instead of giving a special verdict, find a general verdict for either of the parties, subject to a special case; the special case is drawn in accordance with the facts proved at the trial and settled like a special verdict.<sup>4</sup> § 5. A partial verdict in criminal practice is where the jury convict the prisoner on part of the indictment and acquit him as to the residue.<sup>5</sup> § 6. When a coroner's jury find the death of a person without saying how he came by it, this is called an open verdict. (See *Inquest*.)

**Verdict subject to special case.** § 7. In an action in the High Court, when the jury have found their verdict, the judge may direct that judgment be entered for any party, or adjourn the case for further consideration, or leave any party to move for judgment. (See *Judgment*, § 6; *Further Consideration*, § 3; *Motion for Judgment*; *Signing Judgment*.) Any party may also move for a new trial (see *Trial*, § 6), or apply to the Court of Appeal to set aside the judgment, if it has been directed to be entered by the judge before whom the action was tried.<sup>6</sup>

**Partial.**

**Judgment after verdict.**

See *Action*; *Conviction*; *Acquittal*; *Inquisition*; *Finding*.

**ETYMOLOGY.**—Latin, *veredictum*; *verè*, truthfully, *dictum*, spoken, in accordance with the juror's oath.

**VERGE.**—"At common law, the coroner of the county had no jurisdiction within the compass of the king's Court, which bounds the jurisdiction of the Lord High Steward of the household, and comprehends a circuit of twelve miles round the residence of the Court [wherever held]. This jurisdiction is usually called the verge, within which the coroner of the king's household, or, as commonly called, the Coroner of the Verge, had jurisdiction over all matters within the duty of a coroner, exclusive

<sup>1</sup> See *Krehl v. Burrell*, 10 Ch. D. 420.

<sup>2</sup> "It does not follow merely because a jury choose to return their verdict only in particular words, instead of saying aye or no, that the verdict is a special one. (See per Patteson, J., in *Scales v. Key*, 11 A. & E. 819.) Accordingly, where upon an issue bringing into question the existence of a custom, the jury found 'that the custom existed to 1689,' it was held that this was a verdict for the defendants, who alleged the custom." Archbold's Pr. 394, note.

<sup>3</sup> Smith's *Action* (11th edit.), 158. Formerly called a verdict at large: Litt. § 366.

<sup>4</sup> Chitty, Pr. 452 *et seq.*; Smith's *Action*, (11th edit.), 162. It seems that this mode of deciding questions is still available (Smith's *Action* (12th edit.), 140), though rarely resorted to (Arch. Pr. 394). As to special findings under stat. 3 & 4 Will. 4, c. 42, see Chitty, Pr. 406.

<sup>5</sup> Archbold, Crim. Pl. 170.

<sup>6</sup> Rules of Court, xxxvi., xl.

of the coroner of the county. A jurisdiction so exclusive, particularly as the king's Court was moveable, was found to be attended with many inconveniences . . . and therefore it was found expedient to impart, in some cases, to the coroner of the county, a jurisdiction concurrent with that of the Coroner of the Verge."<sup>1</sup> (See *Tenants by the Verge*.)

**VERY LORD AND VERY TENANT** means an immediate lord and tenant,<sup>2</sup> as where A. holds land of B. without any mesne lord. (See *Lord*, § 2.)

**VEST—VESTED.**—§ 1. When a person becomes entitled to a right, estate, &c., it is said to vest in him.

§ 2. An estate or interest may vest in one of two manners, namely, in possession or in interest. An estate is said to be vested in possession when it gives a present right to the immediate possession of property; while an estate which gives a present right to the future possession of property is said to be vested in interest: thus, if land is given to A. for life, and after his death to B. in fee, then A.'s estate is vested in possession, while B.'s estate is vested in interest. If B. dies before his estate vests in possession, it passes to his representatives (his heir or devisee). As a general rule, "vested" means "vested in interest," as opposed to "contingent" (*q. v.*). Thus, remainders are divided into vested and contingent. (See *Remainder*.)

Vested in possession, in interest.

§ 3. An estate or interest is said to be "vested subject to being divested" when it is vested, but is defeasible on the happening of a particular event. Thus, where property is given to A., an infant, absolutely, with remainder over to some one else if he dies under twenty-one, he takes a vested interest determinable on his death under age.<sup>3</sup> (See *Condition*.)

§ 4. "Vest" is used especially to denote a transfer by or under an act of parliament. Thus, by the Bankruptcy Act, 1869, as soon as a person is adjudicated bankrupt, his property vests in the trustee for the time being:<sup>4</sup> that is, the property is transferred to the trustee in the same way as if the bankrupt had executed a conveyance of it. (See *Vesting Order*.) A statutory transfer of this kind may be either absolute (as in the above example) or limited: thus, where an act of parliament enacts that a street shall vest in an urban sanitary authority, this means that the surface of the land, and so much of the soil as is necessary for its use as a street, shall be transferred to the authority.<sup>5</sup>

By statute.

§ 5. Vested is also applied in a semi-popular sense to rights, interests and expectancies with which it is considered the legislature ought not to interfere without giving compensation. Such are the rights of land-owners, which are interfered with when an act of parliament is passed authorizing the compulsory purchase of their land for the purposes of a railway.<sup>6</sup> The Endowed Schools Act, 1869, enumerates various kinds

"Vested interests."

<sup>1</sup> Jervis on Coroners, 5, 59; stats. 28 Ed. 1, c. 3; 33 Hen. 8, c. 12, s. 3.

<sup>2</sup> Blount, Dict. s. v., citing Brook, Abr. tit. *Harlot*, 23.

<sup>3</sup> Watson's Comp. Eq. 1092, 1093.

<sup>4</sup> Sect. 17.

<sup>5</sup> *Coverdale v. Charlton*, 4 Q. B. D. 104.

<sup>6</sup> See Austin, i. 887.

of "vested interests" for which compensation is to be made,<sup>1</sup> such as the interest of a child on the foundation of an endowed school, by which seems to be meant the child's expectation or hope that it will be kept in the school. Such interests are obviously not of a legal nature.

**VESTING ORDER.**—Under the Trustee Acts (*q.v.*), when a person in whom lands, stock or choses in action are vested upon any trust or by way of mortgage, is a lunatic, so found by inquisition, or of unsound mind, or an infant, or is out of the jurisdiction, or refuses to convey or transfer the property, or has died without leaving any known heir or devisee or personal representative (as the case may be), the Court may make an order vesting the property in such person or persons, in such manner, and for such estate as it may direct, and on that being done, the title to the property vests in him or them accordingly. In cases of lunacy and unsoundness of mind, the order is made by the Lord Chancellor or Lords Justices of Appeal: in other cases by the High Court in the Chancery Division.<sup>2</sup>

When, in an action or suit, a judgment or decree is made directing the sale or conveyance of lands, the Court may make vesting orders for carrying the same into effect.<sup>3</sup>

**VESTRY.**—A vestry, properly speaking, is the assembly of the whole of a parish, met together in some convenient place, for the despatch of the affairs and business of the parish, especially to make rates for the relief of the poor (see *Poor Law*), the repair of the church, &c.: and this meeting being formerly commonly holden in the vestry adjoining to or belonging to the church, it thence takes the name of vestry, as the place itself does, from the priest's vestments, which are usually deposited and kept there.<sup>4</sup> Meetings in the vestry room of a church may be forbidden by the Poor Law Commissioners<sup>5</sup> (now the Local Government Board, *q.v.*).

Select  
vestries.

§ 2. In ordinary cases, the vestry consists of all persons rated for the relief of the poor in the parish, but in some parishes there exists a custom by which a certain number of persons (in many cases self-elected) manage the concerns of the parish in lieu of the whole body of parishioners: these are called select vestries.<sup>6</sup> Under stat. 59 Geo. 3, c. 12, every parish may establish a select vestry for the concerns of the poor of the parish. (See *Overseers*, § 1.) Vestries in the metropolitan parishes are regulated by special statutes.<sup>7</sup> (See *Metropolitan Board of Works*.)

§ 3. In modern times, numerous duties have been imposed on vestries by statute: in respect of burial grounds (stats. 15 & 16 Vict. c. 85; 18 & 19

<sup>1</sup> See *In re Alleyn's College*, 1 App. Cas. 68; *In re Shaftoe's Charity*, 3 App. Cas. 872.

<sup>2</sup> As to whether vesting orders can be made in chambers, see *Frodsham v. Frodsham*, 15 Ch. D. 317.

<sup>3</sup> As to the acts generally, see Daniell,

Ch. Pr. 1798 *et seq.*

<sup>4</sup> Phillimore, Eccl. Law, 1871; stats. 58 Geo. 3, c. 69; 59 Geo. 3, c. 85.

<sup>5</sup> Stat. 13 & 14 Vict. c. 57.

<sup>6</sup> Phill. 1890.

<sup>7</sup> See 18 & 19 Vict. c. 120, and 19 & 20 Vict. c. 112.



Vict. c. 128; 20 & 21 Vict. c. 81); in lighting and watching parishes (stat. 3 & 4 Will. 4, c. 90; see *Rate*, § 2, x): under the Public Libraries Acts, 1855, 1866, 1871 and 1877; and the Baths and Washhouses Acts, 1846 and 1878.

**VESTURE.**—§ 1. If a man, being seised in fee of land, grants the vesture of the land to another man in fee, the land itself will not pass to the grantee, but only a particular right in the land; "for thereby he shall not have the houses, timber-trees, mines, and other reall things parcell of the inheritance, but he shall have the vesture of the land (that is), the corne, grass, underwood, swepage and the like, and he shall have an action of trespass *quare clausum fregit*," for any infringement of his right.<sup>1</sup>

§ 2. "A man may prescribe or alledge a custome to have and enjoy *solam vesturam terræ* from such a day till such a day, and hereby the owner of the soyle shall be excluded to pasture or feed there;"<sup>2</sup> and it seems that a person may also prescribe for a sole vesture, excluding the owner from year's end to year's end.<sup>3</sup> § 3. A right of *prima vestura* gives the right of mowing the first crop.<sup>4</sup> *Sola vestura.* *Prima vestura.*

§ 4. The right of vesture seems to be an incorporeal hereditament.<sup>5</sup>

**VEXATIOUS.**—A proceeding is said to be vexatious when the party bringing it is not acting *bonâ fide*, and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result. Such a proceeding is often described as "frivolous and vexatious," and the Court may stay it on that ground.<sup>6</sup> If an action fails, and a second action is brought oppressively or vexatiously for the same cause of action, the Court will stay the proceedings until the costs of the former action are paid.<sup>7</sup> So, where a claim or defence is trifling or vexatious, the Court will not grant a new trial.<sup>8</sup>

**VI ET ARMIS** = "with force and arms."<sup>9</sup> See *Trespass*, § 1.

**VI LAICÂ REMOVENDÂ.** See *De Vi laicâ removendâ*.

**VICAR.**—§ 1. In the original sense of the word, a vicar is an incumbent appointed to an appropriated church. A vicar is therefore, in effect, a perpetual curate with a standing salary. (See *Appropriation*, § 7; *Improportion*; *Rector*; *Curate*; *Tithes*, § 3.) § 2. Every incumbent of a parish church, not being a rector, who is authorized to solemnize marriage, baptisms, &c., and to take for his sole benefit the fees payable thereon, is a vicar for the purpose of style and designation, but not for any other purpose.<sup>10</sup>

<sup>1</sup> Co. Litt. 4 b.

<sup>2</sup> *Ibid.* 122 a.

<sup>3</sup> Williams' Saunders, notes to *Potter v. North*.

<sup>4</sup> *L'evesque de Oxford's Case*, Palm. 174.

<sup>5</sup> Williams on Commons, 19; but see Hall on Profits à Prendre, 18; Burton, Comp. § 1158.

<sup>6</sup> *Castro v. Murray*, 10 Ex. 213.

<sup>7</sup> Archbold, Pr. 1105. As to actions of ejectment, see *ibid.* 855.

<sup>8</sup> *Ibid.* 1222.

<sup>9</sup> Co. Litt. 161 b; Bl. Comm. iii. 120.

<sup>10</sup> Bl. Comm. i. 386; Steph. Comm. ii. 682; Williams, R. P. 345; Phill. Eccl. Law, 2177; stat. 31 & 32 Vict. c. 117.

**VICAR-GENERAL** is an ecclesiastical officer appointed by a bishop to act by his authority and under his direction in matters purely spiritual, as visitation, correction of manners, &c., "with a general inspection of men and things, in order to the preserving of discipline and good government in the church."<sup>1</sup> (See *Chancellor*, § 4; *Official Principal*.)

**VICARIAL TITHES.** See *Tithes*.

**VICE-ADMIRALTY COURTS** are Courts having admiralty jurisdiction in the British colonies and possessions.<sup>2</sup>

**VICE-CHANCELLOR** is a judge of the High Court of Justice. The first Vice-Chancellor (styled Vice-Chancellor of England) was appointed in 1813 to relieve the Lord Chancellor of some of his duties as a judge of first instance of the Court of Chancery; in 1841, two more Vice-Chancellors were appointed, partly to take over the equity business of the Court of Exchequer, but the number of three was not made permanent until 1852.<sup>3</sup>

§ 2. The Vice-Chancellors and the Master of the Rolls (*q. v.*) were the judges of first instance of the Court of Chancery, and on the formation of the Supreme Court of Judicature they were transferred to the Chancery Division of the High Court of Justice (*q. v.*).<sup>4</sup> The judges appointed as successors to the present Vice-Chancellors do not bear that title, but are called justices of the High Court.<sup>5</sup>

§ 3. One of the Vice-Chancellors (usually the senior Vice-Chancellor) constituted a Court of Appeal in equity business from the County Courts and the Chancery Court of Lancaster.<sup>6</sup> All appeals from inferior Courts are now heard by Divisional Courts of Appeal of the High Court.<sup>7</sup>

**VICINAGE.** See *Common*, § 8.

**VIEW.**—When an action or other proceeding concerns an immoveable thing, such as land or houses, it is frequently desirable to have it seen and examined by the jury, referee, &c. before the trial. In the Queen's Bench Division an order or rule to view may be obtained for this purpose (the old writ of view having been abolished), and shewers (*q. v.*) are generally appointed. Only a few of the jury usually "have the view," and these are hence called the "viewers."<sup>8</sup> (See *Inspection*, § 2.)

**VIEW AND DELIVERY.**—When a right of common is exerciseable not over the whole waste, but only in convenient places indicated from

<sup>1</sup> Gibson, *Codex*, *Intro.* xxii.; Phillimore, *Eccl. Law*, 1208.

<sup>2</sup> Roscoe's *Admiralty*, 84; stats. 26 & 27 *Vict.* c. 24; 30 & 31 *Vict.* c. 45.

<sup>3</sup> Haynes's *Equity*, 34. The name Vice-Chancellor is, however, much older than 1813: officers bearing that title, who acted in the chancellor's absence and kept the great seal, are mentioned in Henry II.'s

reign: Madox's *Exchequer*, 76 *et seq.*; Spence's *Equity*, i. 117.

<sup>4</sup> *Jud. Act*, 1873, ss. 5, 31.

<sup>5</sup> *Ibid.* s. 5.

<sup>6</sup> County Courts Act, 1865; Daniell, *Ch. Pr.* 1975.

<sup>7</sup> *Jud. Act*, 1873, s. 45.

<sup>8</sup> Chitty, *Pr.* 371, 382; *Arch. Pr.* 339.

time to time by the lord of the manor or his bailiff, it is said to be exerciseable after "view and delivery."<sup>1</sup> (See *Common*; *Assignment*, § 7; *Stint*, § 1.)

**VIEW OF FRANKPLEDGE.** See *Frankpledge*.

**VIIS ET MODIS.**—In the Ecclesiastical Courts, service of a decree or citation *viis et modis*, that is, by all "ways and means" likely to affect the party with knowledge of its contents, is equivalent to substituted service in the temporal Courts, and is opposed to personal service.<sup>2</sup> (See *Service*, § 8.)

**VILL** is in law the same thing as "town" in the technical sense of that word.<sup>3</sup> (See *Town*, § 1.) A "vill" seems originally to have been used in the same sense as the Latin *villa*, and to have signified a mere collection of houses in the country, such as buildings on a farm or a manor (*villa ruralis*),<sup>4</sup> in opposition to a walled town (*villa muralis*), namely, a city or borough. (See *Villein*.) "*Villa ruralis*" appears to be the same thing as an "upland town."<sup>4</sup> (See *Town*, § 1.)

**VILLEIN.**—§ 1. Formerly there existed a class of persons in a position "superior to downright slavery, but inferior to every other condition."<sup>5</sup> They belonged principally to lords of manors, and were either *villeins regardant*, that is, annexed to the manor or land, or else they were *in gross*, or at large, that is, annexed to the person of the lord; thus, where a lord granted a villein regardant by deed to another person, he became a villein in gross.<sup>6</sup> Villeins could not leave their lord without his permission, nor acquire any property,<sup>7</sup> but they could sue any one except their lord, and were protected against atrocious injuries by him.<sup>8</sup>

§ 2. Villénage has never been formally abolished, but it had become rare in Edward the Sixth's reign, and disappeared altogether under the Stuarts.<sup>9</sup>

See *Villénage*; *Neife*; *Manumission*; *Copyhold*; *Market*; *Confession*, n. (9); *Prescription*, n. (7); *Service*, § 3; *Tenure*.

ETYMOLOGY.—Norman-French, *vileyn*;<sup>10</sup> low Latin, *villanus*, from *villa*, a farm.<sup>11</sup>

**VILLEIN SOCAGE.** See *Socage*, § 2.

**VILLEIN TENURE.** See *Tenure*, § 7; *Service*, § 3.

**VILLENAGE** signified I. the status of a villein (*q. v.*), and II. an obsolete tenure, which existed where land was held of a lord of a manor by a villein, or by a free person by villein or base service. It has gradually become either extinct or converted into copyhold tenure.<sup>12</sup> § 2. There was also a kind of tenure in villénage known as privileged Privileged.

<sup>1</sup> Elton, Commons, 233.

<sup>2</sup> Phillimore, Eccl. Law, 1258, 1283.

<sup>3</sup> Co. Litt. 115 b; Bl. Comm. i. 115.

<sup>4</sup> Spelman, Gl. s. v. *Villa*; *Villanus*. "Upland" literally means "in the country," "rustic." See Ælfric's Homilies (Thorpe's ed.), vol. ii. 302.

<sup>5</sup> Bl. Comm. ii. 92. See Britton's account of the origin of villénage (77 b).

<sup>6</sup> Litt. § 181.

<sup>7</sup> See, however, as to choses in action, &c., Co. Litt. 117 a.

<sup>8</sup> Bl. ii. 93 *et seq.*; Litt. §§ 189 *et seq.*

<sup>9</sup> Bl. ii. 96, n. (24).

<sup>10</sup> Britton, 77 b.

<sup>11</sup> Littré, Dict. s. v. *Vilain*.

<sup>12</sup> Litt. § 172; Bl. Comm. ii. 62, 98.

villanage or villein-socage, which existed in certain lands of the crown: The tenants of these lands could not be removed from their lands so long as they did their services, which differed from ordinary villein services in being certain. This kind of tenure gradually became converted into tenure in ancient demesne (*q. v.*).<sup>1</sup> (See *Copyhold.*)

**VIS MAJOR** is such a force as it is practically impossible to resist, *e. g.*, a storm, earthquake, the acts of a large body of men, &c. The doctrine of vis major is, that a person is not liable for damage which he has been instrumental in producing, if it was directly caused by vis major.<sup>2</sup> "Vis major" is practically equivalent to "the act of God" (*q. v.*), the latter term being perhaps more used in the law of contracts.<sup>3</sup>

**VISIT AND SEARCH.** See *Search.*

**VISITATION—VISITOR.**—§ 1. Ecclesiastical and eleemosynary corporations are visitable, or subject to visitation, that is, the law has appointed proper persons (called visitors) to visit, inquire into and correct all irregularities that arise in them. With regard to ecclesiastical corporations, the crown is the visitor of the archbishops, the archbishops of the bishops within their diocese, and the bishops are the visitors of all subordinate corporations, sole and aggregate.<sup>4</sup> Hence, when an archbishop or bishop makes a circuit through his district to inquire into matters of church discipline, this is called a visitation.<sup>5</sup> § 2. As regards lay eleemosynary corporations, and other charities, the visitor is the founder, and his heirs, or a person appointed by him, or, in default of all of them, the crown. The visitors of a charity superintend its internal management, but not (as a rule) the management of its estates and revenue.<sup>6</sup>

§ 3. Visitors of Lunatics form a board of five members, whose duties are to visit periodically lunatics so found by inquisition, and to report to the Lord Chancellor on their condition and treatment. Their functions were, by 25 & 26 Vict. c. 86, extended to visiting and making inquiries as to persons alleged to be insane, in such cases as the Lord Chancellor may direct.<sup>7</sup> This provision is intended to apply to the case of lunatics whose property is of small value, and who have therefore not been found lunatic by inquisition.<sup>8</sup> (See *Commissioners in Lunacy.*)

§ 4. Under stat. 22 Geo. 3, c. 83, the guardians of the poor for any parishes which have been united pursuant to that act, are directed to appoint, with the approbation of two justices, a person to act as visitor of the poorhouse. His duty is to superintend the poorhouse, and settle all questions relating to it. A single parish may also have a visitor. (See *Guardians of the Poor; Overseers.*)

As to visiting justices, see *Prisons.*

<sup>1</sup> Bl. ii. 98.

<sup>2</sup> *Nichols v. Marsland*, L. R., 10 Exch. 255; 2 Ex. D. 1; *Rylands v. Fletcher*, L. R., 3 H. L. 330; Underhill on Torts, 14.

<sup>3</sup> See Pollock on Contract (3rd edit.), 381.

<sup>4</sup> Bl. Comm. i. 480; Steph. Comm. iii.

28; Tudor's Char. Trusts, 111 *et seq.*

<sup>5</sup> Rogers, Eccl. Law, 976; Phill. 1332.

<sup>6</sup> Comyns' Dig. *Visitor*; Phill. 1984, 2006; Watson, Comp. Eq. 45.

<sup>7</sup> Second Rep. of Leg. Dep. Comm. (1874), 63.

<sup>8</sup> Pope on Lunacy, 39.

**VISNE** is an old name for a jury, because formerly the jurors were taken *de vicineto*, that is, out of the neighbourhood where the matters in question had taken place.<sup>1</sup>

**VIVÂ VOCE.** See *Examination; Evidence*, § 7.

**VIVARY** "signifieth fish-ponds or waters wherein fish are kept or nourished."<sup>2</sup> "If a man buy divers fishes, as carps, breames, tenches, &c., and put them in his pond, and dyeth [intestate], in this case the heire shall have them, and not the executors, but they shall goe with the inheritance, because they were at libertie, and could not be gotten without industrie, as by nets, and other engines. Otherwise it is, if they were in a trunke or the like;"<sup>3</sup> for in that case they go to the executors. A man has a qualified property in fish confined in a small pond, tank, or stew, so that they can be caught at pleasure, and they may therefore be the subject of larceny.<sup>4</sup> "Vivary" seems to mean a place of this kind.<sup>5</sup> (See *Animals Feræ Naturæ; Fishery*.)

**ETYMOLOGY.**—Old French, *viver*, *vivier*; low Latin, *vivarium* = a place for keeping live animals of any kind.

**VOID.**—I. § 1. In the proper sense of the word, an agreement or other act is said to be void when it has no legal effect, or not the legal effect which it was intended to produce. Thus, an agreement which is void on account of its being made for an immoral consideration cannot be enforced.<sup>6</sup> (See *Unlawful*.) But an instrument which is void may subject the parties to penal consequences. Thus, an agreement amounting to a conspiracy would be admissible as evidence in criminal proceedings.

§ 2. An act may be void either *ab initio* or *ex postfacto*.<sup>7</sup> Thus, if a contract is made without the true consent of the parties, or for an immoral consideration, or in fraud of third persons, or by an infant (unless for necessities), it is void *ab initio*. No person's rights can be affected by it, whether he be a party or a stranger.<sup>8</sup> In the case of a contract which is void for illegality, immorality, or on a similar ground, if money has been paid as the consideration of its performance, the party who has paid it may repudiate the contract and recover it back at any time before performance. But when an unlawful contract has been executed, money paid either in consideration or performance of the contract cannot be recovered back, for *in pari delicto melior est conditio possidentis*.<sup>9</sup>

§ 3. If a contract or deed is properly entered into, and is afterwards altered in a material point by the fraud or laches of either party, it becomes void *ex postfacto* as against him, so that he cannot enforce or take advantage of it.<sup>10</sup> Another example of a transaction becoming void *ex postfacto* occurs in the case of a transaction which was originally voidable, and has been avoided by the election of the party or otherwise. (See *Avoid; Voidable*.)

<sup>1</sup> Co. Litt. 125 a, 158 b.

<sup>2</sup> 2 Inst. 199.

<sup>3</sup> Co. Litt. 8 a.

<sup>4</sup> Coulson & Forbes on Waters, 370.

<sup>5</sup> Spelman, Gl. s. v.

<sup>6</sup> Leake on Contracts (2nd edit.), 760.

<sup>7</sup> *Pigot's Case*, 11 Co. 27.

<sup>8</sup> Pollock on Contract, 7.

<sup>9</sup> Leake, 772.

<sup>10</sup> *Master v. Miller*, 4 T. R. 320; Smith, L. C. i.; Leake, 805.

Effect of  
estoppel.

§ 4. A peculiar kind of void transaction is one the validity of which one of the parties is, as against the other, estopped from denying. Thus, if A. by fraud induces B. to sign a contract for the sale of land while he thinks he is signing one for the purchase of goods, the contract is void as against B., but he can nevertheless enforce it against A., because A. is estopped from setting up his own fraud as a defence.

Such a contract is said to be void as against third persons, and voidable as between the parties.<sup>1</sup> (See *Estoppel*; *Mistake*, § 6; *Voidable*, § 2.)

"Void" =  
"void ab  
initio."

II. § 5. "Void" is frequently used in the sense of "void ab initio," as opposed to "voidable" (*q. v.*). It would be convenient to express "void ab initio" by "void," and "void ex postfacto" by "avoided."

**VOIDABLE.**—§ 1. An agreement or other act is said to be voidable when either of the parties is entitled to rescind it, while until that happens it has the legal effects which it was intended to have. (See *Rescind*; *Avoid*.) It can, however, be disputed only by certain persons and under certain conditions, and the right of rescission may be abandoned by the party entitled to exercise it. (See *Adopt*; *Ratification*.) § 2. If third persons acquire rights under a voidable contract or other transaction without notice and for value, they cannot afterwards be put in a worse position by its being set aside.<sup>2</sup> Herein a voidable contract differs from a void contract, the nullity of which one of the parties is estopped from asserting (see *Void*, § 4), for in the latter case no third person can acquire rights under the contract unless the party against whom it is void elects to affirm it.<sup>3</sup>

§ 3. The principal examples of voidable transactions occur in the case of fraud (*q. v.*), collateral mistake (see *Mistake*, §§ 8 *et seq.*), and lunacy (see *Lunatic*, § 2). As to the contracts of infants, see *Infant*.

**VOIRE DIRE**, in procedure, is a sort of preliminary examination of a witness by the judge, in which he is required to *speak the truth* with respect to the questions put to him; if his incompetency appears from this examination or from extrinsic evidence, *e. g.*, on the ground that he is not of sound mind, he is rejected.<sup>4</sup> (*Voire* is Norman-French for "true" or "truly."<sup>5</sup>)

**VOLENTI NON FIT INJURIA.**—An act is not an injury if the party consents to it. For an example, see *Seduction*.

**VOLUNTARY.**—§ 1. A conveyance, settlement, gift or similar transaction is said to be voluntary when there is no valuable consideration for it. (See *Consideration*.)

<sup>1</sup> *Foster v. Mackinnon*, L. R., 4 C. P. 704; Pollock (3rd edit.), 463.

<sup>2</sup> Leake on Contracts (2nd edit.), 388; Pollock on Contract (3rd edit.), 7.

<sup>3</sup> *Foster v. Mackinnon*, L. R., 4 C. P. 704; Pollock, 463.

<sup>4</sup> Best on Evidence, 190; Roscoe, Crim. Ev. 140.

<sup>5</sup> Littre, Dict. v. *Voire*.

§ 2. As a general rule a voluntary gift, conveyance or other executed transaction is valid as between the parties, and so is a voluntary contract, if under seal (see *Consideration*, § 2; *Contract*, § 9); but this rule is subject to exceptions, principally in favour of the creditors of the person bound by the transaction. Thus, in the administration of the estate of a deceased person, his voluntary bonds and covenants are postponed to his other debts and obligations.<sup>1</sup> (See *Administration*, § 2.) As to voluntary settlements, see *Settlement*, §§ 6 *et seq.* The Court will not enforce specific performance of a voluntary covenant.<sup>2</sup>

§ 3. By the act 27 Eliz. c. 4, a voluntary conveyance of lands or hereditaments is void against a subsequent purchaser for good consideration, even though he has notice of the prior voluntary conveyance.<sup>3</sup> (See *Fraudulent Conveyances*.) § 4. In equity it is a rule that in every case where one person obtains, by voluntary donation (gift, settlement, contract, &c.), a large pecuniary benefit from another, he is bound to show that the donor understood what he was doing, and that if he cannot the donation may be set aside at the instance of the donor or his representatives.<sup>4</sup> (See *Rescission*.) § 5. It is also a rule of equity that although no consideration is required for the validity of a complete declaration of trust, or a complete transfer of any legal or equitable interest in property, yet an incomplete voluntary gift creates no right which can be enforced. Thus, where a person possessed of a leasehold house and stock in trade purported to make a voluntary gift in favour of his grandson E. by indorsing and signing the following memorandum on the lease, "This deed and all thereto belonging I give to E. from this time forth, with all the stock in trade;" and by delivering the lease to E.'s mother on his behalf; it was held that there was no valid declaration of trust in favour of E.<sup>5</sup> (See *Oaths*, § 2; *Waste*; *Winding-up*.)

**VOLUNTEER** is used in law in two senses: § 1. A person who gives his services without any express or implied promise of remuneration in return is called a volunteer, and is entitled to no remuneration for his services, nor to any compensation for injuries sustained by him in performing what he has undertaken. But a person who, though he is not obliged to do an act, yet has an interest in doing it, is not necessarily a volunteer. Thus, where the owner of goods assisted the servants of a railway company with the assent of the company in delivering them, and was injured by the servants' negligence, it was held that he was entitled to damages.<sup>6</sup>

§ 2. In the law of settlements and wills, a volunteer is a person who is merely an object of bounty, as opposed to a person who takes an interest

Contracts and  
torts.

<sup>1</sup> Not so in bankruptcy. See *Ex parte Pottinger*, 8 Ch. D. 621.

<sup>2</sup> *Kekewich v. Manning*, 1 De G. M. & G. 176; Pollock, 201.

<sup>3</sup> Bl. Comm. ii. 296, n. (4); Watson's Comp. Eq. 275; White & Tudor's L. C. i. 223.

<sup>4</sup> *Hoghton v. Hoghton*, 15 Beav. 275;

White & Tudor, L. C. ii. 580; Pollock on Contract (3rd edit.), 574; *Bainbridge v. Browne*, 18 Ch. D. 188.

<sup>5</sup> *Richards v. Delbridge*, L. R., 18 Eq. 11; *Jefferys v. Jefferys*, Cr. & Ph. 138; Pollock, 202.

<sup>6</sup> *Wright v. L. & N. W. Rail. Co.*, 1 Q. B. D. 252.

Settlements  
and wills.

for valuable consideration.<sup>1</sup> Thus, an ordinary devisee or legatee is a volunteer; and if an appointment be made under a general power without consideration the appointee is a volunteer.<sup>2</sup> So, in the case of a settlement or conveyance void under the statute 27 Eliz. c. 4, which makes voluntary conveyances of land void as against subsequent purchasers for value, the person on whom the voluntary settlement is made is called a volunteer.<sup>3</sup> (See *Voluntary*, § 3.)

**VOUCH—VOUCHER.**—I. § 1. To vouch is to call upon, rely on, or quote as an authority. Thus, in the old writers, to vouch a case or report is to quote it as an authority.<sup>4</sup>

§ 2. Hence, a "voucher" is a document which evidences a transaction, especially a receipt for the payment of money. In the practice of the Chancery Division, when an account is being taken in chambers, the accounting party has to produce vouchers for all payments of 2*l.* or over claimed to have been made by him. This is called "vouching the account." (See *Account*, § 5.)

Voucher to  
warranty.

II. § 3. In the old law of real property, voucher (or "voucher to warranty") was where a person who was being sued for the recovery of land held by him called into Court the person who had warranted the land to him, and required him either to defend the title against the demandant or to yield him land of equal value; the person thus called into Court was called the vouchee. Double voucher was where the vouchee vouched the person who had warranted the land to him; and so with treble voucher, &c. A foreign voucher was where the vouchee was a foreigner, that is, a person out of the jurisdiction of the Court in which the action was brought.<sup>5</sup> In the fictitious proceedings called common recoveries, the vouchee (or ultimate vouchee if there were more than one) was usually the crier of the Court, who was hence called the common vouchee.<sup>6</sup> (See *Recovery*, § 7; *Præcipe*, § 3.)

Double  
voucher.  
Foreign  
voucher.

§ 4. Real actions having been abolished,<sup>7</sup> the proceeding by voucher no longer exists. (See *Warranty*, §§ 6 *et seq.*; *Warrantia Chartæ*.)

ETYMOLOGY.]—Norman-French, *voucher*;<sup>8</sup> from Latin, *vocare*, to call.

**VOYAGE POLICY.** See *Policy of Assurance*, § 3.

## W.

**WAGER.**—§ 1. A wager consists of mutual promises between two persons that one will pay the other a certain sum of money if a certain event happens or is ascertained to have happened. At common law a

<sup>1</sup> Spence, Eq. ii. 285 *et seq.*

<sup>2</sup> Watson's Comp. Eq. 293.

<sup>3</sup> White & Tudor's L. C. i. 223; *Price v. Jenkins*, 4 Ch. D. 483, overruled on appeal, 5 Ch. D. 619.

<sup>4</sup> Co. Litt. 70 a.

<sup>5</sup> *Ibid.* 101 b.

<sup>6</sup> Bl. Comm. ii. 359.

<sup>7</sup> Stat. 3 & 4 Will. 4, c. 27, s. 36.

<sup>8</sup> Britton, 255 a.



wager constituted a good contract, unless it was contrary to public policy, morality or the like;<sup>1</sup> but by stat. 8 & 9 Vict. c. 109, all contracts by way of gaming or wagering are null and void,<sup>2</sup> except so far as concerns subscriptions or contributions for prizes or money to be awarded to the winner of any lawful game, sport, pastime or exercise.<sup>3</sup> There is nothing illegal in a wager: it is merely not enforceable.<sup>4</sup> (See *Unlawful*.)

§ 2. Numerous questions have arisen as to the lawfulness of speculative transactions on the Stock Exchange, especially as regards "time-bargains" and "differences." A time-bargain is in form a contract to buy or sell shares or other securities, with an agreement (contemporaneous or subsequent) that the sale shall not be really carried out by delivery of the securities, but that one party shall pay to the other the difference between the market price of the security on the day when the contract was made and the day fixed for its performance. It is, therefore, a wager on the price of the security. The term "difference" is generally applied to the case where a person employs a broker to buy or sell stock for him on the understanding that when the day for completing the transaction arrives, the broker shall re-sell or re-buy the stock, and that the employer shall take the profit or bear the loss. A time-bargain is void as between the parties to it,<sup>5</sup> but if a broker is employed to speculate in stocks, he can recover from his employer brokerage and "differences" in respect of all genuine contracts for buying and selling stock which he enters into with other persons.<sup>6</sup>

Gambling in stocks.

Time-bargain.

"Differences."

§ 3. By numerous statutes from 33 Hen. 8 to the present time, especially stat. 42 Geo. 3, c. 119; 8 & 9 Vict. c. 109; 16 & 17 Vict. c. 119; 17 & 18 Vict. c. 38; 37 Vict. c. 15, persons who keep gambling- or betting-houses, or otherwise publicly offer facilities for gambling or betting, are made liable to various penalties and punishments.

Betting-houses.

As to wager of law, see Bl. Comm. iii. 341; Steph. Comm. iii. 424.

**WAGES** are money payable by a master to his servant in respect of services. (See *Master and Servant*; *Service*, § 7.)

§ 2. Some wages are preferential debts in bankruptcy (see *Debt*, § 12), and in the liquidation of a mining company under the Stannaries Act, 1869.<sup>7</sup>

Bankruptcy.

§ 3. With reference to seamen's wages, the general rule used to be "freight is the mother of wages," so that if no freight was received no wages were payable; but this rule has been abolished by the Merchant Shipping Act, 1854, s. 183.<sup>8</sup> Seamen have a lien on the ship and freight for their wages. Claims to wages may be enforced by action in rem or in personam. (See *Action*, §§ 11—18.) County Courts and justices of the

Seamen's wages.

<sup>1</sup> Chitty on Contracts, 468.

<sup>2</sup> *Ibid.* 470.

<sup>3</sup> See *Diggle v. Higgs*, 2 Ex. D. 422; *Trimble v. Hill*, 5 App. Ca. 342.

<sup>4</sup> Pollock on Contract (3rd edit.), 276.

<sup>5</sup> *Grisewood v. Blane*, 11 C. B. 526, 538; *Melsheimer & Lawrence on the Stock Exchange*, 21, where the nature of

"options," "puts," and "calls" is explained.

<sup>6</sup> *Thacker v. Hardy*, 4 Q. B. D. 685; *Ex parte Rogers*, 15 Ch. D. 207.

<sup>7</sup> Buckley on Companies, 281.

<sup>8</sup> Maude & Pollock, *Merch. Shipp.* (4th edit.), 219.

peace have jurisdiction in claims for wages up to a certain amount, and may enforce them by distress and sale of the vessel. The wages of a master are now on the same footing as those of ordinary seamen.<sup>1</sup>

**WAIFS**, *bona waviata*, are stolen goods which are waived or thrown away by the thief in his flight, for fear of being apprehended. They belong to the owner, if he follows and apprehends the thief or prosecutes him to conviction; otherwise they belong to the crown.<sup>2</sup> (See *Prerogative*; *Franchise*, § 2; *ADDENDA*, title *Fugitives' Goods*.)

**WAIVE—WAIVER.**—I. § 1. A person is said to waive a benefit when he renounces or disclaims it, and he is said to waive a tort or injury when he abandons the remedy which the law gives him for it. A waiver may be either express or implied. Thus, if a tenant commits a breach of covenant, and thereby makes the lease liable to forfeiture, the lessor may waive the breach either by promising not to take advantage of it, or by receiving rent after knowing of the breach: the former is an express, the latter an implied, waiver. Formerly, if a lessor waived a right of re-entry for a breach of covenant, or the like, this operated as a waiver in law of all future breaches, so that the right of re-entry was destroyed. This rule was abolished by stat. 22 & 23 Vict. c. 35. (See *Apportion*, § 4; and *ADDENDA*.)

II. § 2. "A man which is outlawed is called outlawed, and a woman which is outlawed is called waived,"<sup>3</sup> "*waviata* and not *utlegata* or *exlex*, for that women are not sworne in leets or tornes, as men which be of the age of twelve yeares or more be: and therefore men may be called *utlegati*, *id est*, *extra legem positi*, but women are *waviatæ*, *id est*, *derelictæ*, left out or not regarded, because they were not sworne to the law."<sup>4</sup> (See *Outlaw*.)

**WAPENTAKE** in the northern counties is equivalent to a hundred (*q. v.*).<sup>5</sup>

**WARD—WARDSHIP.**—§ 1. A ward is an infant who is under the care of a guardian (*q. v.*). Wardship is the condition or status of a ward.

§ 2. If an action, suit or other proceeding relative to an infant's estate or person, and for his benefit, be instituted in the Chancery Division of the High Court, the infant, whether plaintiff or defendant, immediately becomes a ward of Court, although its father or testamentary guardian may be living. Thus, the institution of an action for the administration of property in which an infant is interested, or the payment into Court under the Trustee Relief Act of a fund in which he is interested, makes him a ward of Court.<sup>6</sup> § 3. A ward of Court cannot be taken out of the jurisdiction of the Court, nor can any change be made in his or her

Ward of  
Court.

<sup>1</sup> Maude & Pollock, 122, 239 *et seq.*

<sup>2</sup> Bl. Comm. i. 297; Steph. Comm. ii.

547.  
<sup>3</sup> Litt. § 186.

<sup>4</sup> Co. Litt. 122 b.

<sup>5</sup> Bl. Comm. i. 116.

<sup>6</sup> Snell's Eq. 323; Watson's Comp. 295; Daniell, Ch. Pr. 1190.

position in life (as by marriage, adoption of a profession, &c.), without leave of the Court, and the details of his or her education and maintenance are regulated by the Court, namely, a judge of the Chancery Division sitting in chambers.<sup>1</sup>

§ 4. In the law of tenure, wardship is the right to the custody of the land, and in some cases also of the person, of an infant heir of land. The right is a chattel real.<sup>2</sup> As to its nature and varieties, see *Guardian*.

**WARDEN** literally means a keeper; but generally the term is used to denote an officer of the crown. (See *Cinque Ports*; *Stannaries*.)

**WARING, EX PARTE.**—The case of *Ex parte Waring*<sup>3</sup> was as follows:—Bracken & Co. had an account with bankers named Brickwood, drawing upon them by bill, and lodging in their hands from time to time securities against their drafts. Brickwoods became bankrupt on the 7th July, 1810, being then liable on acceptances for Bracken & Co. to the amount of 24,000*l.*, and having in their hands a cash balance of 6,700*l.*, and securities worth a considerable sum. On the 2nd August, 1810, Bracken & Co. also became bankrupt. Almost all the acceptances were proved against both estates, and the holders received dividends on Brickwoods' estate to the amount of 3,400*l.* An application was then made by Waring and other holders of Brickwoods' acceptances, that the assignees (or trustees in bankruptcy, as we should say now) of Brickwoods' estate might be ordered to pay to the petitioners and the other holders of the acceptances, the cash balance, less the dividends received by the petitioners (6,700*l.*, less 3,400*l.* = 3,300*l.*), and also the proceeds of the securities held by Brickwoods, towards satisfaction of the amount due on the acceptances. An order to this effect was accordingly made, on the ground that the securities were applicable in clearing the estate of Brickwoods from the liability on the acceptances, and that therefore, to avoid circuitry, the securities should be given up to the holders of the acceptances: in other words, the securities held by the banker were made available to the bill holders, not directly, or as having a claim on the securities in respect of the acceptances by them, but through the equity (that is, the equitable rights and obligations) between the banker and the customer.

The rule in *Ex parte Waring* only applies—(i) where there is a double insolvency;<sup>4</sup> and (ii) where there has been a specific appropriation of securities.<sup>5</sup>

**WARNING**, under the old practice of the Court of Probate, was a notice given by a Registrar of the Principal Registry to a person who had entered a caveat (*q. v.* § 2), warning him, within six days after service, to enter an appearance to the caveat in the Principal Registry and to set forth his interest, concluding with a notice that in default of his doing so the Court would proceed to do all such acts, matters, and things

<sup>1</sup> See Watson, 301 *et seq.*; Bl. Comm. i. 463, n. (13). The jurisdiction is not affected by the lunacy of the infant: *In re Edwards*, 10 Ch. D. 605.

<sup>2</sup> Litt. § 320; Co. Litt. 200 a.

<sup>3</sup> 19 Vesey, 345.

<sup>4</sup> *Hickie's Case*, L. R., 4 Eq. 226.

<sup>5</sup> *Ex parte Banner*, 2 Ch. D. 278. See Fisher on Mortgage, 218.

as should be necessary.<sup>1</sup> By the rules under the Judicature Acts, a writ of summons has been substituted for a warning.<sup>2</sup> (See *Appearance*.)

**WARRANT.**—§ 1. In its primary sense, a warrant is an authority.<sup>3</sup>

Letters  
patent.

I. § 2. Every royal grant under the great seal is sealed by the Lord Chancellor under the authority of a warrant prepared by the Attorney or Solicitor-General, setting forth the proposed letters-patent, countersigned by one of the principal Secretaries of State, and sealed with the privy seal.<sup>4</sup> (See *Great Seal*; *Privy Seal*; *Sign Manual*.)

As to warrants for the delivery of goods, see *Dock Warrant*; *Delivery Order*. As to share warrants, see *Share*, § 5. See also *Warrant of Attorney*.

II. Warrants are used in executing process both in civil and criminal cases.

Bailiff's  
warrant.

(1) § 3. In ordinary actions, when a sheriff does not execute a writ either personally or by his under-sheriff, he must authorize a bailiff to execute it, and this authority is given by a document called a warrant.<sup>5</sup> (See *Bailiff*.)

Warrant to  
bring up  
prisoner as  
witness.

§ 4. Stat. 16 & 17 Vict. c. 30, s. 9, enables a Secretary of State, or judge of any of the common law Courts, to issue a warrant for bringing up any prisoner or person committed for trial, to be examined as a witness in any Court.<sup>6</sup> (See *Habeas Corpus*, § 4.)

Admiralty  
practice.

§ 5. Under the old practice of the Admiralty Court, a warrant in a cause in rem answered to and was almost in the same words as the writ of summons in an admiralty action in rem under the new practice.<sup>7</sup> As to the warrant of arrest in an admiralty action, see *Action*, § 12.<sup>8</sup>

(2) In criminal procedure, warrants authorizing the arrest or apprehension of persons charged with or suspected of having committed indictable offences, are issued in the following cases:—

Warrant to  
answer.

§ 6. A warrant to apprehend a person accused of an indictable offence may be issued by a justice of the peace, either in the first instance on a sworn information, or after a summons requiring the accused to appear and answer the charge has been served on him and disobeyed. This kind of warrant is sometimes called a warrant to answer.<sup>9</sup>

Warrant to  
appear on  
indictment.

§ 7. A warrant may also be granted by a justice to apprehend a person who has been indicted of an offence, and is at large.<sup>10</sup> (See *Backing a Warrant*.)

Bench war-  
rant.

§ 8. A bench warrant is a warrant issued by the Court before which an indictment has been found, to arrest the accused and bring him before the Court to find bail for his appearance at the trial.<sup>11</sup>

Warrant of  
deliverance.

§ 9. A warrant of deliverance is a warrant to discharge from prison a person who has been bailed.<sup>12</sup>

<sup>1</sup> Browne's Probate Pr. 266.

<sup>2</sup> Rules of Court, i. 1.

<sup>3</sup> See Co. Litt. 52 a.

<sup>4</sup> Stat. 14 & 15 Vict. c. 82; Stephen, Comm. i. 619; stat. 15 & 16 Vict. c. 83, s. 15; Johnson on Patents, 283.

<sup>5</sup> Smith's Action, 251.

<sup>6</sup> Coe's Pract. 171.

<sup>7</sup> Williams & Bruce's Admiralty, 191.

<sup>8</sup> The reference in note (4) on p. 23 should be to the Rules of February, 1876, r. 4.

<sup>9</sup> Stat. 11 & 12 Vict. c. 42, s. 1; Stone's Justice of the Peace, 100.

<sup>10</sup> Stat. 11 & 12 Vict. c. 42, s. 3; Archbold, Crim. Pl. 82; Pritchard, Q. S. 176.

<sup>11</sup> Archbold, Crim. Pl. 83; Pritchard's Q. S. 178.

<sup>12</sup> Archbold, 90.

(3) The following kinds of warrants are used in summary proceedings before justices of the peace and other magistrates:—

§ 10. A warrant of distress is a warrant authorizing a penalty or other sum of money to be levied by distress and sale of the defendant's goods.<sup>1</sup> Warrant of distress.

§ 11. A warrant of commitment authorizes the commitment of the defendant to prison for a certain time, and is granted either (i) where the imprisonment is the punishment for the offence, or (ii) after a return of nulla bona to a warrant of distress, or (iii) in the first instance on default in paying a penalty or other sum of money.<sup>2</sup> Warrant of commitment.

**WARRANT OF ATTORNEY** originally meant the same thing as a power or letter of attorney,<sup>3</sup> but at the present day the term is used only to denote a written authority from a person enabling the person to whom it is given (the attorney) to enter an appearance for him in an action, and to allow judgment to be entered for the plaintiff, or to suffer judgment to go by default.<sup>4</sup> Such a warrant is usually given to secure the payment of a sum of money, and is therefore qualified by a condition that it shall only be put in force if the debt is not paid by a certain day; this condition is expressed in a document called the defeazance, which also usually contains various stipulations designed to facilitate the execution of the judgment when obtained. The defeazance must be written on the same paper or parchment as the warrant, and its execution requires to be attested by a solicitor, who must explain the nature of the document to the debtor before he signs it.<sup>5</sup> Warrants of attorney are not now of such frequent occurrence as formerly.

**WARRANTIA CHARTÆ** was a real action which lay to enforce a warranty of title to land where the tenant was unable to avail himself of the warranty by voucher<sup>6</sup> (*q. v.*). It was abolished by stat. 3 & 4 Will. 4, c. 27, s. 36. (See *Warranty*, § 6.)

**WARRANTY.**—§ 1. A warranty is an engagement or undertaking forming part of a sale or other transaction. A warranty differs from a representation in giving rise to an absolute liability on the part of the warrantor, whether made in good faith or not, and unless it is strictly and literally performed the contract is avoided,<sup>7</sup> or he becomes liable to an action for breach of warranty, according to the nature of the transaction. (See *Representation*, §§ 3, 4.)

I. § 2. In the law relating to sales of goods, a warranty is a collateral contract by a vendor on a sale of goods, that the goods have a certain quality or property. Warranty of title is an engagement by the vendor that he has a good title to the goods which he professes to sell.<sup>8</sup> On sale of goods.  
Warranty of quality is an engagement by the vendor that the goods are Warranty of title,  
of quality.

<sup>1</sup> Stone's Justice of the Peace, 193; Summary Jurisdiction Act, 1879, ss. 21, 39, 43.

<sup>2</sup> Stone, 197 *et seq.*; S. J. Act, 1879, ss. 21, 39.

<sup>3</sup> Co. Litt. 52 a.

<sup>4</sup> Chitty, Pr. 950; Archbold, Pr. 762; Smith's Action, 161; stat. 32 & 33 Vict.

c. 62, s. 24.

<sup>5</sup> Co. Litt. 52 a.

<sup>6</sup> Bl. Comm. iii. 300.

<sup>7</sup> Maude & Pollock, 393; Smith's Merc. Law, 369, 374; *Steel v. State Line Steamship Co.*, 3 App. Ca. at p. 86.

<sup>8</sup> Chitty on Contracts, 407; Benjamin on Sales, 497.

of a good quality and fit for the purpose for which they are wanted, or that they are of a particular description.<sup>1</sup> Such a warranty may be either general or restricted to some particular point.<sup>2</sup> § 3. Such warranties are usually express, that is, created by appropriate words, though no particular form is required. Sometimes a warranty is implied. Thus, on a sale of goods, though the general rule is *caveat emptor*, a warranty of quality will be implied if the goods are made or supplied to the order of the purchaser, or if they are sold as answering a particular description, or by sample; or it may arise from a usage of trade.<sup>3</sup> As regards implied warranty of title, the law is not quite settled, but the rule appears to be that "a sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shewn by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold."<sup>4</sup>

## Insurance.

II. § 4. In the law of insurance, warranty means any assertion or undertaking on the part of the assured, whether expressed in the contract or capable of being annexed to it, on the strict and literal truth or performance of which the liability of the underwriter is made to depend.<sup>5</sup> The most usual express warranties in time of peace are, that a ship is safe on a given day, and that she will sail or depart on a given day. In time of war it is also usual to warrant that the ship will sail with convoy, and that she and her cargo are neutral property and free from confiscation or seizure in the port of discharge.<sup>6</sup> The most important implied warranty is that the vessel is seaworthy at the commencement of the risk.<sup>7</sup> (See *Seaworthy*.) Warranty of documentation is a warranty that she has those documents which are required by international law or treaty to establish

## Continuing.

her national character.<sup>8</sup> § 5. A continuing warranty is one which applies to the whole period during which the contract is in force: thus, an undertaking in a charter-party that a vessel shall continue to be of the same class that she was at the time the charterparty was made is a continuing warranty.<sup>9</sup>

## Land.

III. § 6. In the old law of real property, warranty was an obligation by the feoffor or donor of land (or other hereditaments) to defend the feoffee or donee in the possession of the land, and to give him land of equal value if he was evicted from it. A warranty was a real covenant. (See *Covenant*, § 3.) Warranties were either in deed, that is, expressed; or in law, that is, implied.<sup>10</sup>

## Warranty in deed or express.

## Lineal.

(1) Warranties in deed were of three kinds. § 7. Lineal warranty was where the heir of the warrantor was or might by possibility have been entitled to the land by descent from the warrantor;<sup>11</sup> this happened if a man seised of land in fee made a feoffment of them by deed and bound himself and his heirs to warranty, and died, so that the warranty descended to his heir, who would otherwise have inherited the land.<sup>12</sup>

## Collateral.

§ 8. Collateral warranty was where the heir of the warrantor could not by any possibility

<sup>1</sup> Chitty, 410; Smith, L. C. i. 173.

<sup>2</sup> Chitty, 417.

<sup>3</sup> Benjamin, 525.

<sup>4</sup> *Ibid.* 523.

<sup>5</sup> Maude & Pollock, Merch. Shipp. 377.

<sup>6</sup> *Ibid.* 378.

<sup>7</sup> *Ibid.* 387.

<sup>8</sup> Smith's Merc. Law, 381.

<sup>9</sup> See *French v. Newgass*, 3 C. P. D. 163.

<sup>10</sup> Williams on Seisin, 156; Shepp. Touch. 181.

<sup>11</sup> Co. Litt. 370 a.

<sup>12</sup> Litt. § 703.

have been entitled to the land by descent from the warrantor; thus, if a younger son released with warranty to his father's disseisor, this warranty was collateral to his elder brother, because by no possibility could the latter in such a case claim the land as heir to his younger brother.<sup>1</sup> § 9. Where the conveyance to which the warranty was annexed immediately followed a disseisin, or operated itself as such (as where a father, being tenant for years with remainder to his son in fee, aliened in fee simple with warranty), this was called a warranty commencing by disseisin, and did not bar the heir of the warrantor.<sup>2</sup>

Commencing  
by disseisin.

§ 10. The operation of a warranty as against the heir of a warrantor in case the warrantee was evicted from the land was to compel him to yield the warrantee other lands in its stead, to the extent of any land which had descended to him from the ancestor;<sup>3</sup> and if he had no land by descent, then he was barred of all claim to the land warranted. This operation, however, was from time to time restrained by various statutes,<sup>4</sup> and voucher (*q. v.*) and the writ of warrantia chartæ (*q. v.*) have been abolished,<sup>5</sup> so that a warranty of land seems to be now entirely inoperative.<sup>6</sup> A fictitious warranty was the foundation of the proceeding called a common recovery (*q. v.*), now also abolished. (See *Recovery*, § 7.)

(2) § 11. Warranty was implied in certain cases; thus, the word *give* in a feoffment created a warranty binding on the feoffor during his life; and an exchange at common law created an implied warranty (see *Exchange*, § 2); these and all other implied warranties have been abolished.<sup>7</sup> (See *Assets*, § 4; *Rebutter*, § 2.)

Implied  
warranty.

**WARREN** is the privilege of keeping and killing certain kinds of animals (especially hares and rabbits) on a piece of ground. As to what are beasts of warren, see *Game*. A warren in the hands of a private person (sometimes called a free warren) is a franchise (*q. v.*); it may be claimed either by royal grant or prescription, and may exist either in the lands of the owner of the warren, or in those of another person.<sup>8</sup>

§ 2. The owner of a warren has a qualified property in the animals belonging to it, so that no other person can acquire a property in them either by taking them within the warren, or by chasing them thence and taking them on other ground. (See *Animals Ferae Naturæ*; *Forest*, § 3; *Game*.)

**ETYMOLOGY.**—Norman-French, *garenne*; low Latin, *warenna*; from Old High German, *warôn*, to take care of, preserve: ("place defendue et garenne.")<sup>9</sup>

**WASTE.**—I. § 1. In the law of real property, waste is, properly speaking, land which has never been cultivated, as opposed to pasture and arable land, &c. The most important kind of waste is manorial waste, or that part of a manor which is subject to the tenants' rights of common, and hence "waste" is sometimes used improperly to denote any land subject to rights of common or similar rights, although under cultivation.<sup>10</sup> (See *Common*; *Commonable*; *Lammas Lands*; *Manor*; *Open*

Waste land.

<sup>1</sup> Litt. § 707.

<sup>2</sup> Bl. Comm. ii. 302. For an instance of a "warranty paramount," see *Deraign*, § 2.

<sup>3</sup> Co. Litt. 102 a.

<sup>4</sup> Especially 6 Edw. 1, c. 3; 11 Hen. 7, c. 20; 4 & 5 Ann. c. 16; 3 & 4 Will. 4, c. 27, s. 39; 3 & 4 Will. 4, c. 74, s. 14.

<sup>5</sup> Stat. 3 & 4 Will. 4, c. 27, s. 35.

<sup>6</sup> Bl. Comm. ii. 303, n. 13.

<sup>7</sup> Stat. 8 & 9 Vict. c. 106, s. 3. For other instances of implied warranties, see

Williams on Seisin, 101; Co. Litt. 102 a, 384 a, b.

<sup>8</sup> Comyns's Dig. Chase, D.; Co. Litt. 233 a. As to whether a conveyance of a "warren" passes the soil, see Co. Litt. 5 b; *Earl Beauchamp v. Winn*, L. R., 6 H. L. 223.

<sup>9</sup> Britton, 85 a; Littre, s. v. *Garenne*; Schmidthenner's Dict. s. v. *Wahren*.

<sup>10</sup> Elton, Comm. 188; Cooke, Incl. 42; Fleta, 265; 7 Co. 5.

*Fields; Shack.*) The soil of a manorial waste is vested in the lord of the manor, and he therefore is entitled to pasture his cattle on it. He is also entitled to the minerals under the waste, and may work them so that he do not unduly interfere with the commonable rights of the tenants.<sup>1</sup> As to the inclosure of waste lands, see *Approve*, § 1; *Inclosure*.

Waste by tenant.

Voluntary or permissive.

Impeachability for waste.

Equitable waste.

Meliorating waste.

II. § 2. In the law of torts, waste is whatever does lasting damage to the freehold or inheritance of land, or anything which alters the nature of the property so as to render the evidence of ownership more difficult, or to destroy or weaken the proof of identity, or diminish the value of the estate, or increase the burden upon it. It is either voluntary or permissive—the former being an offence of commission, such as pulling down a house, converting arable land into pasture, opening new mines or quarries, &c.: the latter is one of omission, such as allowing a house to fall for want of necessary repairs, allowing land to remain flooded with water, &c.<sup>2</sup>

§ 3. A copyhold tenant may not commit waste upon the lands he holds.<sup>3</sup> A freehold tenant in fee simple or fee tail, on the other hand, may commit as much waste as he likes; but the general rule is, that a tenant for life of freehold land is impeachable for waste, that is, he may not commit waste unless his estate is without impeachment of waste (or sans waste), as where it is expressly so given to him. (See *Tenant in Tail after Possibility of Issue extinct.*) § 4. But there are certain kinds of waste which Courts of Equity would always prevent, even where the tenant for life was unimpeachable for waste, and which are hence known as equitable waste: cutting down ornamental timber, and pulling down buildings, are instances of equitable waste:<sup>4</sup> where, however, a tenant for life pulls down a building and erects a new one in such a way as to effect an improvement, the Court will not interfere, this being what is called “meliorating” or “ameliorating waste.”<sup>5</sup>

§ 4. The remedy for waste is an action for damages or an injunction.

ETYMOLOGY.]—Norman-French, *wast*; <sup>6</sup> from Latin, *vastare*, *vastus*.<sup>7</sup>

**WATCH.** See *Constable*, § 2; *Rate*, § 2 (x).

**WATCH AND WARD.**—In the old books, one of the principal duties of constables is described as that of keeping watch and ward; “ward” being used to signify the duty of apprehending rioters and robbers during the day-time, while “watch” is properly applicable to the night.<sup>8</sup> (See *Constable*; *Rate*, § 2 (x).

Public.

**WATER** is either public or private. Public waters are the sea and its branches, and navigable rivers, the beds of which belong *primâ facie*

<sup>1</sup> Williams on Commons, 150 *et seq.*

<sup>2</sup> Co. Litt. 52 b; Litt. § 71; Woodfall's Landlord & Tenant, 566; Smith & Soden's L. & T. 228; Fawcett's L. & T. 198; Steph. Comm. iii. 405 *et seq.*

<sup>3</sup> Williams on Seisin, 40.

<sup>4</sup> Watson's Eq. 1153 *et seq.*; Steph. Comm. iii. 405; *Garth v. Cotton*, 1 Ves.

524, 546; White & Tudor, L. C. i. 623; *Baker v. Sebright*, 13 Ch. D. 179; Judicature Act, 1873, s. 25, § 3.

<sup>5</sup> *Doherty v. Allman*, 3 App. Ca. 709.

<sup>6</sup> Britton, 168.

<sup>7</sup> Littré, s. v. *Gâter*.

<sup>8</sup> Bl. Comm. i. 356.



to the crown. As a rule the soil of estuaries and of rivers (whether navigable or not) in which the tide ebbs and flows is vested in the crown.<sup>1</sup> (See *High Seas*; *King's Chambers*; *Rivers*.) Private waters are rivers, streams, lakes and ponds, &c., the beds of which belong to private persons. *Primâ facie* the soil of non-tidal rivers and lakes belongs to the owners of the adjoining land. § 2. Public waters are, as a rule, subject only to the public right of navigation, and to the right of access possessed by the owners of the adjoining shores or banks.<sup>2</sup> (See *Access*; *Frontage*; *Navigable*; *Riparian*.) As to the right of fishing in public waters, see *Fishery*. As to territorial waters, see *Territorial*.

Private.

Private waters are of three kinds:—

§ 3. Private waters may be subject to a right of navigation by the public, as in the case of the Severn and other rivers.<sup>3</sup>

Private waters navigable by public.

The distinction between public waters and private waters subject to a public right of navigation is that in the case of the latter the owners of the soil may (as against the public) do what they like with the water and its bed so long as they do not obstruct the navigation.<sup>4</sup>

§ 4. Private waters passing through or between the lands of different proprietors may be subject to two kinds of rights, natural and acquired. Natural or proprietary rights are those possessed by every riparian proprietor, and consist principally in the right to have the water flow in its accustomed manner, without sensible disturbance or diminution by the superior and inferior riparian proprietors, and the right to the reasonable use of the water while it is flowing past his land, including its use for domestic purposes, for turning mills, &c.<sup>5</sup> § 5. Acquired rights are those easements which entitle a riparian proprietor to interfere with a natural stream of water to an extent not justified by his natural or proprietary rights, *e.g.*, by diminishing or obstructing the flow of water, or by polluting it, &c., or which entitle him to the use of an artificial water-course (*q. v.*).<sup>6</sup> Acquired rights in respect of water may exist in the inhabitants of a district by virtue of a custom.<sup>7</sup> As to the right of fishing in private waters, see *Fishery*, §§ 4 *et seq.*

Natural rights of water.

Acquired rights.

§ 6. Water covering and surrounded by land belonging to one proprietor is not the subject of any special rights. It is not considered as part of the soil, and therefore a right to go on a man's land and take water from it is an easement and not a profit à prendre;<sup>8</sup> and if a man grant to another a piece of water on his land, all that the grantee takes is

Land covered by water.

<sup>1</sup> Coulson & Forbes on Waters, 413. As to the jurisdiction of the English Crown over the open seas adjacent to the coast, see *Territorial*.

<sup>2</sup> *Orr Ewing v. Colquhoun*, 2 App. Ca. 839; *Bristow v. Cormican*, 3 App. Ca. 641; *Bell v. Corporation of Quebec*, 5 App. Ca. 84; Phear on Water, *passim*.

<sup>3</sup> *Ibid.* This seems to be Lord Hale's meaning in the passage quoted in *Lyon v. Fishmongers' Co.*, 1 App. Ca. at p. 673.

<sup>4</sup> *Orr Ewing v. Colquhoun*, *ubi supra*.

<sup>5</sup> Phear, 30; Gale on Easements, 218; Dart, V. & P. 364 *et seq.*; *Orr Ewing v.*

*Colquhoun*, at p. 854; *Mackenzie v. Bankes*, 3 App. Ca. 1324; *Earl of Sandwich v. G. N. R.*, 10 Ch. D. 707. As to natural rights in an artificial watercourse, see *Wood v. Waud*, 3 Exch. 748, cited by Gale, at p. 308. As to the obligation of keeping an artificial flow of water within bounds, see *West Cumberland, &c. Co. v. Kenyon*, 11 Ch. D. 782.

<sup>6</sup> Gale, 270.

<sup>7</sup> Shelford, R. P. Stat. 97; *Harrop v. Hirst*, L. R., 4 Ex. 43.

<sup>8</sup> *Race v. Ward*, 4 E. & B. 702. Britton (154 b) describes this as a right of common.

the right of fishing in it. The proper legal description of a pond or the like is "land covered with water."<sup>1</sup>

For other points connected with water, see *Accretion*; *Alluvion*; *Conservators of Rivers*; *Dereliction*, § 3; *Ferry*; *Foreshore*; *Frontage*; *Ship*; *Water Supply*.<sup>2</sup>

#### Artificial.

**WATERCOURSE.**—§ 1. In the proper sense of the word, a watercourse is an artificial channel (whether above or below ground) by which water is led from or over the land of one person to or over that of another.<sup>3</sup> The right of watercourse, in this sense of the word, is therefore the right of receiving or discharging water through another person's land, and is an easement, the tenement for the benefit of which the watercourse exists being the dominant tenement.<sup>4</sup> (See *Easement*.) § 2. In some cases, however, it seems that where a watercourse passes over land for the discharge of water from the dominant tenement, the owner of the servient tenement may be entitled to have the flow of water through the watercourse uninterrupted, so that the dominant owner cannot stop or divert it.<sup>5</sup> In such a case there are correlative easements, each tenement and owner being dominant or servient, according to the easement which is in question: and the watercourse is practically undistinguishable from a natural stream.

#### Natural.

§ 3. The term "watercourse" is also sometimes applied to natural streams. The rights of receiving and discharging the water of a natural stream over the land of adjoining proprietors are not easements, but natural rights.<sup>6</sup> (See *Water*, § 4.)

**WATER SUPPLY—WATERWORKS.**—The principal statutes relating to the supply of water are the Waterworks Clauses Acts, 1847 and 1863, for regulating waterworks constructed under private acts of parliament: the Metropolis Water Acts, 1852 and 1871, applying only to London: the Gas and Water Facilities Act, to facilitate the construction of gas and waterworks under provisional orders of the Board of Trade (see *Provisional Order*): the Public Health Act, 1875, sects. 51—70 of which empower urban authorities to construct or acquire waterworks within their districts in certain cases: and stat. 40 & 41 Vict. c. 31, as to which see *Improvement of Land Acts*.

**WAY.**—§ 1. A right of way is where a person has the right of passing through or over land not belonging to him.

#### Public.

§ 2. Ways are either public or private.<sup>7</sup> Public ways are more commonly called highways (*q. v.*).

<sup>1</sup> Co. Litt. 4 b.

<sup>2</sup> As to rights relating to water in Roman law and in jurisprudence, see Elvers, *Recht des Wasserlaufes*; Championnière, *Propriété des Eaux Courantes*; *Zeitschrift für vergl. Rechtswiss.* i. 261; Holtz. *Encycl.* i. 388.

<sup>3</sup> Britton, 153 b.

<sup>4</sup> Gale on Easements, 23; Shelford's

R. P. Stat. 86; Phear on Water, 38. As to what is a watercourse within the Prescription Act, see Gale, 169, n. (a).

<sup>5</sup> *Wood v. Waud*, 3 Exch. 748, cited by Gale, 308; *Singh v. Pattick*, 4 App. Ca. 121.

<sup>6</sup> Gale, 218; *West Cumberland, &c. Co. v. Kenyon*, 11 Ch. D. 782.

<sup>7</sup> Shelford's R. P. Stat. 62.

§ 3. Private rights of way are of various kinds. They may be limited Private. (1) as to the intervals at which they may be used, *e. g.*, a way to church or market: (2) as to the actual extent of the user authorized, *e. g.*, a foot-way, horse-way, cart-way, carriage-way, a way for driving cattle, or drift way, a way for carrying coals, &c.: and (3) as to the nature of the tenement to which the way is claimed, *e. g.*, a way to a shed used for storing wood.<sup>1</sup>

As to ways of necessity, see *Easement*, §§ 9, 10.

§ 4. A private right of way is either an easement (*q. v.*) or a customary right.<sup>2</sup>

§ 5. The obstruction of a private way is a disturbance (*q. v.*): the obstruction of a public way is a nuisance (*q. v.*).

**WAYLEAVE** is a right of way over or through land for the carriage of minerals from a mine or quarry. It is an easement (*q. v.*), being a species of the class called rights of way (see *Way*), and is generally created by express grant or reservation. A wayleave rent may be a fixed annual sum, or a sum payable according to the quantity of minerals drawn over the way, or a combination of the two.<sup>3</sup> (See *Rent*, § 6.)

**WAYWARDENS.**—The Highway Acts provide that in every parish forming part of a highway district there shall annually be elected one or more waywardens. The waywardens so elected, and the justices for the county residing within the district, form the highway board for the district. Each waywarden also represents his parish in regard to the levying of the highway rates, and in questions arising concerning the liability of his parish to repairs, &c.<sup>4</sup>

**WEIGHTS AND MEASURES.**—The Weights and Measures Act, 1878, enacts that the same weights and measures shall be used throughout the United Kingdom. It establishes standards of weights and measures, and provides that all contracts, sales, &c. made in the United Kingdom for any work, goods, &c. by weight or measure, shall be deemed to be made and had according to those weights and measures, and if not so made shall be void. It also imposes penalties on persons using or having in their possession unjust measures or weights.

**WELSH MORTGAGE.** See *Mortgage*, § 10.

**WHIPPING** may be inflicted as a punishment for offences under several statutes, especially under the Criminal Law Consolidation Acts of 1861 and stat. 26 & 27 Vict. c. 44.<sup>5</sup> (See *Larceny*; *Misdemeanor*, § 3.)

**WILFUL** means intentional or deliberate. Thus if a person accidentally strikes another, this is a battery giving rise to a right of action for

<sup>1</sup> Co. Litt. 56 a; Gale on Easements, 337; Shelford, R. P. Stat. 71.

<sup>2</sup> Formerly treated as an easement. See *Easement*, n. (1).

<sup>3</sup> Bainbridge on Mines (4th edit.), 211 *et seq.*; Elphinst. Conv. 264.

<sup>4</sup> Highway Acts, 1862, 1863, 1864, 1878.

<sup>5</sup> Stephen's Crim. Dig. 6; Russell on Crimes, i. 80, 946.

damages, while if he does it intentionally it is a wilful battery, for which the party injured may have an action of damages or a criminal prosecution. (See *Battery*.) § 2. Similarly a "wilful default" is an act of omission done with intention. Mortgagees and other persons holding securities are liable for losses caused by their wilful default; hence if a mortgagee of land in possession does not avail himself of an opportunity of beneficially letting the land, he is bound to give credit for what he has thus lost by his wilful default. (See *Account*, §§ 7 *et seq.*; *Mortgagee in Possession*.) Wilful default is a species of contributory negligence. (See *Negligence*, § 6.)

**WILL.**—§ 1. A will is a disposition or declaration by which the person making it (who is called the testator) provides for the distribution or administration of property after his death. It does not take effect until the testator's death, and is always revocable by him.

"Wills,"  
"testaments,"  
and "codicils."

§ 2. Formerly "will" signified a testamentary disposition of land, as opposed to a testament (*q. v.*), but this distinction is now obsolete.<sup>1</sup> In the strict sense of the word, a will includes all testamentary dispositions by the testator in force at the time of his death; but in practice "will" signifies a testamentary document which is in form complete in itself, while additional or supplementary dispositions are called "codicils." (See *Codicil*; *Testamentary*, § 2.)

Lex loci.

§ 3. A will of fixed or immovable property (including leaseholds) is generally governed by the *lex loci rei sitæ*. (See *Lex Loci*.) Thus, a will made in Holland in the Dutch language must, in order to operate on lands in England, be executed and attested according to English law, and must contain expressions which, being translated into English, would comprise and pass the lands in question. In regard to personal, or rather moveable property, the will is governed by the law of the place where the person was domiciled at the time of his death. But as regards formalities of execution, this rule is now subject to some exceptions, as to which see *Domicile*, § 2.<sup>2</sup>

Lex domicilii.

Testamentary capacity.

§ 4. Infants and lunatics are wholly incapable of making wills while their disability lasts. A married woman may make a will in respect of property settled to her separate use, or, with the assent of her husband, in respect of personal estate not so settled. (See *Separate Estate*; *Testable*.) All other persons have complete testamentary capacity. A person may also have a power of appointment by will over property not belonging to him. (See *Power*, § 6; *Testable*.) The rule of the High Court (in its probate jurisdiction) as to such wills is that it will grant probate of any instrument of a testamentary character if duly executed, leaving the question whether it is a valid exercise of the power to be decided by the proper tribunal.<sup>3</sup> So that a testamentary document purporting to be made in execution of a power may be proved as a will and yet be invalid, because it has not complied with the power. By the Wills Act, every

<sup>1</sup> Williams on Exec. 6; Bl. Comm. ii. 373.

<sup>2</sup> Jarman on Wills, 1 *et seq.*  
<sup>3</sup> *Ibid.* 29.

will executed in accordance with its provisions (*infra*, § 7) is declared to be, so far as respects the execution and attestation thereof, a valid execution of a power of appointment by will, although the power may have expressly required that a will made in exercise of it should be executed with some additional or other form of execution or solemnity.<sup>1</sup> (See *Appointment*, § 2; *Execute*, § 2.)

§ 5. A person having testamentary capacity may dispose by will of all real and personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so disposed of, would devolve upon his heir, executor or administrator, including estates pur auter vie, and all contingent, executory and future interests in property, and all rights of entry.<sup>2</sup> (See *Occupancy*, § 3; *Right of Entry*, § 2.) Testamentary power.

As to devises in mortmain, see that title.

As to the descent of trust and mortgage estates, notwithstanding a testamentary disposition, see ADDENDA, title *Descent*.

§ 6. No particular form of words is required to make a valid will<sup>3</sup> so long as the testator's intention can be ascertained; otherwise its provisions will fail from uncertainty (*q. v.*).

§ 7. A will must in ordinary cases be in writing, and signed at the foot or end by the testator, or by some one in his presence and by his direction, and the signature must be made or acknowledged by the testator in the presence of two or more witnesses, who must be present together at the same time, and must attest and subscribe the will in the presence of the testator.<sup>4</sup> (See *Alteration*, § 4.) Formalities.

§ 8. A devise or bequest to an attesting witness, or to his or her wife or husband, does not affect the validity of the will, but the gift is void.<sup>5</sup>

§ 9. A nuncupative will is when the testator without any writing declares his will before a sufficient number of witnesses. Before the Statute of Frauds, such wills were as valid for disposing of personalty as written wills; but by that statute<sup>6</sup> they were laid under several restrictions, except when made by soldiers or seamen in actual service. And by the Wills Act, nuncupative wills are altogether rendered invalid, except those made by soldiers or seamen in accordance with the old law.<sup>7</sup> Nuncupative.

As to the revocation and revival of wills, see those titles.

§ 10. Every will is construed, with reference to the real and personal property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear.<sup>8</sup> As to the effect of this rule, see *Devise*, § 2; *Lapse*, § 1; *Legacy*, §§ 2 *et seq.*; *Residue*. Operation of will.

§ 11. Wills are not required to be in any particular form, but a well-drawn will usually contains the following clauses (or as many of them as Form and contents of will.

<sup>1</sup> Sect. 10.

<sup>2</sup> Wills Act, s. 3.

<sup>3</sup> Williams, 99; Watson's Comp. Eq. 1163. As to the ordinary frame of wills, see Davids. Conv. iv.

<sup>4</sup> Wills Act (1 Vict. c. 26); stat. 15 Vict. c. 24.

<sup>5</sup> Wills Act, s. 15.

<sup>6</sup> 29 Car. 2, c. 3, ss. 19 *et seq.*

<sup>7</sup> Wills Act, s. 11; Williams, 111.

<sup>8</sup> Wills Act, s. 24.

may be required) in the following order:—(i) commencement (“This is the last will of me, A. B., &c.”): (ii) revocation of former wills: (iii) specific legacies: (iv) general legacies: (v) annuities: (vi) specific devises: (vii) residuary gift: (viii) clauses relating to property settled or given in trust (if any): (ix) devise and bequest of trust and mortgage estates: (x) appointment of executors and guardians: (xi) testimonium.<sup>1</sup> (See the various titles; and as to settlements made by will, see *Settlement; Trust*.)

Probate of will.

§ 12. As soon as possible after the testator's death, it is the duty of the executor to prove his will, either in common or in solemn form. (See *Probate*.) If there is no executor, letters of administration with the will annexed are granted. (See *Letters of Administration*.) Before the probate is obtained, an executor may act as effectually in almost everything as if probate had been granted, and when granted it has relation back to the death of the testator. In the case of an administrator, on the other hand, acts done before the grant of administration are, as a general rule, not binding. Both rules are subject to exceptions.<sup>2</sup>

**WINDING-UP**, as applied to a partnership or company, is the operation of stopping the business, realizing the assets and discharging the liabilities of the concern, settling any questions of account or contribution between the members, and dividing the surplus assets (if any) among the members.<sup>3</sup> The term “winding-up” is also sometimes applied to the estates of deceased persons, but “administration” (*q. v.*) is the more usual expression.

Partnership.

(1) § 2. The winding-up of a partnership is either—(1) voluntary (*i. e.*, by agreement between the partners), or (2) by order of a Court made in an action for the dissolution of the partnership. (See *Dissolution*.) A partnership consisting of more than seven members may be wound up by an order obtained on a petition under the Companies Act, 1862, sect. 199, in which case the winding-up is almost the same as if the partnership were a company.<sup>4</sup>

Company.

(2) § 3. The winding-up of companies before 1862 was effected under the Winding-up Acts of 1848-49, and the Joint Stock Companies Acts, 1856-58, which provided a machinery partly in Chancery, and partly in Bankruptcy;<sup>5</sup> but now all companies, except railway companies incorporated by act of parliament, are wound up under the provisions of the

Compulsory.

Companies Act, 1862, in one of three manners:—(a) § 4. A compulsory winding-up takes place when the Court having jurisdiction in the matter (*e. g.*, the High Court, in the Chancery Division), makes an order to that effect on a petition<sup>6</sup> presented by the company itself, or by a creditor or a contributory. The commonest case of compulsory winding-up occurs where a company cannot pay its debts. Companies not registered

<sup>1</sup> Elphins. Conv. 427.

<sup>2</sup> Watson's Comp. Equity, 235.

<sup>3</sup> Lindley on Partnership, 1028.

<sup>4</sup> See *In re South Wales Atlantic Steam-*

*ship Co.*, 2 Ch. D. 763.

<sup>5</sup> Lindley on Part. 1211.

<sup>6</sup> *Ibid.* 1241; Thring on Companies, 172 *et seq.*

under the act can only be wound up compulsorily.<sup>1</sup> All the proceedings in a compulsory winding-up are taken under the direction of the Court.

(b) § 5. A voluntary winding-up takes place when the company passes a resolution to that effect. Such a resolution must, in certain cases, be either a special or extraordinary resolution. (See *Resolution*, § 2.) A voluntary winding-up is conducted without the intervention of any Court.<sup>2</sup>

(c) § 6. A winding-up may be voluntary, but subject to the supervision of the Court: that is, the winding-up is determined on by resolution of the company, but an order is subsequently made by the Court that it shall be carried out subject to such restrictions as the Court may impose, and with such liberty for persons interested to apply to the Court, and generally in such manner, as the Court thinks just.<sup>3</sup>

§ 7. By the doctrine of relation (see *Relate*) a compulsory winding-up is deemed to commence at the time of the presentation of the petition. Voluntary winding-up (whether under supervision or not) commences at the time of the passing of the resolution to wind up, or the passing of the second resolution, if the resolution is a special one.<sup>4</sup> All dispositions of the property of the company, and every transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding-up, are void, except in certain cases.<sup>5</sup>

§ 8. The principal effects of a winding-up are: 1st. Nothing can be done after its commencement, except with a view to realize the company's assets, enforce contributions from its members if necessary, and distribute them among its creditors,<sup>6</sup> and then, if there is any surplus, among the members. 2nd. Liquidators must be appointed to carry out these objects. 3rd. No legal proceeding giving one creditor an advantage over another, can be taken against the company or the members, except by leave of the Court, in the winding-up.<sup>7</sup> Where a company is being wound up compulsorily or subject to supervision in the High Court, the judge before whom it is pending may order any actions by or against the company pending in any other division to be transferred to him.<sup>8</sup> (See *Adjudication*, § 2; *Claim*, § 2; *Contributory*; *Dissolution*, § 3; *Liquidator*; and compare *Administration*; *Bankruptcy*.)

**WINDOW.** See *Light*.

**WITHDRAWAL.**—§ 1. Where the plaintiff in an action does not wish to proceed with a portion of his claim, he may withdraw that part of his statement of claim either (i) by giving notice to the defendant, if no step subsequent to the delivery of the statement of defence has been taken;

<sup>1</sup> Sect. 199; Thring, 205. The provisions of the act also apply to Building, Friendly, and Industrial and Provident Societies registered under the acts regulating those associations (see the various titles).

<sup>2</sup> Lindley, 1410.

<sup>3</sup> *Ibid.* 1420. See *In re Rochdale, &c.* Co., 12 Ch. D. 775.

<sup>4</sup> Companies Act, 1862, s. 130; *Dawes' Case*, L. R., 6 Eq. 232.

<sup>5</sup> See *Emmerson's Case*, L. R., 9 Eq. 231.

<sup>6</sup> See the Judicature Act, 1875, s. 10, and *Administration*, p. 27, note (3).

<sup>7</sup> Companies Act, 1862, s. 85.

<sup>8</sup> Rules of Court, li. 2 a.

Defence. or (ii) at any other time by leave of the Court or a judge. § 2. A defendant may also, by similar leave, withdraw the whole or any part of his defence or counterclaim. § 3. When a cause has been entered for trial, it may be withdrawn by consent.<sup>1</sup> (See *Discontinuance*.)

Cause for trial.

**WITHDRAWAL OF A JUROR.**—At the trial of an action, when neither party feels sufficient confidence to render him anxious to persevere till verdict, or when the judge recommends that the action should not proceed further, the parties may by consent, for it cannot be done otherwise, withdraw a juror; and as that leaves the jury incomplete, there can be no verdict, and the trial comes to an end. The withdrawal of a juror in this way always puts an end to the cause; and if the action be afterwards proceeded with, an application may be made to the Court or a judge to stay the proceedings. This practice was peculiar to the common law courts, but does not seem to have been abolished in civil cases by the Judicature Acts; and it still applies to criminal trials.<sup>2</sup> (See *Discharge*, § 6.)

**WITHERNAM.** See *Capias in Withernam*.

**WITHOUT DAY.**—Formerly, when a defendant in an action succeeded on a plea, the judgment in certain cases was that he should “go without day,” or “go quit without day,” that is, go free from the action without a continuance to any certain day, in other words, be discharged of further attendance. In some cases (*e. g.*, in case of nonsuit) this disposed of the action altogether, while in other cases it only suspended the action until the plaintiff remedied some defect in his title.<sup>3</sup>

**WITHOUT PREJUDICE.** See *Prejudice*.

**WITNESS.**—I. § 1. In the primary sense of the word, a witness is a person who has knowledge of an event. As the most direct mode of acquiring knowledge of an event is by seeing it, “witness” has acquired the sense of a person who is present at and observes a transaction.

Attesting witness. § 2. Hence, when a deed or other instrument is executed in the presence of a person, and he records the fact by signing his name on it, he is said to witness it, or to be an attesting witness. As to the proof of attested documents, see *Attest*. As to gifts to attesting witnesses in the case of wills, see *Will*, § 8.

Procedure. II. § 3. In procedure, a witness is a person who makes a *vivâ voce* statement to a judicial tribunal on a question of fact. (See *Evidence*, § 7; *Examination*; *Fact*.) Witnesses require to be sworn before their evidence is given (see *Oath*, § 2), unless they have conscientious objections to taking an oath, or have no religious belief, in which case they make a solemn affirmation. (See *Affirm*, § 3.)

§ 4. The general rule is that all persons are competent to give evidence,

<sup>1</sup> Rules of Court, xxiii.

<sup>2</sup> Smith's Action, 139; Archbold, Pr. 376; Arch. Crim. Pl. 175.

<sup>3</sup> Co. Litt. 134 b, 362 b. See per Bramwell, L. J., in *Poyser v. Minors*, 7 Q. B. D. at p. 336.



provided they have sufficient mental understanding, except that a person accused of a crime (and the husband or wife of such a person) is not competent to give evidence respecting it. (See *Competency*; *Credibility*; *Voire dire*.)

§ 5. All persons (if competent) are compellable to give evidence, except the sovereign. But every witness has a right to refuse to answer certain questions, such as a question the answer to which would have a tendency to expose the witness to criminal proceedings, or to a forfeiture or penalty. Liability to civil proceedings is not a ground of privilege.<sup>1</sup> See further on this subject, *Confidential Communications*; *Privilege*.

§ 6. As a general rule, every witness ought, in the first instance at least, to be presumed to be favourably disposed towards the party by whom he is called, and his examination should be conducted on that theory. Sometimes, however, it happens that a party is obliged to call

a witness who is unfavourable towards him, or that after a witness has been called and partly examined he develops a state of mind unfavourable to the party calling him: such a witness is called an adverse or hostile witness, and his examination generally becomes more or less a cross-examination; as to this see *Discredit*.<sup>2</sup>

§ 7. A zealous witness is one who endeavours to shape his testimony so as to make it as favourable as possible for one of the parties. One of the most dangerous kinds of witness for the party calling him is a witness who "proves too much."<sup>3</sup>

**WITNESSING PART**, in a deed or other formal instrument, is that part which comes after the recitals, or where there are no recitals, after the parties. It usually commences with a reference to the agreement or intention to be effectuated, then states or refers to the consideration, and concludes with the operative words and parcels, if any (*q. v.*). Where a deed effectuates two distinct objects there are two witnessing parts.<sup>4</sup>

The witnessing part is so called because in indentures it commences with the words "This Indenture Witnesseth," meaning that the instrument is intended as a record of the transaction.

**WOODS AND FORESTS.** See *Commissioners of Woods, &c.*

**WORDS OF LIMITATION—WORDS OF PROCREATION—WORDS OF PURCHASE.**—§ 1. In a conveyance or will, words which have the effect of marking the duration of an estate are termed words of limitation. (See *Limitation*, § 1.) Thus, in a grant to A. and his heirs, the words "and his heirs" are words of limitation, because they show that A. is to take an estate in fee simple, and do not give his heirs anything.<sup>5</sup> In a deed executed after the 31st December, 1881, it is sufficient, in the limitation of an estate in fee simple, to use the words "in fee simple," without the word "heirs."<sup>6</sup> § 2. To create an

Words of limitation.

<sup>1</sup> Best on Evidence, 188 *et seq.*

<sup>2</sup> *Ibid.* 815 *et seq.*

<sup>3</sup> *Ibid.* 826.

<sup>4</sup> Davids. Conv. i. 63 *et seq.*

<sup>5</sup> Fearne, Cont. Rem. 78.

<sup>6</sup> Conveyancing Act, 1881, s. 51.

Words of procreation.

estate tail by deed, it is necessary that words of procreation should be used in order to confine the estate to the descendants of the first grantee, as in the usual form of limitation—"to A. and the heirs of his body." Hence, a limitation to A. and his heirs male would not create an estate tail, for want of words of procreation. In a deed executed after the 31st December, 1881, it is sufficient to use the words "in tail" without the words "heirs of the body."<sup>1</sup>

Words of purchase.

§ 3. Words of purchase are words which denote the person who is to take the estate. Thus, if I grant land to A. for twenty-one years, and after the determination of that term to A.'s heirs, the word "heirs" does not denote the duration of A.'s estate, but the person who is to take the remainder on the expiration of the term, and is therefore called a word of purchase.<sup>2</sup> Hence, "words of purchase" and "words of limitation" are opposed to one another. (See *Shelley's Case*; *Purchase*.) But there are cases in which words operate partly as words of purchase, and partly as words of limitation; thus, if an estate is limited to the heirs of the body of A., A. being dead, these words are words of purchase to the extent that they give the estate to the person who fills the character of heir of the body of A. (*e. g.*, his eldest son B.) by purchase and not by descent; but as they also have the effect of giving B. an estate tail, they are to this extent words of limitation.<sup>3</sup>

**WORKHOUSE** is a building for the accommodation of paupers in a parish or union. (See *Poor Law*; *Vestry*.)

**WORKING-MEN'S CLUBS** are societies established and registered under the Friendly Societies Act, 1875,<sup>4</sup> for purposes of social intercourse, mutual helpfulness, mental and moral improvement and rational recreation. According to the Fourth Report of the Commissioners on Friendly Societies, the members of these clubs "meet and read newspapers, and have lectures and tea and coffee, and sometimes beer."<sup>5</sup> (See *Friendly Societies*.)

**WORKMEN.** See *Common Employment*; *Master and Servant*; *Trade Unions*; *Truck Act*.

**WORKSHOPS.** See *Factories*.

**WOUNDING AND MAIMING**, as civil offences, are merely aggravated forms of battery<sup>6</sup> (*q. v.*, and see *Mayhem*).

§ 2. As to felonious wounding and maiming, see *Malicious Injuries to the Person*; *Mayhem*.

Common law.

**WRECK.**—§ 1. By the common law, if a ship was lost at sea, and the cargo or a portion of it came to land, the goods saved belonged to

<sup>1</sup> Conveyancing Act, 1881, s. 51.

<sup>2</sup> Wms. Real P.; Fearn, Con. Rem. 76 *et seq.*

<sup>3</sup> Fearn, 80; Co. Litt. 26 b.

<sup>4</sup> Sect. 8, § 4.

<sup>5</sup> P. cxlvii.

<sup>6</sup> Underhill on Torts, 120.

the crown under the name of wreck. (See *Prerogative*, § 2.) This privilege was frequently granted to lords of manors. (See *Franchise*, § 2; *Manor*.)

The strictness of the prerogative right to wreck was relaxed by early charters and statutes, under which the owners of shipwrecked goods were allowed to reclaim them within a year and a day, if they could identify them.<sup>1</sup>

§ 2. At the present day, "wreck" includes not only wreck at common law, but also jetsam, flotsam, ligam and derelict (*q. v.*); and statutory provision has been made for the appointment of officers called Receivers of Wreck (*q. v.*), whose duty it is to preserve wreck until it is claimed by the owner, or, if he does not claim it within a year, then to sell it and pay the proceeds into the exchequer.<sup>2</sup> § 3. Provision has also been made for rewarding those persons by whose labour and enterprise shipwrecked property has been saved, and for holding investigations as to wrecks and casualties. (See *Wreck Commissioners*.) All these matters are under the general superintendence of the Board of Trade.<sup>3</sup>

§ 4. The statutes 24 & 25 Vict. cc. 96, 100, provide for the punishment of offences in respect of wrecks.

**WRECK COMMISSIONERS** are persons appointed by the Lord Chancellor under the Merchant Shipping Act, 1876 (sect. 29), to hold investigations at the request of the Board of Trade into losses, abandonments, damages and casualties of or to ships on or near the coast of the United Kingdom, whereby loss of life is caused.

**WRIT.**—§ 1. A writ is a document in the Queen's name and under the seal of the crown, a court or an officer of the crown, commanding the person to whom it is addressed to do or forbear from doing some act. As to the issue and service of writs, see *Issue*, § 11; *Service*, §§ 8 *et seq.*

Writs are of two principal kinds—prerogative and of right.

I. § 2. Prerogative writs are so called because they are issued by virtue of the crown's prerogative, and not as part of the public administration of justice; writs belonging to the latter class are called writs of right, because the crown is bound by Magna Charta to issue them, while prerogative writs are granted at the discretion of the Court, and only on a *prima facie* case being shown. The writs of mandamus, procedendo, prohibition, quo warranto, habeas corpus and certiorari, are prerogative writs.<sup>4</sup> (See the titles.) There are also statutory writs of mandamus (*q. v.*), which are grantable as a matter of right.

<sup>1</sup> Bl. Comm. i. 290; stats. 3 Edw. 1, c. 4; 27 Edw. 3, c. 13; see *Shepherd v. Kottgen*, 2 C. P. D. 578.

<sup>2</sup> Steph. Comm. ii. 544; Merchant Shipping Acts, 1854 and 1862.

<sup>3</sup> Maude & Pollock, Merch. Shipp. 504 *et seq.*; Merch. Shipp. Act, 1854, ss. 477 *et seq.*

<sup>4</sup> Bl. Comm. iii. 132; Steph. Comm. iii. 629; *Reg. v. Churchwardens of All Saints, Wigan*, 1 App. Ca. 611.

*Writs of right.*  
Original writs.

II. Writs of right are of two kinds—original and judicial.<sup>1</sup>

§ 3. An original writ was anciently the mode of commencing every action at common law. It issued out of the common law side of the Chancery, and was under the great seal. To avoid the expense of original writs, other modes of beginning actions were devised with the connivance of the Courts; but they were all abolished, and the modern writ of summons introduced by the stat. 2 & 3 Will. 4, c. 39.<sup>2</sup> Original writs, however, continued some time longer to be used as modes of appealing from one Court to another (as in the case of writs of error, writs of false judgments, &c.);<sup>3</sup> but the only one now existing appears to be the writ of error used in criminal proceedings. (See *Writ of Error*.)

Judicial writs.

§ 4. A judicial writ seems to be any writ which is issued by a Court under its own seal, as opposed to an original writ.<sup>4</sup> Judicial writs may be divided into—(1) writs originating actions and other proceedings, of which the ordinary writ of summons (*q. v.*) is the commonest instance; (2) interlocutory writs, issued during the course of an action before final judgment, such as writs of inquiry, mandamus and recaption, and writs for enforcing obedience to interlocutory orders by attachment, sequestration, &c.; (3) writs of execution. § 5. Writs of execution are of two kinds: some are issued in the first instance (*e. g.*, writs of fieri facias, elegit, sequestration, delivery, possession, levavi facias, &c.): while others are only issued in aid of other writs, that is, when a writ of execution has been issued without producing the desired effect: such are writs of venditioni exponas, distringas nuper vicecomitem, fi. fa. de bonis ecclesiasticis, sequestrari fa. de bonis eccl., and the writ of assistance. (See the various titles.)

Writs of execution.

Writs in aid.

“Writ” =  
“action.”

§ 6. In the old books, “writ” is used as equivalent to “action:” hence writs are sometimes divided into real, personal and mixed. (See *Action*, § 22.)

Alias and pluries.

As to *alias* and *pluries* writs, see those titles. See also *Return*; *Teste*; *Detainer*; *Execution*, § 3; *Mandatory*; *Testatum*.

**WRIT OF ASSISTANCE.**—Where a writ of sequestration (*q. v.*) has been issued, and the commissioners are unable to obtain possession of the property to be sequestered, the Court may order a writ of assistance to issue, commanding the sheriff to put them in possession.<sup>5</sup>

**WRIT OF ATTACHMENT** is a writ employed to enforce obedience to an order or judgment of the High Court. It commands the sheriff to attach the disobedient party and to have him before the Court to answer his contempt.<sup>6</sup> It is used not only as a writ of execution (*e. g.*, to enforce

<sup>1</sup> Co. Litt. 73 b.

<sup>2</sup> Steph. Comm. iii. 489.

<sup>3</sup> Archbold, Pr. 478.

<sup>4</sup> Coke says that “writs of execution are called judicial because they are grounded upon the judgement” (Co. Litt. 289 a). No doubt writs of execution are judicial, but not for the reason stated, which appears to be one of the many cases where Coke’s

etymological guesses have misled him.

<sup>5</sup> Daniell, Ch. Pr. 917, 923. The other kind of writ of assistance (Daniell, 923) seems to have been superseded by the writs of possession and delivery under Orders xlviii, xlix.

<sup>6</sup> Smith’s *Action*, 176; *Rules of Court*, xlii, xliv.; *Forms*, App. F. 9.

a judgment for the recovery of chattels, or a judgment requiring any person to do or abstain from doing any specific act), but also to enforce obedience to interlocutory orders, injunctions, &c., and the performance of undertakings (*q. v.*).

**WRIT OF DELIVERY** is a writ of execution employed to enforce a judgment for the delivery of chattels. It commands the sheriff to cause the chattels mentioned in the writ to be returned to the person who has obtained the judgment; and if the chattels cannot be found, to distrain the person against whom the judgment was given until he returns them.<sup>1</sup>

**WRIT OF DOWER.**—Under the old practice, when a widow had no dower assigned to her within the proper time, she had a remedy by “writ of dower unde nihil habet.” If she had only part of her dower assigned to her, she had a remedy by “writ of right of dower,” which was a general remedy also applicable to the case of no dower being assigned.<sup>2</sup> These forms of real action were abolished by the Common Law Proc. Act, 1860, and the ordinary form of action substituted. (See *Action*, § 22.)

**WRIT OF ENTRY** was a real action to recover the possession of land where the tenant (or owner) had been disseised or otherwise wrongfully dispossessed. If the disseisor had aliened the land, or if it had descended to his heir, the writ of entry was said to be in the *per*, because it alleged that the defendant (the alienee or heir) obtained possession *through* the original disseisor. If two alienations (or descents) had taken place, the writ was in the *per* and *cui*, because it alleged that the defendant (the second alienee) obtained possession *through* the first alienee, *to whom* the original disseisor had aliened it. If more than two alienations (or descents) had taken place, the writ was in the *post*, because it simply alleged that the defendant acquired possession *after* the original disseisin.<sup>3</sup> The writ of entry was abolished, with other real actions, by stat. 3 & 4 Will. 4, c. 27, s. 36.

**WRIT OF ERROR**, in criminal cases, is an original writ issuing from the Petty Bag Office in Chancery, and directed to an inferior Court practice. (*e. g.*, the Central Criminal Court or quarter sessions), requiring them to send the record and proceedings on an indictment in which judgment has been pronounced to a superior Court for review. It lies for every substantial defect appearing on the record for which the indictment might have been quashed, or which would have been fatal on demurrer, or in arrest of judgment, provided such defect is not cured by verdict; thus it lies on an indictment for perjury in which it does not appear that the alleged false oath was taken in a judicial proceeding (see *Aid*, § 3; *Arrest of Judgment*; *Demurrer*; *Quash*). It also lies to reverse an outlawry.<sup>4</sup>

§ 2. Writ of error appears to be the mode by which appeals from Appeal. certain inferior Courts of record (proceeding according to the course of the common law) are brought to the High Court of Justice.<sup>5</sup> (See *Error*; *Writ of False Judgment*.)

<sup>1</sup> Smith's *Action*, 175; Rules of Court, xlii. 4, xlix.; Forms, App. F., 8; C. L. P. Act, 1854, s. 78.

<sup>2</sup> Bl. Comm. iii. 182.

<sup>3</sup> Co. Litt. 238 b; Bl. Comm. iii. 180.

<sup>4</sup> Archbold, Crim. Pl. 196 *et seq.*, where the formalities are detailed; Pritchard's Q. S. 349; *Bradlaugh v. Reg.*, 3 Q. B. D. 607.

<sup>5</sup> Archbold, Pr. 1418; Judicature Act, 1875, s. 15.

**WRIT OF FALSE JUDGMENT** is a writ which appears to be still in use to bring appeals to the High Court from inferior Courts not of record proceeding according to the course of the common law.<sup>1</sup> (See *Error*.)

**WRIT OF INQUIRY** is one of the modes of assessing damages when interlocutory judgment (*e. g.*, by default or on demurrer) has been obtained by the plaintiff in an action for unliquidated damages. It is usually executed by the sheriff or under-sheriff and a jury of twelve, much in the same manner as an ordinary trial. When the damages have been assessed, the writ, return and inquisition are filed and final judgment signed.<sup>2</sup> (See *Judgment*, § 5 ; *Reference*, § 6.)

**WRIT OF POSSESSION** is the writ of execution employed to enforce a judgment to recover the possession of land. It commands the sheriff to enter the land and give possession of it to the person entitled under the judgment.<sup>3</sup> (See *Habere facias Possessionem* ; *Writ of Delivery* ; *Execution*.)

**WRIT OF PROTECTION.**—The Queen may, by her writ of protection, privilege any person in her service from arrest in civil proceedings during a year and a day ; but this prerogative is seldom, if ever, exercised.<sup>4</sup>

**WRIT OF RECAPTION.**—If pending an action of replevin for a distress, the defendant distrains again for the same rent or service, the owner of the goods is not driven to another action of replevin, but is allowed a writ of recaption, by which he recovers the goods and damages for the defendant's contempt of the process of the law in making a second distress while the matter is sub judice.<sup>5</sup> (See *Replevin*.)

**WRIT OF RESTITUTION.** See *Restitution*.

**WRIT OF RIGHT.**—I. §. 1. In the general sense of the term, a writ of right is one which is grantable as a matter of right, as opposed to a prerogative writ, which is issued only as a matter of grace or discretion. (See *Writ*, § 2.)

Real property.

II. § 2. In the old real property law, a writ of right was a real action which lay to recover lands in fee simple, unjustly withheld from the owner. It might be brought in any case of disseisin, but was in practice only used where the disseisee had lost his right of entry or right to the possession, as in other cases a possessory action (such as a writ of entry) was more convenient. It was called a writ of right, because it was brought to assert the right of property remaining in the owner, which, as already mentioned, was usually a mere right (see *Right*, § 10). § 3. There were also writs in the nature of writs of right, such as the writ of right of dower.<sup>6</sup> (See *Writ of Dower*.)

**WRIT OF SEQUESTRATION.** See *Sequestration*, § 2 ; *Writ of Assistance*.

<sup>1</sup> Archbold, Pr. 1427.

<sup>2</sup> *Ibid.* 807.

<sup>3</sup> Smith's Action, 175 ; Rules of Court, xlii. 3, xlviii. ; Forms, App. F., 7.

<sup>4</sup> Archbold, Pr. 687 ; see Co. Litt. 130 a.

<sup>5</sup> Woodfall, L. & T. 484.

<sup>6</sup> Bl. Comm. iii. 193.

**WRIT OF SUMMONS.**—I. In ordinary actions in the High Court, the writ of summons is a writ issued at the instance of the plaintiff for the purpose of giving the defendant notice of the claim made against him and of compelling him to appear and answer it if he does not admit it. It is the first step in the action. (See *Action*, § 2.)

§ 2. The writ consists of the body, the memoranda and the endorsements.<sup>1</sup> The body contains the "title" (that is, the reference to the record, the name of the Court, division and judge if required, and the names of the parties, see *Title*, § 10), the mandatory part (by which the defendant is ordered to enter an appearance), and the teste (*q. v.*). The memoranda specify the time within which the writ must be served and the place where the defendant may enter an appearance. The endorsements are of four kinds. First, the endorsement of claim, being a brief statement of the nature of the plaintiff's claim.<sup>2</sup> When the plaintiff's claim is for a debt or liquidated demand, the endorsement of claim must state the amount thereof and the amount claimed for costs, and state that upon payment of both within a certain time further proceedings will be stayed.<sup>3</sup> Secondly, the special endorsement, which may be employed where the plaintiff's claim consists of a debt or liquidated demand. It gives the particulars of the amount,<sup>4</sup> and shows how it is arrived at. Thus, in an action for money lent the special endorsement would give the amount of the loan, the arrears of interest and any repayments made on account, and would claim payment of the balance. The principal object of the special endorsement is to enable the plaintiff to obtain "judgment under Order XIV." (see *Judgment*, § 9). Thirdly, the endorsement of address, giving the name and address of the plaintiff and his solicitor, with an address for service if necessary (see *Address for Service*). Fourthly, the endorsement of service made by the person who serves the writ.

§ 3. In addition to these endorsements there are others used in special cases: such are the endorsement that the plaintiff sues or that the defendant is sued in a representative capacity<sup>5</sup> (*e. g.*, as executor); that the plaintiff claims to have an account taken in the first instance (that is, immediately after appearance),<sup>6</sup> &c., and in probate actions, the endorsement of the character in which the plaintiff claims (*e. g.*, as next of kin, creditor, executor, &c.).<sup>7</sup>

§ 4. In Admiralty actions in rem the writ of summons is in a special form; it is addressed to the owners of the ship or other property, authorizes the marshal to arrest the ship, and commands the owners to enter an appearance. (See *Action*, § 12.)

§ 5. A writ of summons is issued at the Central Office of the Supreme Court. (See *Issue*, § 11; *Central Office*.) As to its service, see *Service*, §§ 8 *et seq.*

§ 6. A writ remains in force for twelve months from its issue, but if

Body of writ.

Memoranda.

Endorsements.

Special endorsement.

Miscellaneous endorsements.

In Admiralty actions in rem.

Renewal of writ.

<sup>1</sup> Smith's *Action*, 44.

<sup>2</sup> Rules of Court, ii. 1, iii. 2.

<sup>3</sup> *Ibid.* iii. 7.

<sup>4</sup> *Ibid.* iii. 6.

<sup>5</sup> Rules of Court, iii. 4.

<sup>6</sup> *Ibid.* iii. 8; Smith's *Action*, 50.

<sup>7</sup> *Ibid.* iii. 5.

service has not been effected within that time it may (if a judge so orders) be renewed for six months, by being sealed by the proper officer.<sup>1</sup>

Concurrent writs.

§ 7. If there are several defendants to be served, or the whereabouts of a defendant is doubtful, or some similar reason exists, one or more concurrent writs (that is, writs to the same effect as the original writ and remaining in force for the same time) may be issued, so as to facilitate service.<sup>2</sup>

Probate practice.

II. § 8. The Court of Probate had power to cause questions of fact arising in suits or proceedings to be tried by a jury by means of an issue directed to one of the superior Courts of Law: the issues were contained in a document called a writ of summons.<sup>3</sup> This practice seems no longer applicable.<sup>4</sup>

"Written,"  
"verbal."

**WRITING—WRITTEN.**—I. § 1. In the most general sense of the word, "writing" denotes a document, whether manuscript or printed, as opposed to mere spoken words. Writing is essential to the validity of certain contracts and other transactions (as to which see *Bill of Exchange*; *Contract*, § 4; *Copyright*, § 8; *Patent Right*; *Statute of Frauds*; *Tenterden's Act*; *Will*), while some legal transactions require the additional formality of a deed (*q. v.*). As to written and spoken defamation, see *Libel*; *Slander*; *Sedition*. As to written evidence, see *Evidence*, § 7.

"Written,"  
"printed."

II. § 2. Writing is sometimes opposed to printing: thus, in the practice of the High Court, pleadings not exceeding ten folios in length may be written or printed, while those exceeding that length must be printed.<sup>5</sup>

"Written,"  
"parol."

III. § 3. In the old books, "writing" sometimes signifies a "writing sealed," that is, a deed, as opposed to "parol" (*q. v.*).<sup>6</sup>

**WRONG** is that which takes place when a right is violated or infringed.

Wrongs are generally divided into private and public. A private wrong is one which confers a remedy or right of redress on an individual: such are breaches of contract, torts, &c. A public wrong is one which renders the wrongdoer responsible to the community: such are crimes<sup>7</sup> and other offences (*q. v.*), and generally all infringements of the rules of public law. (See *Law*, § 6.)

As to estates or titles by wrong, see *Title*, § 2.

<sup>1</sup> Rules of Court, viii.

<sup>2</sup> *Ibid.* vii.

<sup>3</sup> Browne's Probate Pr. 314; Court of Probate Act, 1857, s. 35.

<sup>4</sup> Rules of Court, xxxvi. 29.

<sup>5</sup> *Ibid.* xix. 5.

<sup>6</sup> Shepp. Touch. 52; Co. Litt. 36 a.

<sup>7</sup> Bl. Comm. i. 122.



## Y.

**YACHTS** are vessels navigated solely for purposes of pleasure. The provisions of the Merchant Shipping Acts with regard to discipline, supply of medicine, and some other matters, apply to sea-going yachts.<sup>1</sup> Yachts not exceeding fifteen tons do not require to be registered,<sup>2</sup> except for the purpose of taking advantage of the privileges granted by the Admiralty to certain yacht clubs. Yachts belonging to the principal yacht clubs are exempted from the obligation of having their names and other particulars painted on them.<sup>3</sup>

**YARD.** See *Curtilage*.

**YARDLAND**, or *virgata terræ*, is a quantity of land, said by some to be twenty acres, but by Coke to be of uncertain extent. (See *Ploughland*.)

**YEAR.**—A year consists of twelve calendar months; that is, 365 days in ordinary years, and 366 days in leap-year. By the stat. 21 Hen. 3 (40 Hen. 3 in the Statutes of the Realm) the increasing day in the leap-year, as well as the preceding day, are accounted for one day only. The 1st January is the first day of the year by stat. 24 Geo. 2, c. 23; before that enactment the 25th March was the first day of the year.<sup>4</sup>

See *Time*. As to leases for years, see *Lease*; *Tenant for Years*; *Term*, § 1.

**YEAR AND DAY.**—§ 1. The owners of estrays (*q. v.*) must claim them within a year and a day, otherwise they belong to the crown or a grantee from the crown. As to wreck see that title; see also *Continual Claim*.

§ 2. In order to make killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which the whole day upon which the hurt was done shall be reckoned the first.<sup>5</sup>

**YEAR-BOOKS** are the reports of cases in the superior Courts of common law from the reign of Edward II. to that of Henry VIII. They were taken by the prothonotaries or chief scribes of the Court at the expense of the crown, and published annually, whence their name.<sup>6</sup> (See *Report*, § 5.)

<sup>1</sup> Merchant Shipp. Act, 1854, s. 109; Act of 1862, s. 13; Maude & Pollock (4th edit.), 186 *et seq.*

<sup>2</sup> Merch. Shipp. Act, 1854, s. 19.

<sup>3</sup> Regulations of Board of Trade under

M. Shipp. Act, 1872; Maude & Pollock, ii. 320, note (o).

<sup>4</sup> Co. Litt. 135 a; Bl. Comm. ii. 140.

<sup>5</sup> Bl. Comm. iv. 197.

<sup>6</sup> *Ibid.* i. 71.

**YEAR, DAY AND WASTE**, in the law of forfeiture (*q. v.*, § 7), is the right which the crown had to hold the lands of felons for a year and a day, and to pull down the houses, cut down the woods and commit other waste thereon.<sup>1</sup> This right was restricted by stat. 54 Geo. 3, c. 145, and ceased to exist (except on attainder for treason), when forfeiture was abolished.

**YEAR TO YEAR.** See *Tenant from Year to Year*.

**YEOMAN.**—"A yeoman is he that hath free land of forty shillings by the year: who was anciently thereby qualified to serve on juries, vote for knights of the shire, and do any other act where the law requires one that is *probus et legalis homo*." Yeomen rank next after gentlemen in order of precedence.<sup>2</sup>

**YIELD**, in the law of real property, is to perform a service due by a tenant to his lord.<sup>3</sup> Hence the usual form of reservation of a rent in a lease begins with the words "yielding and paying." (See *Render*.)

**YORKSHIRE LAND REGISTRIES** are regulated by stats. 2 & 3 Anne, c. 4; 5 Anne, c. 18 (6 Anne, c. 20, in the Statutes of the Realm), as to the West Riding; 6 Anne, c. 35 (or 62), as to the East Riding, and 8 Geo. 2, c. 6. (See *Land Registries*, § 6; *Memorial*, § 1.)

## Z.

**ZEALOUS WITNESS.** See *Witness*, § 7.

<sup>1</sup> Bl. Comm. iv. 385.

<sup>2</sup> *Ibid.* i. 406.

<sup>3</sup> See *Mortmain*, note on the etymology of the word.

# ADDENDA.



**ABANDONMENT.** See *Easement*, § 12.

**ACCOUNT** (to § 5 *after* note (7)).—There are, however, instances in which an agent is entitled to an account from his principal; such is the case of the steward or bailiff of an estate, because “the nature of his dealing is, that money is paid in confidence, without vouchers, embracing a great variety of accounts with the tenants; and nine times in ten it is impossible that justice can be done to the steward.”<sup>1</sup> (See also *Joint Account* in these addenda.)

§ 12A. By the Customs and Inland Revenue Act, 1880, when an executor or administrator applies for a grant of probate or letters of administration, he must deliver an account of the particulars of the personal estate of the deceased, and of the estimated value of such particulars. § 12B. By the Customs and Inland Revenue Act, 1881, this account must be verified by affidavit. A further account (similarly verified) must be delivered if any understatement is discovered in the original account.

§ 12C. By the same act, accounts of the following kinds of property must be delivered by the person who acquires possession thereof, whether as trustee or beneficiary:—(a) Property taken as a *donatio mortis causâ*, or under a voluntary gift *inter vivos*, not made *bonâ fide* three months before the death of the donor; (b) Property which the deceased has voluntarily vested in himself and another person jointly, so that on his death the latter takes it by survivorship; (c) Property passing under a voluntary settlement, whereby the settlor reserves to himself a life interest or a right of revoking the settlement. (See *Probate*, § 5B, in these addenda.)

**ACKNOWLEDGMENT.** See *Title Deeds*, § 2.

**AD QUOD DAMNUM.**—§ 3. The writ of *ad quod damnum* was also anciently employed on applications by persons for liberty to make a park or amortise their lands, that is, convey them in mortmain. The writ directed the king’s escheator to inquire whether it would be to the damage of the king or of others, should he grant a licence to make the park or alien the lands in mortmain.<sup>2</sup> The stat. 34 Edw. 1 made the assent of the mesne lords (if any) necessary to the grant of a licence in mortmain.<sup>3</sup> (See *Mortmain* for the further history of this subject.)

<sup>1</sup> Per Lord Eldon, *Dinwiddie v. Bailey*,  
6 Ves. p. 141.

<sup>2</sup> Stat. 27 Edw. 1 (*Ordinatio de liber-*

*tatibus perquirendis*); Reeves, Hist. ii.  
230.

<sup>3</sup> Reeves, ii. 231.

**ADMINISTRATION** (to § 2).—A judgment has no priority against an executor, administrator or heir unless it is registered under stat. 23 & 24 Vict. c. 38, and therefore an executor who pays contract debts in priority to an unregistered judgment incurs no liability to the judgment creditor.<sup>1</sup> The effect of the act seems to be to put unregistered judgment debts on a level with contract debts,<sup>2</sup> although it is obvious that the act was only intended for the protection of executors paying contract debts without notice of judgment debts;<sup>3</sup> and that where an executor has notice of a judgment there is on principle no reason why it should not be paid in priority to the other debts, although it is unregistered.

Judgments obtained against the personal representatives of a deceased debtor do not require registration,<sup>4</sup> and are paid according to their priority in point of time, while judgments obtained against the deceased rank *pari passu*.<sup>5</sup>

Add to note (3), p. 27, a reference to *Smith v. Morgan*, 5 C. P. D. 337, deciding that section 10 of the Judicature Act, 1875, does not affect the priority of judgment creditors.

Since that note passed through the press, it has been decided by the Court of Appeal in *re Withernsea Brickworks Company* (16 Ch. D. 337) that the 10th section of the Judicature Acts does not assimilate the rules of administration in Chancery proceedings to those in bankruptcy, overruling *In re Printing, &c. Company* (8 Ch. D. 535), and thus confirming the construction of the section contended for in the above note. The inconsistent decision of V.-C. Malins in *re Association of Land Financiers* (16 Ch. D. 373) appears to have been given without the attention of the Court being drawn to *In re Withernsea Brickworks Company*.

See also *In re Bridges*, 17 Ch. D. 342.

**ADVANCE-NOTE.**—Formerly it was the practice for the owner or master of a ship to give each seaman whom he had hired for an intended voyage an advance-note, by which he agreed that, in the event of the seaman sailing in the ship, he would repay a certain sum to any person who should advance it to the seaman; the sum was of course afterwards deducted from the wages earned by the seaman on the voyage. It was supposed that this practice was a commendable one, as it enabled the seaman to procure clothing and other necessities for the voyage;<sup>6</sup> but the practical result in the majority of cases was that sailors either converted their notes into cash at an exorbitant discount and spent it in riotous living, or were compelled to purchase inferior articles at high prices. The legislature has now adopted this view, and has made the practice illegal.<sup>7</sup> (See *Allotment*, § 4; and ADDENDA, title *Allotment*.)

<sup>1</sup> *Kemp v. Waddingham*, L. R., 1 Q. B. 355; *Shelford*, R. P. Stats. 620.

<sup>2</sup> *Watson*, Comp. Eq. 36.

<sup>3</sup> See *Jennings v. Rigby*, 33 Beav. 198.

<sup>4</sup> *Re Williams*, L. R., 15 Eq. 270;

*Smith v. Morgan*, 5 C. P. D. 337.

<sup>6</sup> *Jennings v. Rigby*, *supra*.

<sup>7</sup> *M'Kune v. Joynson*, 5 C. B., N. S. 218.

<sup>7</sup> Merchant Seamen Act, 1880.

**AFFIDAVIT.**—§ 4A. As to affidavits of increase in the Chancery Division, see *Smith v. Day*, 16 Ch. D. 726.

**ALL THE ESTATE.**—An attempt to abolish the “all the estate clause” has been made by the Conveyancing Act, 1881, which enacts (section 63) that every conveyance and other assurance shall be effectual to pass all the estate, &c., which the conveying parties respectively have in the property conveyed, subject to the terms and provisions contained in the deed.

**ALLOTMENT** (*add* to § 4).—Allotment notes may now be made in favour of savings-banks.<sup>1</sup>

**ALTERATION.**—§ 2A. See *Suffell v. Bank of England*, 7 Q. B. D. 270.

**ANNUL.**—§ 1A. See *Markwick v. Hardingham*, 15 Ch. D. 339.

**ANTICIPATION.**—§ 1A. After the 31st December, 1881, the High Court will have power to bind the interest of a married woman in any property, with her consent, notwithstanding that she is restrained from anticipation.<sup>2</sup>

**APPEAL.**—§ 4A. See Judicature Act, 1881, s. 9, limiting time for appeal to the House of Lords from the Court of Appeal.

**APPORTIONMENT.**—§ 2A. The Conveyancing Act, 1881 (sects. 10—12), enacts that rent reserved by a lease, and the benefit and burden of every covenant contained in a lease, having reference to the subject-matter thereof, and every condition of re-entry, and every other condition contained in the lease, shall be annexed and incident to the immediate reversion in the land, notwithstanding any severance of that reversion.

**ASSESSORS.**—§ 4A. See *The Aid*, 6 P. D. 84. § 5. As to assessors of taxes, see the Taxes Management Act, 1880, s. 42.

**ATTACHMENT.**—*Add* to § 5 a reference to *In re Cowan's Estate*, 14 Ch. D. 638, and *Chatterton v. Watney*, 17 Ch. D. 259.

**ATTEST.**—§ 1A. The Conveyancing Act, 1881 (sect. 8), entitles a purchaser of land to have the execution of the conveyance attested by a person appointed by him.

**ATTORNMENT.**—§ 4A. It seems that the ordinary attornment clause in a mortgage has the effect of making the mortgagee a mortgagee in possession from the date of the deed.<sup>3</sup>

<sup>1</sup> Merchant Seamen Act, 1880, s. 3.

<sup>2</sup> Conveyancing Act, 1881, s. 39.

<sup>3</sup> *Stockton Iron Furnace Co.*, 10 Ch. D. 335.

**AVERAGE.**—§ 3A. See *Wright v. Marwood*, 7 Q. B. D. 62.

**BACKING A WARRANT.**—See the Summary Jurisdiction (Process) Act, 1881.

The Fugitive Offenders Act, 1881, contains provisions as to the backing in one British colony of a warrant issued in another colony.

**BARTER.** See *Exchange*, § 5.

**BILL OF LADING.** See *Glyn Mills, Currie & Co. v. E. & W. I. D. Co.*, 6 Q. B. D. 475.

**BILL OF SALE.** See *Lyons v. Tucker*, 6 Q. B. D. 660.

**CAUSA CAUSANS—CAUSA SINE QUÂ NON.**—When a result is produced by two causes, one of which is the proximate cause, and the other is a concurrent cause, without which the result would not have been produced, the former is called the *causa causans*, the latter, the *causa sine quâ non*. Thus, where a steamer became a wreck by reason of the explosion of her boiler, which was too thin to resist the pressure of steam, it was held, in an action against the insurers of the vessel, that the explosion was the proximate cause, and the thinness of the boiler the *causa sine quâ non*, and that the explosion, being a peril insured against, the insurers were liable, although the vessel was unseaworthy in respect of her boiler.<sup>1</sup>

**CENTRAL CRIMINAL COURT.** See C. C. C. Act, 1881.

**CHARITY.**—§ 3A. See *Royal Society of London and Thompson*, 17 Ch. D. 407.

**CLERGYABLE.**—A crime was said to be clergyable when the “benefit of clergy” (*q. v.*) could be claimed in respect of it.

**COLLATERAL.**—Where A. mortgaged to B. freehold land, and also on the same day, and as part of the same transaction, mortgaged to B. leaseholds as “collateral security” for the same advance, it was held that the leasehold security was not “collateral” in the sense of secondary, and that accordingly the debt was payable rateably out of the two securities, and not primarily out of the freeholds.<sup>2</sup>

**COLLISION.**—As to the duty of the masters of two ships under danger of collision, see *Stoomvaart Maatschappij Nederland v. P. & O. Steam Navigation Co.*, 5 App. Ca. 876.

See *Rule of the Road*.

<sup>1</sup> *West India, &c. Co. v. Home & Campbell on Negligence*, 66.  
*Colonial, &c. Co.*, 6 Q. B. D. 51. See

<sup>2</sup> *Athill v. Athill*, 16 Ch. D. 211.

**COMMON.**—§ 1A. See *Earl de la Warr v. Miles*, 17 Ch. D. 535.

**COMMON PLEAS.**—The Common Pleas Division has now been consolidated with the Queen's Bench and Exchequer Divisions. (See *High Court of Justice*, and *Queen's Bench Division*.)

**CONDITION.**—§ 10A. See *Mackay v. Dick*, 6 App. Ca. 251.

**CONSOLIDATION OF SECURITIES.**—The Conveyancing Act, 1881, abolishes the right of consolidation in many cases, by enacting (sect. 17) that a mortgagor entitled to redeem any one mortgage shall be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. This provision only applies where the mortgages, or one of them, are or is made after the 31st December, 1881, and then only if a contrary intention is not expressed in the mortgage deeds or one of them. "Mortgagor" includes any person deriving title under the original mortgage, or entitled to redeem the mortgage.<sup>1</sup>

**CONTRACT OF SALE.**—§ 1. The Conveyancing Act, 1881, supplementing the provisions of the Vendor and Purchaser Act, 1874, makes certain conditions incident to contracts for the sale of freehold and leasehold interests in land, unless the parties otherwise agree.<sup>2</sup> These conditions consist mainly of provisions which are inserted as a matter of course for the protection of the vendor in an ordinary contract of sale, and make it safer to enter into an "open contract" than was formerly the case. (See *Contract*, § 14; *Title*, § 4.)

§ 2. The act also provides for the completion of a contract of sale by the personal representatives of the deceased vendor. (See *Descent*, § 8B, in these addenda.)

**CONVEY** is the new operative word for the conveyance of corporeal or incorporeal tenements or hereditaments, used in the statutory forms of conveyance, mortgage and settlement contained in the schedules to the Conveyancing Act, 1881. (See *Covenant*; *Grant*, in these addenda.)

**CONVEYANCE.**—§ 8. The Conveyancing Act, 1881, gives forms of statutory conveyances, embodying the alterations made by the act, as to which see in these addenda, *All the Estate*; *Convey*; *Covenant*; *General Words*; *Grant*.

**COUNTER-CLAIM.** See *Beddall v. Maitland*, 17 Ch. D. 174.

**COURT FOR CROWN CASES RESERVED.** See *Judicature Act*, 1881, s. 15.

<sup>1</sup> Sect. 2, § 6.

<sup>2</sup> Conveyancing Act, 1881, s. 3.

**COURT OF APPEAL.** See Judicature Act, 1881, and *Master of the Rolls*, *infra*.

**COVENANT.**—§ 7A. The Conveyancing Act, 1881, contains provisions designed to abbreviate the forms of covenant in ordinary use, by enacting that a covenant by A. shall bind A.'s heirs and real estate; that a covenant with A. relating to land of inheritance shall have effect as if it were made with A., his heirs and assigns; &c. § 10. By the same act, the insertion of the usual covenants for title in a conveyance for valuable consideration (whether by a beneficial owner or by a trustee, mortgagee, or representative) is in many cases made unnecessary, as the act provides that where the grantor is in the deed expressed to convey in a certain capacity (namely as "beneficial owner," "trustee," "mortgagee," &c.), then the deed shall be deemed to include the covenants for title, appropriate to that capacity. (See *Covenant*, §§ 8, 9.) The capacity in which the grantor conveys is expressed in the operative words ("A. B. as beneficial owner hereby grants (or 'conveys') to C. D.," &c.). The appropriate covenants for title are also implied in a mortgage, where the mortgagor is expressed to convey as "beneficial owner," and in a settlement, where the grantor is expressed to convey as "settlor."<sup>1</sup>

As to the provisions of the act relating to the production of title-deeds, see *Title Deeds*, § 2; see also *Apportionment*; *Convey*, in these addenda.

**DAY.**—§ 3A. See *Clarke v. Bradlaugh*, 7 Q. B. D. 751.

**DEBENTURE.** See *British India, &c. Co. v. Comm. Inland Revenue*, 7 Q. B. D. 165.

**DE CONTUMACE CAPIENDO.** See *Dale's Case*, 6 Q. B. D. 376.

**DEDICATION.**—§ 1A. See *Vernon v. St. James*, 16 Ch. D. 449.

**DESCENT.**—§ 8A. By the Conveyancing Act, 1881, s. 30, these provisions are repealed as to persons dying after the 31st December, 1881, and a different provision is made, as to which, see *Trustee* (§ 3). § 8B. By s. 4 of the same act, where a person dies after the 31st December, 1881, leaving an uncompleted contract for the sale of land enforceable against his heir or devisee, his personal representatives have power to convey the land so as to give effect to the contract.

**DISCHARGE.**—§ 3A. As to the discharge of encumbrances by payment of the amount secured into Court, see *Payment into Court* in these addenda. As to the discharge of quit-rents, &c., see *Rent*, § 8B, in these addenda.

<sup>1</sup> Conveyancing Act, 1881, s. 7, and forms in schedule.



**DISCLAIMER.**—§ 1A. As to the disclaimer of a tenancy, see *Vivian v. Moat*, 16 Ch. D. 730.

§ 3A. See *Smalley v. Hardinge*, 6 Q. B. D. 371.

**DISSOLUTION.**—§ 2A. See *Lyon v. Tweddell*, 17 Ch. D. 529.

**DISTRICT REGISTRIES.** See Judicature Act, 1881, s. 22.

**ELECTION PETITIONS.** See Judicature Act, 1881, ss. 13, 14.

**ENGAGEMENT.**—§ 3. See *Robinson v. Pickering*, 16 Ch. D. 660; *Pike v. Fitzgibbon*, 17 Ch. D. 454.

**ESTOPPEL.**—§ 6. See *McKenzie v. British Linen Co.*, 6 App. Ca. 82.

**EVICT** is used in the old books where a person in possession of land under a title derived from A. is turned out of possession by B., who has a title paramount.<sup>1</sup> (See *Exchange*, § 2; *Warranty*, §§ 6 *et seq.*)

**EVIDENCE** (*add to* § 11).—In some cases evidence given in a proceeding by a person who is a party to it, is not sufficient unless corroborated by the evidence of some other person; *e. g.*, in affiliation proceedings, in actions for breach of promise of marriage,<sup>2</sup> and in orders of removal under stat. 39 & 40 Vict. c. 61, s. 34.<sup>3</sup> (See also *Treason*.)

**EX POSTFACTO** literally means “from that which happened subsequently.”<sup>4</sup> Thus, a transaction which was originally binding and effective may become void *ex postfacto*, that is, by matter subsequent: see *Fraud*, § 5; *Void*, § 3. The term is also applied in a general sense to denote anything which has a retrospective operation; thus, a statute applying to acts and events which took place before it was enacted is sometimes called *ex postfacto* legislation.

**EXECUTOR.**—§ 11A. The Conveyancing Act, 1881, repeals ss. 11—30 of the stat. 23 & 24 Vict. c. 145, and re-enacts them with extended provisions. (In § 11, *for* “23 & 24 Vict. c. 145, s. 27,” *read* “23 & 24 Vict. c. 145, s. 30.”)

**FISHERY.**—§ 4A. See *Corporation of Saltash v. Goodman*, 7 Q. B. D. 106.

**FOREIGN ATTACHMENT.** See *Mayor of London v. London Joint Stock Bank*, 6 App. Ca. 393.

<sup>1</sup> Co. Litt. 173b.

<sup>2</sup> Best on Evidence, 773.

<sup>3</sup> *Reg. v. Abergavenny*, 6 Q. B. D. 31.

<sup>4</sup> “Nunquam crescit *ex postfacto* pre-

teriti delicti æstimatio.” Digest, L. xvii. fr. 138, § 1. The ordinary way of spelling the phrase in three words—*ex post facto*—is, of course, incorrect.

**FORFEITURE.**—§ 3A. These provisions have been repealed by the Conveyancing Act, 1881, which enacts (s. 14), that a forfeiture for a breach of any covenant or condition in a lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the breach complained of and requiring him to remedy or make compensation for the same, and the lessee fails to comply with the notice within a reasonable time. Where a lessor proceeds to enforce a forfeiture the lessee may apply to the Court for relief, and the Court may grant or refuse relief as it thinks fit. This provision does not affect the law relating to forfeiture for non-payment of rent (see *Forfeiture*, § 3), and it does not extend to certain covenants and conditions (*e.g.*, those against assigning, underletting, &c., or providing for forfeiture on the lessee's bankruptcy and the like), but, with these exceptions, it applies, notwithstanding any stipulation by the parties to the contrary.

**FRAUD.**—§ 17A. An agreement in fraud of third persons, or one which is a fraud on a statute, or on the public, is void ab initio, and not merely voidable.<sup>1</sup> (See *Void*; *Voidable*.)

**FUGITIVE'S GOODS.**—Under the old law, where a man fled for felony and escaped, his own goods were not forfeited as *bona fugitivorum* until it was found by proceedings of record (*e.g.*, before the coroner, in case of death) that he fled for the felony.<sup>2</sup> (See *Waif*.)

**FUGITIVE OFFENDERS.**—A fugitive offender is a person who, being accused of committing a crime in one part of her Majesty's dominions, has left that part and gone to another. The Fugitive Offenders Act, 1881, contains provisions for the apprehension and return of such persons. (See above, *Backing a Warrant*.)

**GENERAL WORDS.**—By the Conveyancing Act, 1881 (s. 6), it is unnecessary to insert, in any conveyance of lands, buildings, or manors executed after the 31st December, 1881, the "general words" usually contained in such conveyances, as the act declares that they shall be deemed to be included in the conveyance.

**GRANT.**—§ 2A. The Conveyancing Act, 1881 (s. 49), declares that the use of the word "grant" is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal, in conveyances made before or after the commencement of the act. As mentioned in § 2 of the title *Grant*, the word was not necessary even before this enactment. The operative word used in the statutory forms given in the act is "convey" (see *Convey*; *Covenant*, in these addenda).

**HEIR.**—§ 9A. The word "heirs" is not now necessary for the limitation of an estate in fee simple, nor "heirs of the body" for that of an estate tail. (See *Words of Limitation*.)

<sup>1</sup> Leake on Contracts, 766.

<sup>2</sup> *Foxley's Case*, 5 Rep. 109 a.

**HIGH COURT OF JUSTICE.** See Judicature Act, 1881.

**HUNDRED.**—§ 2A. See *Drake v. Footill*, 7 Q. B. D. 201.

**IN REM.**—§ 5A. See *The City of Mecca*, 6 P. D. 106.

**INFANT.**—§ 1A. By the Conveyancing Act, 1881, s. 41, where an infant is entitled to land in his own right in fee simple or for any leasehold interest at a rent, the land is to be deemed to be a settled estate within the Settled Estates Act, 1877. (See *Settled Estates*.) § 1B. By sect. 42 of the same act, where land is held in trust for an infant under an instrument coming into operation after the 31st December, 1881, the trustees may enter into possession of it, cut timber, erect, pull down, rebuild and repair houses, continue the working of mines and quarries, and generally deal with the land in a proper course of management, apply the income, or part of it, for the infant's maintenance and invest the surplus for his benefit.

See *Maintenance* in these addenda.

**INHABITED HOUSE DUTY.** See *Chapman v. Royal Bank of Scotland*, 7 Q. B. D. 136, and title *Lodger*.

**INTEREST.**—§§ 14A, 15A. See *In re Emmet's Estate*, 17 Ch. D. 142; *Ex parte Furber*, *ibid.* 191.

**JOINT.**—§ 1A. As to a conveyance by a man to himself and another jointly, see *Use*, § 15A, in these addenda.

**JOINT ACCOUNT.**—The rule that where two or more persons advance money and take the security to themselves jointly, each is in equity deemed to be separately entitled to his proportion of the money, so that on his death it passes to his personal representatives and not to his surviving co-lenders, made it usual, in cases where money was advanced by trustees, to insert in the mortgage deed or other instrument of security a declaration that the money belonged to the lenders on a joint account in equity as well as at law, and that the receipt of the survivors or survivor, or his personal representatives, should be a full discharge for any moneys due on the security. By the Conveyancing Act, 1881 (s. 61), it is now sufficient to say that the money is advanced by the lenders out of money belonging to them on a joint account, without more, while in cases where the security is made to two or more persons jointly and not in shares, it is (it seems) unnecessary to say even that. The section is, however, somewhat involved and consequently obscure.

**JURISPRUDENCE.**—I. § 1. In the proper sense of the word jurisprudence is the science of law, namely, that science which has for its function to ascertain the principles on which legal rules are based, so as not only to classify those rules in their proper order and show the

relation in which they stand to one another, but also to settle the manner in which new or doubtful cases should be brought under the appropriate rules. Jurisprudence is more a formal than a material science; it has no direct concern with questions of moral or political policy, for they fall under the province of ethics and legislation, but when a new or doubtful case arises to which two different rules seem, when taken literally, to be equally applicable, it may be, and often is, the function of jurisprudence to consider the ultimate effect which would be produced if each rule were applied to an indefinite number of similar cases, and to choose that rule which, when so applied, will produce the greatest advantage to the community.

§ 2. Jurisprudence is mainly based on comparative law, that is, on the comparative study of the legal institutions of various countries, because such a study makes it more easy to separate the essential elements of the science from its historical accidents.<sup>1</sup>

II. § 3. "Jurisprudence" is also used, incorrectly, as synonymous with "law." "The imposing quadrisyllable is constantly introduced into a phrase, solely on grounds of euphony. Thus we have books upon 'Equity Jurisprudence' which are nothing more nor less than treatises upon the law administered by Courts of Equity; and we hear of the Jurisprudence of France or Russia, when nothing else is meant than the law which is in force in those countries respectively."<sup>2</sup>

**LEGACY DUTY.**—The rates of legacy duty are as follows:—Where the legacy or residue, or share of residue, is given to or devolves on a child of the deceased, or any descendant of a child of the deceased, or the father or mother or any lineal ancestor of the deceased, the duty is one per cent.; if a brother or sister of the deceased, or a descendant of a brother or sister, three per cent.; if a brother or sister of the father or mother of the deceased, or a descendant of such brother or sister, five per cent.; if a brother or sister of the grandfather or grandmother, or a descendant of such brother or sister, six per cent.; in any other case the duty is ten per cent.<sup>3</sup>

Legacy duty is not payable (i) on any legacy or share of residue coming to the husband or wife of the deceased;<sup>4</sup> (ii) on legacies of books, pictures, &c., given to scientific bodies and schools, &c.;<sup>5</sup> (iii) where the whole personal estate of a person dying after the 24th March, 1880, does not amount to the sum of 100*l.*;<sup>6</sup> (iv) where probate duty has been paid on the estate, not exceeding 300*l.*, of a person dying on or after the 1st June, 1881, under the Customs and Inland Revenue Act, 1881;<sup>7</sup> (v) on any legacy or share of residue coming to a child or other descendant of the deceased where probate duty has been paid under the Customs and Inland Revenue Act, 1881.<sup>8</sup>

See *Probate Duty* in these addenda.

<sup>1</sup> See Holland's *Jurisp.* 7; Austin's *Jurisp.*; Markby's *Elements of Law*, *passim*.

<sup>2</sup> Holland, 4, where Austin's division of jurisprudence into "general" and "particular" is shown to be untenable.

<sup>3</sup> Stat. 55 Geo. 3, c. 184, Schedule.

<sup>4</sup> *Ibid.*

<sup>5</sup> Stat. 39 Geo. 3, c. 73, s. 1.

<sup>6</sup> Stat. 43 Vict. c. 14, s. 13.

<sup>7</sup> Sect. 36.

<sup>8</sup> Sect. 41.

**LIBEL.**—§ 3A. See *Newspapers* in these addenda.

**MAINTENANCE.**—§ 3A. Sect. 26 of stat. 23 & 24 Vict. c. 145, is now repealed by the Conveyancing Act, 1881, which gives trustees a power of applying the income of property held in trust for an infant towards his maintenance, education or benefit, whether it belongs to him absolutely or contingently on his attaining the age of twenty-one, or on the occurrence of any event before his attaining that age. (Sect. 43.)

**MASTER OF THE ROLLS.**—The Judicature Act, 1881, enacts that from the 27th August, 1881, the Master of the Rolls shall cease to be a judge of the High Court of Justice, but shall continue by virtue of his office to be a judge of the Court of Appeal. Every Master of the Rolls appointed after the passing of the act is to be under an obligation to go circuits. The act authorizes the appointment of a puisne judge of the High Court in place of the Master of the Rolls.

**MIDDLESEX.**—§ 1. The Middlesex Land Registry is a registry of Land Regis-  
assurances relating to land situate in the county of Middlesex. (See *Land Regis- try*.  
*Registries*, §§ 3, 6.) It is regulated by stat. 7 Anne, c. 20, which makes every such deed fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless it has been registered before the purchaser's or mortgagee's deed.<sup>1</sup> A will of lands in the county also requires registration within six months of the testator's death, or before the registration of an assurance to a purchaser or mortgagee from the testator's heir-at-law.<sup>2</sup>

§ 2. The sessions of the peace for the county of Middlesex are held Sessions.  
twice in every month, the first sessions in January, April, July and October being the general quarter sessions. At the hearing of appeals and trials of felonies or misdemeanors, the sessions are presided over by an Assistant Judge appointed by the crown.<sup>3</sup> (See *Justices of the Peace; Session of the Peace*.)

**MORTGAGE.**—§ 8A. The Conveyancing Act, 1881, repeals those sections of the Trustees and Mortgagees Clauses Act, 1860, which give mortgagees powers of sale, &c., and re-enacts them in an extended form. The provisions of the act only apply to mortgages which are made by deed executed after the 31st December, 1881, and only so far as no contrary intention is expressed in the deed. They confer on the original mortgagee and any person deriving title under him (i) a power to sell the mortgaged property, as soon as the money has become due; (ii) a power to insure the property against fire, and to add the premiums to the mortgage debt, unless an insurance is kept up by the mortgagor; (iii) a power to appoint a receiver as soon as the money has become due (see *Receiver*, § 5).<sup>4</sup> The power to sell or appoint a receiver is not exercisable

<sup>1</sup> Williams, R. P. 196.

<sup>2</sup> *Ibid.* 223; Vendor & Purchaser Act,  
1874, s. 8.

<sup>3</sup> Stats. 7 & 8 Vict. c. 71; 22 & 23 Vict.  
c. 4; Steph. Comm. iv. 320.

<sup>4</sup> Sect. 19.

unless the mortgagor has failed for three months to comply with a notice requiring him to pay off the mortgage debt, or unless interest is in arrear for two months, or there has been a breach of covenant, &c.; but these restrictions do not affect the title of a purchaser buying under the power of sale.<sup>1</sup> As to the other powers of a mortgagee, see *Mortgagee in Possession; Payment into Court*, in these addenda. See also *Redeem*, *ibid*.

§ 8B. The same act gives to the Court very wide powers of directing the sale of mortgaged property in any action brought respecting a mortgage, whether for redemption, foreclosure or otherwise.<sup>2</sup>

§ 18. A statutory mortgage of freehold or leasehold land, operating by conveyance, may be made under the Conveyancing Act, 1881, s. 26. The act also provides for the transfer and re-conveyance of a statutory mortgage (sects. 27—29).

#### MORTGAGEE AND MORTGAGOR IN POSSESSION.—

§ 3. By the Conveyancing Act, 1881, a mortgagor or mortgagee of land, while in possession, has a power of making binding leases of the mortgaged land, subject to certain limitations and restrictions as to the length of the term, the rent, &c.<sup>3</sup>

§ 4. By the same act, a mortgagee in possession of land has power to cut and sell timber and other trees ripe for cutting, not being used for shelter or ornament.<sup>4</sup>

§ 5. These provisions only apply to mortgages made after the 31st December, 1881, and only so far as a contrary intention is not expressed by the parties.

**MUTINY ACT.**—The Army Discipline and Regulation Act, 1879, has been supplemented and amended by various acts, especially the Regulation of the Forces Act, 1881, and has now been repealed by the Army Act, 1881, which consolidates its provisions with those of the amending acts.

**NEWSPAPERS.**—§ 1. The Newspaper Libel and Registration Act, 1881, provides for the establishment of a register of proprietors of newspapers, and for annual returns being made by the printers and proprietors of every newspaper, giving particulars of its title and its proprietors. The returns are entered in the register, which is open to public inspection.

§ 2. By the same act, any report published in a newspaper of the proceedings of a public meeting is privileged (that is not libellous), if the meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate, and published without malice for the public benefit; but this protection is not available as a defence to any proceeding, if the defendant refused to insert in his newspaper a reasonable explanation or contradiction by the plaintiff.

<sup>1</sup> Sects. 20, 21, 24.

<sup>2</sup> Sect. 25.

<sup>3</sup> Sect. 18.

<sup>4</sup> Sect. 19.

§ 3. No criminal prosecution for a libel contained in a newspaper can be commenced without the fiat of the Director of Public Prosecutions (sect. 3). Charges of libels contained in newspapers may be tried summarily (sects. 4, 5).

**NIENT DEDIRE.**—In the old common law practice, when a suggestion (*q. v.*) was entered on the record in an action, and the opposite party did not wish to deny it, he made an entry on the record to that effect, which operated as a confession of the truth of the suggestion, and was called a *nient dedire*<sup>1</sup> (Norman-French, = “not deny”).

**NUISANCE.**—§ 1A. See the Alkali, &c. Works Regulation Act, 1881.

**PAYMENT INTO COURT.**—§ 5. Where land subject to any incumbrance is sold, whether by the Court or out of Court, the Court may direct or allow payment into Court of a sum sufficient to provide for the incumbrance, and thereupon declare the land to be freed from it. The Court may distribute or apply the fund in Court according to the rights of the parties.<sup>2</sup>

**POWER.**—§ 10A. By sect. 52 of the Conveyancing Act, 1881, a person to whom any power, whether coupled with an interest or not, is given, may by deed release it, or contract not to exercise it. This provision is probably not intended to apply to so-called powers coupled with a trust, as to which see *Power*, § 4.

**POWER OF ATTORNEY.**—§ 5. The Conveyancing Act, 1881, contains the following provisions in regard to powers of attorney. The donee of a power of attorney may act in and with his own name, signature and seal instead of the name, signature and seal of the donor (sect. 46). Any person making or doing any payment or act in good faith, in pursuance of a power of attorney, is not to be liable by reason that the donor of the power had previously died, or become lunatic, or bankrupt, or revoked the power, provided such fact was not known to him at the time (sect. 47). A power of attorney may be deposited in the Central Office of the Supreme Court, on its execution being verified by affidavit or otherwise. The file of powers so deposited may be searched, and an office copy of any power obtained, by any person on payment of the office fees. An office copy is sufficient evidence of the contents of the original instrument (sect. 48). A married woman, whether an infant or not, is to have power, as if she were unmarried and of full age, to appoint an attorney on her behalf to do anything which she herself might do (sect. 40).

<sup>1</sup> *Rex v. Inhabitants of Norwich*, 1 Str. 177; *Barnewall v. Sutherland*, 9 C. B. 380.

<sup>2</sup> Conveyancing Act, 1881, ss. 5, 21, § 3, 2 § vii.

**PROBATE.**—§ 5A. In the case of probates and letters of administration granted before the 1st April, 1880, the rate of duty is regulated by the stat. 55 Geo. 3, c. 184; 5 & 6 Vict. c. 79, s. 23; 22 & 23 Vict. c. 36, s. 1; and 27 & 28 Vict. c. 36. Under these acts the duty was paid by a stamp on the grant, and was calculated on the whole value of the personal estate, without deducting debts (except in the case of mortgage debts charged on leasehold property), but after payment of the debts, a return could be obtained of a proportionate part of the duty. The rates of duties were altered by the Customs and Inland Revenue Act, 1880, applying to grants made between the 1st April, 1880, and the 1st June, 1881.<sup>1</sup> Grants made after the latter date are subject to the provisions of the Customs and Inland Revenue Act, 1881, which fixes the rate of duty at 1*l.* for every 50*l.* on estates between 100*l.* and 500*l.*; 1*l.* 5*s.* for every 50*l.* on estates between 500*l.* and 1,000*l.*; and 3*l.* for every 100*l.* on estates over 1,000*l.* Estates under 100*l.* are exempt from duty, as before. In the case of persons dying on and after the 1st June, 1881, where the gross value of the estate does not exceed 300*l.*, the duty is 30*s.*, which includes legacy and succession duty.<sup>2</sup> (See *Legacy Duty* in these addenda, and *Succession Duty*.) The act further makes an important alteration—(i) by allowing debts (other than voluntary debts) and funeral expenses to be deducted from the value of the estate before payment of the duty;<sup>3</sup> and (ii) in making the duty payable on the affidavit for Inland Revenue instead of on the grant. A certificate is written on the grant to show that the duty has been paid. The affidavit for Inland Revenue verifies an account of the estate (see *Account*, § 12B, in these addenda), a schedule of debts and funeral expenses, and states the net amount of the estate.<sup>4</sup>

§ 5B. Duties at the same rate as probate duties are now payable on property comprised in accounts deliverable under sect. 38 of the Customs and Inland Revenue Act, 1881; as to which, see *Account*, § 12C, in these addenda.

#### PROBATE, DIVORCE AND ADMIRALTY DIVISION.—

§ 3A. This rule has been abolished by the Judicature Act, 1881 (sect. 9), which also makes the judgment of the Court of Appeal in matrimonial causes final in many cases.

**PROHIBITION.**—§ 1A. See *Mackonochie v. Lord Penzance*, 6 App. Ca. 424.

**RECREATION.** See the Metropolitan Open Spaces Acts, 1877 and 1881.

**REDEEM.**—§ 2. By the Conveyancing Act, 1881 (sect. 15), where a mortgagor is entitled to redeem, he may require the mortgagee,

<sup>1</sup> Williams, P. P. 389 *et seq.*

<sup>2</sup> Sects. 33 *et seq.*

<sup>3</sup> Sect. 28.

<sup>4</sup> See the forms, Trevor's Taxes on Succession, 12 *et seq.*



instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs. This provision does not apply where the mortgagor is or has been in possession; but in all other cases it applies, notwithstanding any stipulation by the parties to the contrary.

§ 3. As to the redemption of quit rents, &c., see *Rent*, § 8B, in these addenda.

**RE-ENTRY.**—§ 4. The exercise of a right of re-entry for breach of a covenant or condition contained in a lease is restricted by sect. 14 of the Conveyancing Act, 1881; as to which see *Forfeiture* in these addenda.

**RENT.**—§ 8A. By sect. 44 of the Conveyancing Act, 1881, where a person is entitled to a rent-charge or other annual sum charged on land, or on the income of land (not being rent incident to a reversion, as to which see *Rent*, § 2), he has, in the event of the annual sum being in arrear for a certain period, power to raise the arrears by entry and distress on the land, or by entering on and receiving the income of the land, or by demising the land to a trustee for a term of years upon trust to raise the annual sum by mortgage, sale or lease of the land for all or part of the term, or otherwise. This provision applies to instruments coming into operation after the 31st December, 1881, so far as a contrary intention is not expressed.

§ 8B. Sect. 45 of the same act enables the owner of land, out of which a quit-rent, chief-rent, perpetual rent-charge, or other perpetual annual sum (not being a tithe rent-charge, or a rent reserved on a sale or lease, &c.) is issuing, to redeem the same by application to the Copyhold Commissioners, and by payment to the person entitled to the rent of the amount certified by the commissioners to be the capital value of the rent.

**SUB-AGENT—SUB-CONTRACTOR.** See *New Zealand and Australian Land Co. v. Watson*, 7 Q. B. D. 374.

**TRUSTEE.**—§ 6A. Sect. 31 of the Conveyancing Act, 1881 (giving a power of appointing new trustees where the instrument creating the trusts contains no sufficient power), applies to trusts created either before or after the 31st December, 1881. It therefore applies to trusts which were not within the provisions of the Trustees and Mortgagees Clauses Act, by reason of their having been created before the 28th August, 1860.

**USE.**—§ 15A. At common law, a person could not make any conveyance to himself, so that if A. wished to convey property to himself and B. jointly, he was obliged to make a conveyance to some third person, C., and then C. made a re-conveyance to A. and B. jointly. The Statute of Uses made it possible to evade this rule in the case of freehold estates in land, because if A., the owner of land, conveyed it to C. to the use of A. and B. and their heirs, the statute executed the use, and at once vested

the land in A. and B. for a joint estate in fee simple. The same method is available if A. wishes to convey land to B. in fee simple, reserving to himself a life estate, or if A. wishes to convey land to his wife.<sup>1</sup> As the Statute of Uses does not apply to leaseholds or other chattels, it became necessary to pass an act enabling any person to assign personal property to himself jointly with another.<sup>2</sup> § 15B. In conveyances executed after the 31st December, 1881, freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person, and may be similarly conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.<sup>3</sup>

Easements,  
privileges, &c.

§ 15C. Formerly, a thing could not be granted by way of use if the enjoyment of it was inseparable from the possession, such as annuities, ways, commons and authorities<sup>4</sup> (see page 856, note (3)). Hence, where land was sold subject to an express reservation or exception of such rights, privileges or easements, the object had to be attained either by a re-grant, or by a declaration that the land should remain to such uses as should give full effect to the reservation or exception, and (subject thereto) to the uses declared to vest the land in the purchaser.<sup>5</sup> In conveyances made after 31st December, 1881, a limitation of freehold land to the use that a person may have an easement, right, liberty, or privilege over the land will operate to vest in possession in that person the easement, &c. so limited to him.<sup>6</sup>

<sup>1</sup> Williams, R. P. 191.

<sup>2</sup> Stat. 22 & 23 Vict. c. 35, s. 21;  
Williams, P. P. 477.

<sup>3</sup> Conveyancing Act, 1881, s. 50.

<sup>4</sup> Bl. Comm. ii. 330.

<sup>5</sup> Dart, V. & P. 506.

<sup>6</sup> Conveyancing Act, 1881, s. 62.







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